Table Annexed to Article: William Blackstone’s Commentaries on the Laws of England In Machine Readable Text

Peter J. Aschenbrenner, Purdue University

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Mr Vice-Chancellor, and gentlemen of the university,
THE general expectation of so numerous and respectable an audience, the
novelty, and (I may add) the importance of the duty required from this
chair, must unavoidably be productive of great diffidence and
apprehensions in him who has the honour to be placed in it. He must be
sensible how much will depend upon his conduct in the infancy of a study,
which is now first adopted by public academical authority; which has
generally been reputed (however unjustly) of a dry and unfruitful nature;
and of which the theoretical, elementary parts have hitherto received a
very moderate share of cultivation. He cannot but reflect that, if either his
plan of instruction be crude and injudicious, or the execution of it lame
and superficial, it will cast a damp upon the farther progress of this most
useful and most rational branch of learning; and may defeat for a time the
public-spirited design of our wise and munificent benefactor. And this he
must more especially dread, when he feels by experience how unequal his
abilities are (unassisted by preceding examples) to complete, in the
manner he could wish, so extensive and arduous a task; since he freely
confesses, that his former more private attempts have fallen very short of
his own ideas of perfection. And yet the candour he has already
experienced, and this last transcendent mark of regard, his present
nomination by the free and unanimous suffrage of a great and learned
university, (an honour to be ever remembered with the deepest and most
affectionate gratitude) these testimonies of your public judgment must
entirely supersede his own, and forbid him to believe himself totally
insufficient for the labour at least of this employment. One thing he will
venture to hope for, and it certainly shall be his constant aim, by diligence
and attention to atone for his other defects; esteeming, that the best return, which he can possibly make for your favourable opinion of his capacity, will be his unwearied endeavours in some little degree to deserve it.

/a Read in Oxford at the opening of the Vinerian lectures on Oct. 25, 1758. 

The science thus committed to his charge, to be cultivated, methodized, and explained in a course of academical lectures, is that of the laws and constitution of our own country: a species of knowledge, in which the gentlemen of England have been more remarkably deficient than those of all Europe besides. In most of the nations on the continent, where the civil or imperial law under different modifications is closely interwoven with the municipal laws of the land, no gentleman, or at least no scholar, thinks his education is completed, till he has attended a course or two of lectures, both upon the institutes of Justinian and the local constitutions of his native soil, under the very eminent professors that abound in their several universities. And in the northern parts of our own island, where also the municipal laws are frequently connected with the civil, it is difficult to meet with a person of liberal education, who is destitute of a competent knowledge in that science, which is to be the guardian of his natural rights and the rule of his civil conduct.

Nor have the imperial laws been totally neglected even in the English nation. A general acquaintance with their decisions has ever been deservedly considered as no small accomplishment of a gentleman; and a fashion has prevailed, especially of late, to transport the growing hopes of this island to foreign universities, in Switzerland, Germany, and Holland; which, though infinitely inferior to our own in every other consideration, have been looked upon as better nurseries of the civil, or (which is nearly the same) of their own municipal law. In the mean time it has been the peculiar lot of our admirable system of laws, to be neglected, and even unknown, by all but one practical profession; though built upon the soundest foundations, and approved by the experience of ages.

Far be it from me to derogate from the study of the civil law, considered (apart from any binding authority) as a collection of written reason. No man is more thoroughly persuaded of the general excellence of its rules, and the usual equity of its decisions; nor is better convinced of its use as well as ornament to the scholar, the divine, the statesman, and even the
common lawyer. But we must not carry our veneration so far as to sacrifice our Alfred and Edward to the manes of Theodosius and Justinian: we must not prefer the edict of the praetor, or the rescript of the Roman emperor, to our own immemorial customs, or the sanctions of an English parliament; unless we can also prefer the despotic monarchy of Rome and Byzantium, for whose meridians the former were calculated, to the free constitution of Britain, which the latter are adapted to perpetuate. Without detracting therefore from the real merit which abounds in the imperial law, I hope I may have leave to assert, that if an Englishman must be ignorant of either the one or the other, he had better be a stranger to the Roman than the English institutions. For I think it an undeniable position, that a competent knowledge of the laws of that society, in which we live, is the proper accomplishment of every gentleman and scholar; an highly useful, I had almost said essential, part of liberal and polite education. And in this I am warranted by the example of ancient Rome; where, as Cicero informs us, the very boys were obliged to learn the twelve tables by heart, as a carmen necessarium or indispensable lesson, to imprint on their tender minds an early knowledge of the laws and constitutions of their country. /a

/a De Legg. 2. 23.

But as the long and universal neglect of this study, with us in England, seems in some degree to call in question the truth of this evident position, it shall therefore be the business of this introductory discourse, in the first place to demonstrate the utility of some general acquaintance with the municipal law of the land, by pointing out its particular uses in all considerable situations of life. Some conjectures will then be offered with regard to the causes of neglecting this useful study: to which will be subjoined a few reflexions on the peculiar propriety of reviving it in our own universities.

And, first, to demonstrate the utility of some acquaintance with the laws of the land, let us only reflect a moment on the singular frame and polity of that land, which is governed by this system of laws. A land, perhaps the only one in the universe, in which political or civil liberty is the very end and scope of the constitution. /b This liberty, rightly understood, consists in the power of doing whatever the laws permit; which is only to be effected by a general conformity of all orders and degrees to those equitable rules of action, by which the meanest individual is protected from the insults and oppression of the greatest. /c As therefore every
subject is interested in the preservation of the laws, it is incumbent upon every man to be acquainted with those at least, with which he is immediately concerned; lest he incur the censure, as well as inconvenience, of living in society without knowing the obligations which it lays him under. And thus much may suffice for persons of inferior condition, who have neither time nor capacity to enlarge their views beyond that contracted sphere in which they are appointed to move. But those, on whom nature and fortune have bestowed more abilities and greater leisure, cannot be so easily excused. These advantages are given them, not for the benefit of themselves only, but also of the public: and yet they cannot, in any scene of life, discharge properly their duty either to the public or themselves, without some degree of knowledge in the laws. To evince this the more clearly, it may not be amiss to descend to a few particulars.

/b Montesq. Esp. L. l. 11. c. 5.

/c Facultas ejus, quod cuique facere libet, nisi quid vi, aut jure prohibitur. Inst. 1. 3. 1.

Let us therefore begin with our gentlemen of independent estates and fortune, the most useful as well as considerable body of men in the nation; whom even to suppose ignorant in this branch of learning is treated by Mr Locke as a strange absurdity. /d It is their landed property, with it's long and voluminous train of descents and conveyances, settlements, entails, and incumbrances, that forms the most intricate and most extensive object of legal knowledge. The thorough comprehension of these, in all their minute distinctions, is perhaps too laborious a task for any but a lawyer by profession: yet still the understanding of a few leading principles, relating to estates and conveyancing, may form some check and guard upon a gentleman's inferior agents, and preserve him at least from very gross and notorious imposition. /d Education. 187.

Again, the policy of all laws has made some forms necessary in the wording of last wills and testaments, and more with regard to their attestation. An ignorance in these must always be of dangerous consequence, to such as by choice or necessity compile their own testaments without any technical assistance. Those who have attended the courts of justice are the best witnesses of the confusion and distresses that are hereby occasioned in families; and of the difficulties that arise in
discerning the true meaning of the testator, or sometimes in discovering any meaning at all: so that in the end his estate may often be vested quite contrary to these his enigmatical intentions, because perhaps he has omitted one or two formal words, which are necessary to ascertain the sense with indisputable legal precision, or has executed his will in the presence of fewer witnesses than the law requires.

But to proceed from private concerns to those of a more public consideration. All gentlemen of fortune are, in consequence of their property, liable to be called upon to establish the rights, to estimate the injuries, to weigh the accusations, and sometimes to dispose of the lives of their fellow-subjects, by serving upon juries. In this situation they are frequently to decide, and that upon their oaths, questions of nice importance, in the solution of which some legal skill is requisite; especially where the law and the fact, as it often happens, are intimately blended together. And the general incapacity, even of our best juries, to do this with any tolerable propriety has greatly debased their authority; and has unavoidably thrown more power into the hands of the judges, to direct, control, and even reverse their verdicts, than perhaps the constitution intended.

But it is not as a juror only that the English gentleman is called upon to determine questions of right, and distribute justice to his fellow-subjects: it is principally with this order of men that the commission of the peace is filled. And here a very ample field is opened for a gentleman to exert his talents, by maintaining good order in his neighbourhood; by punishing the dissolute and idle; by protecting the peaceable and industrious; and, above all, by healing petty differences and preventing vexatious prosecutions. But, in order to attain these desirable ends, it is necessary that the magistrate should understand his business; and have not only the will, but the power also, (under which must be included the knowledge) of administering legal and effectual justice. Else, when he has mistaken his authority, through passion, through ignorance, or absurdity, he will be the object of contempt from his inferiors, and of censure from those to whom he is accountable for his conduct.

Yet farther; most gentlemen of considerable property, at some period or other in their lives, are ambitious of representing their country in parliament: and those, who are ambitious of receiving so high a trust, would also do well to remember it's nature and importance. They are not
thus honourably distinguished from the rest of their fellow-subjects, merely that they may privilege their persons, their estates, or their domestics; that they may list under party banners; may grant or with-hold supplies; may vote with or vote against a popular or unpopular administration; but upon considerations far more interesting and important. They are the guardians of the English constitution; the makers, repealers, and interpreters of the English laws; delegated to watch, to check, and to avert every dangerous innovation, to propose, to adopt, and to cherish any solid and well-weighed improvement; bound by every tie of nature, of honour, and of religion, to transmit that constitution and those laws to their posterity, amended if possible, at least without any derogation. And how unbecoming must it appear in a member of the legislature to vote for a new law, who is utterly ignorant of the old! what kind of interpretation can he be enabled to give, who is a stranger to the text upon which he comments!

Indeed it is really amazing, that there should be no other state of life, no other occupation, art, or science, in which some method of instruction is not looked upon as requisite, except only the science of legislation, the noblest and most difficult of any. Apprenticeships are held necessary to almost every art, commercial or mechanical: a long course of reading and study must form the divine, the physician, and the practical professor of the laws: but every man of superior fortune thinks himself born a legislator. Yet Tully was of a different opinion: "It is necessary, says he, for a senator to be thoroughly acquainted with the constitution; and this, he declares, is a knowledge of the most extensive nature; a matter of science, of diligence, of reflexion; without which no senator can possibly be fit for his office." /e

De Legg. 3. 18. Est senatori necessarium nosse rempublicam; idque late patet: genus hoc omne scientiae, diligentiae, memoriae est; sine quo paratus esse senator nullo pacto potest.

The mischiefs that have arisen to the public from inconsiderate alterations in our laws, are too obvious to be called in question; and how far they have been owing to the defective education of our senators, is a point well worthy the public attention. The common law of England has fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence frequently it's symmetry has been destroyed, it's proportions distorted, and it's majestic simplicity exchanged for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and
delays (which have sometimes disgraced the English, as well as other, courts of justice) owe their original not to the common law itself, but to innovations that have been made in it by acts of parliament; "overladen (as sir Edward Coke expresses it) with provisoes and additions, and many times on a sudden penned or corrected by men of none or very little judgment in law." This great and well-experienced judge declares, that in all his time he never knew two questions made upon rights merely depending upon the common law; and warmly laments the confusion introduced by ill-judging and unlearned legislators. "But if, he subjoins, acts of parliament were after the old fashion penned, by such only as perfectly knew what the common law was before the making of any act of parliament concerning that matter, as also how far forth former statutes had provided remedy for former mischiefs, and defects discovered by experience; then should very few questions in law arise, and the learned should not so often and so much perplex their heads to make atonement and peace, by construction of law, between insensible and disagreeing words, sentences, and provisoes, as they now do." And if this inconvenience was so heavily felt in the reign of queen Elizabeth, you may judge how the evil is increased in later times, when the statute book is swelled to ten times a larger bulk; unless it should be found, that the penners of our modern statutes have proportionably better informed themselves in the knowledge of the common law.

What is said of our gentlemen in general, and the propriety of their application to the study of the laws of their country, will hold equally strong or still stronger with regard to the nobility of this realm, except only in the article of serving upon juries. But, instead of this, they have several peculiar provinces of far greater consequence and concern; being not only by birth hereditary counsellors of the crown, and judges upon their honour of the lives of their brother-peers, but also arbiters of the property of all their fellow-subjects, and that in the last resort. In this their judicial capacity they are bound to decide the nicest and most critical points of the law; to examine and correct such errors as have escaped the most experienced sages of the profession, the lord keeper and the judges of the courts at Westminster. Their sentence is final, decisive, irrevocable: no appeal, no correction, not even a review can be had: and to their determination, whatever it be, the inferior courts of justice must conform; otherwise the rule of property would no longer be uniform and steady. Should a judge in the most subordinate jurisdiction be deficient in the knowledge of the law, it would reflect infinite contempt upon himself and
disgrace upon those who employ him. And yet the consequence of his ignorance is comparatively very trifling and small: his judgment may be examined, and his errors rectified, by other courts. But how much more serious and affecting is the case of a superior judge, if without any skill in the laws he will boldly venture to decide a question, upon which the welfare and subsistence of whole families may depend! where the chance of his judging right, or wrong, is barely equal; and where, if he chances to judge wrong, he does an injury of the most alarming nature, an injury without possibility of redress!

Yet, vast as this trust is, it can no where be so properly reposed as in the noble hands where our excellent constitution has placed it: and therefore placed it, because, from the independence of their fortune and the dignity of their station, they are presumed to employ that leisure which is the consequence of both, in attaining a more extensive knowledge of the laws than persons of inferior rank: and because the founders of our polity relied upon that delicacy of sentiment, so peculiar to noble birth; which, as on the one hand it will prevent either interest or affection from interfering in questions of right, so on the other it will bind a peer in honour, an obligation which the law esteems equal to another's oath, to be master of those points upon which it is his birthright to decide.

The Roman pandects will furnish us with a piece of history not unapplicable to our present purpose. Servius Sulpicius, a gentleman of the patrician order, and a celebrated orator, had occasion to take the opinion of Quintus Mutius Scaevola, the oracle of the Roman law; but for want of some knowledge in that science, could not so much as understand even the technical terms, which his friend was obliged to make use of. Upon which Mutius Scaevola could not forbear to upbraid him with this memorable reproof, "that it was a shame for a patrician, a nobleman, and an orator of causes, to be ignorant of that law in which he was so peculiarly concerned." /g This reproach made so deep an impression on Sulpicius, that he immediately applied himself to the study of the law; wherein he arrived to that proficiency, that he left behind him about a hundred and fourscore volumes of his own compiling upon the subject; and became, in the opinion of Cicero, a much more complete lawyer than even Mutius Scaevola himself. /h

/g Ff. 1. 2. 2. 43. Turpe esse patricio, & nobili, & causas oranti, jus in quo versaretur ignorare.
/h Brut. 41.

I would not be thought to recommend to our English nobility and gentry to become as great lawyers as Sulpicius; though he, together with this
character, sustained likewise that of an excellent orator, a firm patriot, and a wise indefatigable senator; but the inference which arises from the story is this, that ignorance of the laws of the land hath ever been esteemed dishonourable, in those who are entrusted by their country to maintain, to administer, and to amend them.

But surely there is little occasion to enforce this argument any farther to persons of rank and distinction, if we of this place may be allowed to form a general judgment from those who are under our inspection: happy, that while we lay down the rule, we can also produce the example. You will therefore permit your professor to indulge both a public and private satisfaction, by bearing this open testimony; that in the infancy of these studies among us, they were favoured with the most diligent attendance, and pursued with the most unwearied application, by those of the noblest birth and most ample patrimony: some of whom are still the ornaments of this seat of learning; and others at a greater distance continue doing honour to it's institutions, by comparing our polity and laws with those of other kingdoms abroad, or exerting their senatorial abilities in the councils of the nation at home.

Nor will some degree of legal knowledge be found in the least superfluous to persons of inferior rank; especially those of the learned professions. The clergy in particular, besides the common obligations they are under in proportion to their rank and fortune, have also abundant reason, considered merely as clergymen, to be acquainted with many branches of the law, which are almost peculiar and appropriated to themselves alone. Such are the laws relating to advowsons, institutions, and inductions; to simony, and simoniacl contracts; to uniformity, residence, and pluralities; to tithes and other ecclesiastical dues; to marriages (more especially of late) and to a variety of other subjects, which are consigned to the care of their order by the provisions of particular statutes. To understand these aright, to discern what is warranted or enjoined, and what is forbidden by law, demands a sort of legal apprehension; which is no otherwise to be acquired than by use and a familiar acquaintance with legal writers.

For the gentlemen of the faculty of physic, I must frankly own that I see no special reason, why they in particular should apply themselves to the study of the law; unless in common with other gentlemen, and to complete the character of general and extensive knowledge; a character which their profession, beyond others, has remarkably deserved. They will give me leave however to suggest, and that not ludicrously, that it might frequently be of use to families upon sudden emergencies, if the physician were
acquainted with the doctrine of last wills and testaments, at least so far as
relates to the formal part of their execution.
But those gentlemen who intend to profess the civil and ecclesiastical laws
in the spiritual and maritime courts of this kingdom, are of all men (next
to common lawyers) the most indispensably obliged to apply themselves
seriously to the study of our municipal laws. For the civil and canon laws,
considered with respect to any intrinsic obligation, have no force or
authority in this kingdom; they are no more binding in England than our
laws are binding at Rome. But as far as these foreign laws, on account of
some peculiar propriety, have in some particular cases, and in some
particular courts, been introduced and allowed by our laws, so far they
oblige, and no farther; their authority being wholly founded upon that
permission and adoption. In which we are not singular in our notions; for
even in Holland, where the imperial law is much cultivated and it's
decisions pretty generally followed, we are informed by Van Leeuwen,
that, "it receives it's force from custom and the consent of the people,
either tacitly or expressly given: for otherwise, he adds, we should no more
be bound by this law, than by that of the Almains, the Franks, the Saxons,
the Goths, the Vandals, and other of the ancient nations." /i Wherefore, in
all points in which the different systems depart from each other, the law of
the land takes place of the law of Rome, whether ancient or modern,
imperial or pontifical. And in those of our English courts wherein a
reception has been allowed to the civil and canon laws, if either they
exceed the bounds of that reception, by extending themselves to other
matters, than are permitted to them; or if such courts proceed according to
the decisions of those laws, in cases wherein it is controlled by the law of
the land, the common law in either instance both may, and frequently
does, prohibit and annul their proceedings: and it will not be a sufficient
excuse for them to tell the king's courts at Westminster, that their practice
is warranted by the laws of Justinian or Gregory, or is conformable to the
decrees of the Rota or imperial chamber. /k For which reason it becomes
highly necessary for every civilian and canonist that would act with safety
as a judge, or with prudence and reputation as an advocate, to know in
what cases and how far the English laws have given sanction to the
Roman; in what points the latter are rejected; and where they are both so
intermixed and blended together, as to form certain supplemental parts of
the common law of England, distinguished by the titles of the king's
maritime, the king's military, and the king's ecclesiastical law. The
propriety of which enquiry the university of Oxford has for more than a
century so thoroughly seen, that in her statutes she appoints, that one of
the three questions to be annually discussed at the act by the jurist-inceptors shall relate to the common law; subjoining this reason, "quia juris civilis studiosos decet haud imperitos esse juris municipalis, & differentias exteri patrique juris notas habere." /l And the statutes/m of the university of Cambridge speak expressly to the same effect. /m

/l Dedicatio corporis juris civilis. Edit. 1663.


/l Tit. VII. Sect. 2. 2.


From the general use and necessity of some acquaintance with the common law, the inference were extremely easy, with regard to the propriety of the present institution, in a place to which gentlemen of all ranks and degrees resort, as the fountain of all useful knowledge. But how it has come to pass that a design of this sort has never before taken place in the university, and the reason why the study of our laws has in general fallen into disuse, I shall previously proceed to enquire.

Sir John Fortescue, in his panegyric on the laws of England, (which was written in the reign of Henry the sixth) puts a very obvious question in the mouth of the young prince, whom he is exhorting to apply himself to that branch of learning; "why the laws of England, being so good, so fruitful, and so commodious, are not taught in the universities, as the civil and canon laws are?" /n In answer to which he gives what seems, with due deference be it spoken, a very jejune and unsatisfactory reason; being in short, that "as the proceedings at common law were in his time carried on in three different tongues, the English, the Latin, and the French, that science must be necessarily taught in those three several languages; but that in the universities all sciences were taught in the Latin tongue only; and therefore he concludes, that they could not be conveniently taught or studied in our universities." /o But without attempting to examine seriously the validity of this reason, (the very shadow of which by the wisdom of your late constitutions is entirely taken away) we perhaps may find out a better, or at least a more plausible account, why the study of the municipal laws has been banished from these seats of science, than what the learned chancellor thought it prudent to give to his royal pupil.

/n c. 47.

/o c. 48.
That ancient collection of unwritten maxims and customs, which is called
the common law, however compounded or from whatever fountains
derived, had subsisted immemorially in this kingdom; and, though
somewhat altered and impaired by the violence of the times, had in great
measure weathered the rude shock of the Norman conquest. This had
endeared it to the people in general, as well because its decisions were
universally known, as because it was found to be excellently adapted to the
genius of the English nation. In the knowledge of this law consisted great
part of the learning of those dark ages; it was then taught, says Mr Selden,
in the monasteries, in the universities, and in the families of the principal
nobility. The clergy in particular, as they then engrossed almost every
other branch of learning, so (like their predecessors the British druids)
they were peculiarly remarkable for their proficiency in the study of the
law. Nullus clericus nisi causidicus, is the character given of them soon
after the conquest by William of Malmsbury. The judges therefore were
usually created out of the sacred order, as was likewise the case among the
Normans; and all the inferior offices were supplied by the lower clergy,
which has occasioned their successors to be denominated clerks to this
day.

But the common law of England, being not committed to writing, but only
handed down by tradition, use, and experience, was not so heartily
relished by the foreign clergy; who came over hither in shoals during the
reign of the conqueror and his two sons, and were utter strangers to our
constitution as well as our language. And an accident, which soon after
happened, had nearly completed its ruin. A copy of Justinian's pandects,
being newly discovered at Amalfi, soon brought the civil law into vogue all
over the west of Europe, where before it was quite laid aside and in a
manner forgotten; though some traces of its authority remained in Italy
and the eastern provinces of the empire. This now became in
a particular manner the favourite of the popish clergy, who borrowed the
method and many of the maxims of their canon law from this original. The
study of it was introduced into several universities abroad, particularly
that of Bologna; where exercises were performed, lectures read, and
degrees conferred in this faculty, as in other branches of science: and
many nations on the continent, just then beginning to recover from the
convulsions consequent upon the overthrow of the Roman empire, and
settling by degrees into peaceable forms of government, adopted the civil
law, (being the best written system then extant) as the basis of their
several constitutions; blending and interweaving it among their own
feodal customs, in some places with a more extensive, in others a more
confined authority. /z
/u circ. A.D. 1130.
/w LL. Wisigoth. 2. 1. 9.
/x Capitular. Hludov. Pii. 4. 102.
/y Selden in Fletam. 5. 5.
A.D. 1254.
Nor was it long before the prevailing mode of the times reached England.
For Theobald, a Norman abbot, being elected to the see of Canterbury, and
extremely addicted to this new study, brought over with him in his retinue
many learned proficients therein; and among the rest Roger sirnamed
Vacarius, whom he placed in the university of Oxford, to teach it to the
people of this country. /a  /b  But it did not meet with the same easy
reception in England, where a mild and rational system of laws had been
long established, as it did upon the continent; and, though the monkish
clergy (devoted to the will of a foreign primate) received it with eagerness
and zeal, yet the laity who were more interested to preserve the old
constitution, and had already severely felt the effect of many Norman
innovations, continued wedded to the use of th
/e  /f  e common law. King
Stephen immediately published a proclamation, forbidding the study of
the laws, then newly imported from Italy; which was treated by the monks
as a piece of impiety, and, though it might prevent the introduction of the
civil law process into our courts of justice, yet did not hinder the clergy
from reading and teaching it in their own schools and monasteries. /c  /d
/a A.D. 1138.
/c Rog. Bacon. citat. per Selden. in Fletam. 7. 6. in Fortesc. c. 33. & 8 Rep.
Pref.
/d Joan. Sarisburiens. Polycrat. 8. 22.
From this time the nation seems to have been divided into two parties; the
bishops and clergy, many of them foreigners, who applied themselves
wholly to the study of the civil and canon laws, which now came to be
inseparably interwoven with each other; and the nobility and laity, who adhered with equal pertinacity to the old common law; both of them reciprocally jealous of what they were unacquainted with, and neither of them perhaps allowing the opposite system that real merit which is abundantly to be found in each. This appears on the one hand from the spleen with which the monastic writers speak of our municipal laws upon all occasions; and, on the other, from the firm temper which the nobility shewed at the famous parliament of Merton; when the prelates endeavoured to procure an act, to declare all bastards legitimate in case the parents intermarried at any time afterwards; alleging this only reason, because holy church (that is, the canon law) declared such children legitimate: but "all the earls and barons (says the parliament roll) with one voice answered, that they would not change the laws of England, which had hitherto been used and approved." /e /f And we find the same jealousy prevailing above a century afterwards, when the nobility declared with a kind of prophetic spirit, "that the realm of England hath never been unto this hour, neither by the consent of our lord the king and the lords of parliament shall it ever be, ruled or governed by the civil law." /g /h And of this temper between the clergy and laity many more instances might be given. 
/g 11 Ric. II. 
/h Selden. Jan. Anglor. l. 2. 43. in Fortesc. c. 33.

While things were in this situation, the clergy, finding it impossible to root out the municipal law, began to withdraw themselves by degrees from the temporal courts; and to that end, very early in the reign of king Henry the third, episcopal constitutions were published, forbidding all ecclesiastics to appear as advocates in foro saeculari; nor did they long continue to act as judges there, nor caring to take the oath of office which was then found necessary to be administred, that they should in all things determine according to the law and custom of this realm; though they still kept possession of the high office of chancellor, an office then of little juridical power; and afterwards, as it's business increased by degrees, they modelled the process of the court at their own discretion. /i /k /i Spelman. Concil. A.D. 1217. Wilkins, vol. 1. p. 574. 599. 
/k Selden. in Fletam. 9. 3.
But wherever they retired, and wherever their authority extended, they carried with them the same zeal to introduce the rules of the civil, in exclusion of the municipal law. This appears in a particular manner from the spiritual courts of all denominations, from the chancellor's courts in both our universities, and from the high court of chancery before-mentioned; in all of which the proceedings are to this day in a course much conformed to the civil law: for which no tolerable reason can be assigned, unless that these courts were all under the immediate direction of the popish ecclesiastics, among whom it was a point of religion to exclude the municipal law; pope Innocent the fourth having forbidden the very reading of it by the clergy, because it's decisions were not founded on the imperial constitutions, but merely on the customs of the laity. /l And if it be considered, that our universities began about that period to receive their present form of scholastic discipline; that they were then, and continued to be till the time of the reformation, entirely under the influence of the popish clergy; (sir John Mason the first protestant, being also the first lay, chancellor of Oxford) this will lead us to perceive the reason, why the study of the Roman laws was in those days of bigotry pursued with such alacrity in these seats of learning; and why the common law was entirely despised, and esteemed little better than heretical. /m
/l M. Paris ad A.D. 1254.
/m There cannot be a stronger instance of the absurd and superstitious veneration that was paid to these laws, than that the most learned writers of the times thought they could not form a perfect character, even of the blessed virgin, without making her a civilian and a canonist. Which Albertus Magnus, the renowned dominican doctor of the thirteenth century, thus proves in his Summa de laudibus christiferae virginis (divinum magis quam humanum opus) qu. 23. 5. "Item quod jura civilia, & leges, & decreta scivit in summo, probatur hoc modo: sapientia advocati manifestatur in tribus; unum, quod obtineat omnia contra judicem justum & sapientem; secundo, quod contra adversarium astutum & sagacem; tertio, quod in causa desperata: sed beatissima virgo, contra judicem sapientissimum, Dominum; contra adversarium callidissimum, dyabolum; in causa nostra desperata; sententiam optatam obtinuit." To which an eminent franciscan, two centuries afterwards, Bernardinus de Busti (Mariale, part. 4. serm. 9.) very gravely subjoins this note. "Nec videtur incongruum mulieres habere peritiam juris. Legitur enim de uxore Joannis Andreae glossatoris, quod tantam peritiam in utroque jure habuit, ut publice in scholis legere ausa sit."
And, since the reformation, many causes have conspired to prevent it's becoming a part of academical education. As, first, long usage and established custom; which, as in every thing else, so especially in the forms of scholastic exercise, have justly great weight and authority. Secondly, the real intrinsic merit of the civil law, considered upon the footing of reason and not of obligation, which was well known to the instructors of our youth; and their total ignorance of the merit of the common law, though it's equal at least, and perhaps an improvement on the other. But the principal reason of all, that has hindered the introduction of this branch of learning, is, that the study of the common law, being banished from hence in the times of popery, has fallen into a quite different chanel, and has hitherto been wholly cultivated in another place. But as this long usage and established custom, of ignorance in the laws of the land, begin now to be thought unreasonable; and as by this means the merit of those laws will probably be more generally known; we may hope that the method of studying them will soon revert to it's ancient course, and the foundations at least of that science will be laid in the two universities; without being exclusively confined to the chanel which it fell into at the times I have been just describing.

For, being then entirely abandoned by the clergy, a few stragglers excepted, the study and practice of it devolved of course into the hands of laymen; who entertained upon their parts a most hearty aversion to the civil law, and made no scruple to profess their contempt, nay even their ignorance of it, in the most public manner. /n /o But still, as the ballance of learning was greatly on the side of the clergy, and as the common law was no longer taught, as formerly, in any part of the kingdom, it must have been subjected to many inconveniences, and perhaps would have been gradually lost and overrun by the civil, (a suspicion well justified from the frequent transcripts of Justinian to be met with in Bracton and Fleta) had it not been for a peculiar incident, which happened at a very critical time, and contributed greatly to it's support.

/n Fortesc. de laud. LL. c. 25.

/o This remarkably appeared in the case of the abbot of Torun, M. 22 E. 3. 24. who had caused a certain prior to be summoned to answer at Avignon for erecting an oratory contra inhibitionem novi operis; by which words Mr Selden, (in Flet. 8. 5.) very justly understands to be meant the title de novi operis nuntiatione both in the civil and canon laws, (Ff. 39. 1. C. 8. 11. and Decretal. not Extrav. 5. 32.) whereby the erection of any new buildings in prejudice of more ancient ones was prohibited. But Skipwith the king's serjeant, and afterwards chief baron of the exchequer, declares them to be
The incident I mean was the fixing the court of common pleas, the grand tribunal for disputes of property, to be held in one certain spot; that the seat of ordinary justice might be permanent and notorious to all the nation. Formerly that, in conjunction with all the other superior courts, was held before the king’s capital justiciary of England, in the aula regis, or such of his palaces wherein his royal person resided; and removed with his household from one end of the kingdom to the other. This was found to occasion great inconvenience to the suitors; to remedy which it was made an article of the great charter of liberties, both that of king John and king Henry the third, that "common pleas should no longer follow the king’s court, but be held in some certain place:" in consequence of which they have ever since been held (a few necessary removals in times of the plague excepted) in the palace of Westminster only. This brought together the professors of the municipal law, who before were dispersed about the kingdom, and formed them into an aggregate body; whereby a society was established of persons, who (as Spelman observes) addicting themselves wholly to the study of the laws of the land, and no longer considering it as a mere subordinate science for the amusement of leisure hours, soon raised those laws to that pitch of perfection, which they suddenly attained under the auspices of our English Justinian, king Edward the first. In consequence of this lucky assemblage, they naturally fell into a kind of collegiate order, and, being excluded from Oxford and Cambridge, found it necessary to establish a new university of their own. This they did by purchasing at various times certain houses (now called the inns of court and of chancery) between the city of Westminster, the place of holding the king’s courts, and the city of London; for advantage of ready access to the one, and plenty of provisions in the other. Here exercises were performed, lectures read, and degrees were at length conferred in the common law, as at other universities in the canon and civil. The degrees were those of barristers (first stiled apprentices from apprendre, to learn) who answered to our bachelors; as the state and degree of a serjeant, servientis ad legem, did to that of doctor.
Apprentices or Barristers seem to have been first appointed by an ordinance of king Edward the first in parliament, in the 20th year of his reign. (Spelm. Gloss. 37. Dugdale. Orig. jurid. 55.)

The first mention I have met with in our lawbooks of serjeants or countors, is in the statute of Westm. 1. 3 Edw. I. c. 29. and in Horn's Mirror, c. 1. 10. c. 2. 5. c. 3. 1. in the same reign. But M. Paris in his life of John II, abbot of St. Alban's, which he wrote in 1255, 39 Hen. III. speaks of advocates at the common law, or countors (quos banci narratores vulgariter appellamus) as of an order of men well known. And we have an example of the antiquity of the coif in the same author's history of England, A.D. 1259. in the case of one William de Bussy; who, being called to account for his great knavery and malpractices, claimed the benefit of his orders or clergy, which till then remained an entire secret; and to that end voluit ligamenta coifae suae solvere, ut palam monstraret se tonsuram habere clericalem; sed non est permissus. Satelles vero eum arripiens, non per coifae ligamina sed per guttur eum apprehendens, traxit ad carcerem. And hence sir H. Spelman conjectures, (Glossar. 335.) that coifs were introduced to hide the tonsure of such renegade clerks, as were still tempted to remain in the secular courts in the quality of advocates or judges, notwithstanding their prohibition by canon. The crown seems to have soon taken under it's protection this infant seminary of common law; and, the more effectually to foster and cherish it, king Henry the third in the nineteenth year of his reign issued out an order directed to the mayor and sheriffs of London, commanding that no regent of any law schools within that city should for the future teach law therein. The word, law, or leges, being a general term, may create some doubt at this distance of time whether the teaching of the civil law, or the common, or both, is hereby restrained. But in either case it tends to the same end. If the civil law only is prohibited, (which is Mr Selden's opinion) it is then a retaliation upon the clergy, who had excluded the common law from their seats of learning. If the municipal law be also included in the restriction, (as sir Edward Coke understands it, and which the words seem to import) then the intention is evidently this; by preventing private teachers within the walls of the city, to collect all the common lawyers into the one public university, which was newly instituted in the suburbs. Ne aliquis scholas regens de legibus in eadem civitate de caetero ibidem leges doceat.

Ne in Flet. 8. 2.

2 Inst. proëm.
In this juridical university (for such it is insisted to have been by Fortescue and sir Edward Coke) there are two sorts of collegiate houses; one called inns of chancery, in which the younger students of the law were usually placed, "learning and studying, says Fortescue, the originals and as it were the elements of the law; who, profiting therein, as they grow to ripeness so are they admitted into the greater inns of the same study, called the inns of court." And in these inns of both kinds, he goes on to tell us, the knights and barons, with other grandees and noblemen of the realm, did use to place their children, though they did not desire to have them thoroughly learned in the law, or to get their living by it's practice: and that in his time there were about two thousand students at these several inns, all of whom he informs us were filii nobilium, or gentlemen born.

Hence it is evident, that (though under the influence of the monks our universities neglected this study, yet) in the time of Henry the sixth it was thought highly necessary and was the universal practice, for the young nobility and gentry to be instructed in the originals and elements of the laws. But by degrees this custom has fallen into disuse; so that in the reign of queen Elizabeth sir Edward Coke does not reckon above a thousand students, and the number at present is very considerably less. Which seems principally owing to these reasons: first, because the inns of chancery being now almost totally filled by the inferior branch of the profession, they are neither commodious nor proper for the resort of gentlemen of any rank or figure; so that there are now very rarely any young students entered at the inns of chancery: secondly, because in the inns of court all sorts of regimen and academical superintendance, either with regard to morals or studies, are found impracticable and therefore entirely neglected: lastly, because persons of birth and fortune, after having finished their usual courses at the universities, have seldom leisure or resolution sufficient to enter upon a new scheme of study at a new place of instruction. Wherefore few gentlemen now resort to the inns of court, but such for whom the knowledge of practice is absolutely necessary; such, I mean, as are intended for the profession: the rest of our gentry, (not to say our nobility also) having usually retired to their estates, or visited foreign kingdoms, or entered upon public life, without any instruction in the laws of the land; and indeed with hardly any opportunity of gaining instruction, unless it can be afforded them in these seats of learning. 

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And that these are the proper places, for affording assistances of this kind to gentlemen of all stations and degrees, cannot (I think) with any colour of reason be denied. For not one of the objections, which are made to the inns of court and chancery, and which I have just enumerated, will hold with regard to the universities. Gentlemen may here associate with gentlemen of their own rank and degree. Nor are their conduct and studies left entirely to their own discretion; but regulated by a discipline so wise and exact, yet so liberal, so sensible and manly, that their conformity to it's rules (which does at present so much honour to our youth) is not more the effect of constraint, than of their own inclinations and choice. Neither need they apprehend too long an avocation hereby from their private concerns and amusements, or (what is a more noble object) the service of their friends and their country. This study will go hand in hand with their other pursuits: it will obstruct none of them; it will ornament and assist them all.

But if, upon the whole, there are any still wedded to monastic prejudice, that can entertain a doubt how far this study is properly and regularly academical, such persons I am afraid either have not considered the constitution and design of an university, or else think very meanly of it. It must be a deplorable narrowness of mind, that would confine these seats of instruction to the limited views of one or two learned professions. To the praise of this age be it spoken, a more open and generous way of thinking begins now universally to prevail. The attainment of liberal and genteel accomplishments, though not of the intellectual sort, has been thought by our wisest and most affectionate patrons, and very lately by the whole university, no small improvement of our ancient plan of education; and therefore I may safely affirm that nothing (how unusual soever) is, under due regulations, improper to be taught in this place, which is proper for a gentleman to learn. But that a science, which distinguishes the criterions of right and wrong; which teaches to establish the one, and prevent, punish, or redress the other; which employs in it's theory the noblest faculties of the soul, and exerts in it's practice the cardinal virtues of the heart; a science, which is universal in it's use and extent, accommodated to each individual, yet comprehending the whole community; that a science like this should have ever been deemed unnecessary to be studied in an university, is matter of astonishment and concern. Surely, if it were not before an object of academical knowledge, it was high time to make it one; and to those who can doubt the propriety of it's reception among us (if any such there be) we may return an answer in their own way; that ethics are confessedly a branch of academical learning,
and Aristotle himself has said, speaking of the laws of his own country, that jurisprudence or the knowledge of those laws is the principal and most perfect branch of ethics. /e
/c Lord chancellor Clarendon, in his dialogue of education, among his tracts, p. 325. appears to have been very solicitous, that it might be made "a part of the ornament of our learned academies to teach the qualities of riding, dancing, and fencing, at those hours when more serious exercises should be intermitted."
/d By accepting in full convocation the remainder of lord Clarendon's history from his noble descendants, on condition to apply the profits arising from it's publication to the establishment of a manage in the university.
/e Ethic. ad Nicomach. B. 5. c. 1. 1129b29.
From a thorough conviction of this truth, our munificent benefactor Mr Viner, having employed above half a century in amassing materials for new modelling and rendering more commodious the rude study of the laws of the land, consigned both the plan and execution of these his public-spirited designs to the wisdom of his parent university. Resolving to dedicate his learned labours "to the benefit of posterity and the perpetual service of his country," he was sensible he could not perform his resolutions in a better and more effectual manner, than by extending to the youth of this place those assistances, of which he so well remembered and so heartily regretted the want. And the sense, which the university has entertained of this ample and most useful benefaction, must appear beyond a doubt from their gratitude in receiving it with all possible marks of esteem; from their alacrity and unexampled dispatch in carrying it into execution; and, above all, from the laws and constitutions by which they have effectually guarded it from the neglect and abuse to which such institutions are liable. /f /g /h /i We have seen an universal emulation, who best should understand, or most faithfully pursue, the designs of our generous patron: and with pleasure we recollect, that those who are most distinguished by their quality, their fortune, their station, their learning, or their experience, have appeared the most zealous to promote the success of Mr Viner's establishment.
/f See the preface to the eighteenth volume of his abridgment.
/g Mr Viner is enrolled among the public benefactors of the university by decree of convocation.
/h Mr Viner died June 5, 1756. His effects were collected and settled, near a volume of his work printed, almost the whole disposed of, and the accounts made up, in a year and a half from his decease, by the very
diligent and worthy administrators with the will annexed, (Dr West and Dr Good of Magdalene, Dr Whalley of Oriel, Mr Buckler of All Souls, and Mr Betts of University college) to whom that care was consigned by the university. Another half year was employed in considering and settling a plan of the proposed institution, and in framing the statutes thereupon, which were finally confirmed by convocation on the 3d of July, 1758. The professor was elected on the 20th of October following, and two scholars on the succeeding day. And, lastly, it was agreed at the annual audit in January following? The residue of this fund, arising from the sale of Mr Viner's abridgment, will probably be sufficient hereafter to found another fellowship and scholarship, or three more scholarships, as shall be thought most expedient.

The statutes are in substance as follows:
1. That the accounts of this benefaction be separately kept, and annually audited by the delegates of accounts and professor, and afterwards reported to convocation.
2. That a professorship of the laws of England be established, with a salary of two hundred pounds per annum; the professor to be elected by convocation, and to be at the time of his election at least a master of arts or bachelor of civil law in the university of Oxford, of ten years standing from his matriculation; and also a barrister at law of four years standing at the bar.
3. That such professor (by himself, or by deputy to be previously approved by convocation) do read one solemn public lecture on the laws of England, and in the English language, in every academical term, at certain stated times previous to the commencement of the common law term; or forfeit twenty pounds for every omission to Mr Viner’s general fund: and also (by himself, or by deputy to be approved, if occasional, by the vice-chancellor and proctors; or, if permanent, both the cause and the deputy to be annually approved by convocation) do yearly read one complete course of lectures on the laws of England, and in the English language, consisting of sixty lectures at the least, to be read during the university term time, with such proper intervals that not more than four lectures may fall within any single week: that the professor do give a month's notice of the time when the course is to begin, and do read gratis to the scholars of Mr Viner's foundation; but may demand of other auditors such gratuity as shall be settled from time to time by decree of convocation: and that, for every of the said sixty lectures omitted, the professor, on complaint made to the vice-chancellor within the year, do forfeit forty shillings to Mr Viner's
general fund; the proof of having performed his duty to lie upon the said professor.
4. That every professor do continue in his office during life, unless in case of such misbehaviour as shall amount to bannition by the university statutes; or unless he deserts the profession of the law by betaking himself to another profession; or unless, after one admonition by the vice-chancellor and proctors for notorious neglect, he is guilty of another flagrant omission: in any of which cases he be deprived by the vice-chancellor, with consent of the house of convocation.
5. That such a number of fellowships with a stipend of fifty pounds per annum, and scholarships with a stipend of thirty pounds be established, as the convocation shall from time to time ordain, according to the state of Mr Viner's revenues.
6. That every fellow be elected by convocation, and at the time of election be unmarried, and at least a master of arts or bachelor of civil law, and a member of some college or hall in the university of Oxford; the scholars of this foundation or such as have been scholars (if qualified and approved of by convocation) to have the preference: that, if not a barrister when chosen, he be called to the bar within one year after his election; but do reside in the university two months in every year, or in case of non-residence do forfeit the stipend of that year to Mr Viner's general fund.
7. That every scholar be elected by convocation, and at the time of election be unmarried, and a member of some college or hall in the university of Oxford, who shall have been matriculated twenty four calendar months at the least: that he do take the degree of bachelor of civil law with all convenient speed; (either proceeding in arts or otherwise) and previous to his taking the same, between the second and eighth year from his matriculation, be bound to attend two courses of the professor's lectures, to be certified under the professor's hand; and within one year after taking the same be called to the bar: that he do annually reside six months till he is of four years standing, and four months from that time till he is master of arts or bachelor of civil law; after which he be bound to reside two months in every year; or, in case of non-residence, do forfeit the stipend of that year to Mr Viner's general fund.
8. That the scholarships do become void in case of non-attendance on the professor, or not taking the degree of bachelor of civil law, being duly admonished so to do by the vice-chancellor and proctors: and that both fellowships and scholarships do expire at the end of ten years after each respective election; and become void in case of gross misbehaviour, non-residence for two years together, marriage, not being called to the bar
within the time before limited, (being duly admonished so to be by the vice-chancellor and proctors) or deserting the profession of the law by following any other profession: and that in any of these cases the vice-chancellor, with consent of convocation, do declare the place actually void. 9. That in case of any vacancy of the professorship, fellowships, or scholarships, the profits of the current year be ratably divided between the predecessor or his representatives, and the successor; and that a new election be had within one month afterwards, unless by that means the time of election shall fall within any vacation, in which case it be deferred to the first week in the next full term. And that before any convocation shall be held for such election, or for any other matter relating to Mr Viner's benefaction, ten days public notice be given to each college and hall of the convocation, and the cause of convoking it.

The advantages that might result to the science of the law itself, when a little more attended to in these seats of knowledge, perhaps would be very considerable. The leisure and abilities of the learned in these retirements might either suggest expedients, or execute those dictated by wiser heads, for improving it's method, retrenching it's superfluities, and reconciling the little contrarieties, which the practice of many centuries will necessarily create in any human system: a task, which those who are deeply employed in business, and the more active scenes of the profession, can hardly condescend to engage in. And as to the interest, or (which is the same) the reputation of the universities themselves, I may venture to pronounce, that if ever this study should arrive to any tolerable perfection either here or at Cambridge, the nobility and gentry of this kingdom would not shorten their residence upon this account, nor perhaps entertain a worse opinion of the benefits of academical education. Neither should it be considered as a matter of light importance, that while we thus extend the pomoeria of university learning, and adopt a new tribe of citizens within these philosophical walls, we interest a very numerous and very powerful profession in the preservation of our rights and revenues. 

See lord Bacon's proposals and offer of a digest. For I think it is past dispute that those gentlemen, who resort to the inns of court with a view to pursue the profession, will find it expedient (whenever it is practicable) to lay the previous foundations of this, as well as every other science, in one of our learned universities. We may appeal to the experience of every sensible lawyer, whether any thing can be more hazardous or discouraging than the usual entrance on the study of the law. A raw and unexperienced youth, in the most dangerous season of life, is
transpanted on a sudden into the midst of allurements to pleasure, without any restraint or check but what his own prudence can suggest; with no public direction in what course to pursue his enquiries; no private assistance to remove the distresses and difficulties, which will always embarass a beginner. In this situation he is expected to sequester himself from the world, and by a tedious lonely process to extract the theory of law from a mass of undigested learning; or else by an assiduous attendance on the courts to pick up theory and practice together, sufficient to qualify him for the ordinary run of business. How little therefore is it to be wondered at, that we hear of so frequent miscarriages; that so many gentlemen of bright imaginations grow weary of so unpromising a search, and addict themselves wholly to amusements, or other less innocent pursuits; and that so many persons of moderate capacity confuse themselves at first setting out, and continue ever dark and puzzled during the remainder of their lives! /l

/l Sir Henry Spelman, in the preface to his glossary, gives us a very lively picture of his own distress upon this occasion. "Emisit me mater Londinum, juris nostri capessendi gratia; cujus cum vestibulum salutassem, reperissemque linguam peregrinam, dialectum barbaram, methodum inconcinnam, molem non ingentem solum sed perpetuis humeris sustinendam, excidit mihi (fateor) animus, &c."
The evident want of some assistance in the rudiments of legal knowledge, has given birth to a practice, which, if ever it had grown to be general, must have proved of extremely pernicious consequence: I mean the custom, by some so very warmly recommended, to drop all liberal education, as of no use to lawyers; and to place them, in it's stead, as the desk of some skilful attorney; in order to initiate them early in all the depths of practice, and render them more dextrous in the mechanical part of business. A few instances of particular persons, (men of excellent learning, and unblemished integrity) who, in spight of this method of education, have shone in the foremost ranks of the bar, have afforded some kind of sanction to this illiberal path to the profession, and biassed many parents, of shortsighted judgment, in it's favour: not considering, that there are some geniuses, formed to overcome all disadvantages, and that from such particular instances no general rules can be formed; nor observing, that those very persons have frequently recommended by the most forcible of all examples, the disposal of their own offspring, a very different foundation of legal studies, a regular academical education. Perhaps too, in return, I could now direct their eyes to our principal seats...
of justice, and suggest a few hints, in favour of university learning: but in these all who hear me, I know, have already prevented me. /m
/m The four highest offices in the law were at that time filled by gentlemen, two of whom had been fellows of All Souls college; another, student of Christ-Church; and the fourth a fellow of Trinity college, Cambridge.

Making therefore due allowance for one or two shining exceptions, experience may teach us to foretell that a lawyer thus educated to the bar, in subservience to attorneys and solicitors, will find he has begun at the wrong end. /n If practice be the whole he is taught, practice must also be the whole he will ever know: if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him: ita lex scripta est is the utmost his knowledge will arrive at; he must never aspire to form, and seldom expect to comprehend, any arguments drawn a priori, from the spirit of the laws and the natural foundations of justice. /o
/o See Kennet's life of Somner. p. 67.

Nor is this all; for (as few persons of birth, or fortune, or even of scholastic education, will submit to the drudgery of servitude and the manual labour of copying the trash of an office) should this infatuation prevail to any considerable degree, we must rarely expect to see a gentleman of distinction or learning at the bar. And what the consequence may be, to have the interpretation and enforcement of the laws (which include the entire disposal of our properties, liberties, and lives) fall wholly into the hands of obscure or illiterate men, is matter of very public concern.

The inconveniences here pointed out can never be effectually prevented, but by making academical education a previous step to the profession of the common law, and at the same time making the rudiments of the law a part of academical education. For sciences are of a sociable disposition, and flourish best in the neighbourhood of each other: nor is there any branch of learning, but may be helped and improved by assistances drawn from other arts. If therefore the student in our laws hath formed both his sentiments and style, by perusal and imitation of the purest classical writers, among whom the historians and orators will best deserve his regard; if he can reason with precision, and separate argument from fallacy, by the clear simple rules of pure unsophisticated logic; if he can fix his attention, and steadily pursue truth through any the most intricate deduction, by the use of mathematical demonstrations; if he has enlarged his conceptions of nature and art, by a view of the several branches of
genuine, experimental, philosophy; if he has impressed on his mind the sound maxims of the law of nature, the best and most authentic foundation of human laws; if, lastly, he has contemplated those maxims reduced to a practical system in the laws of imperial Rome; if he has done this or any part of it, (though all may be easily done under as able instructors as ever graced any seats of learning) a student thus qualified may enter upon the study of the law with incredible advantage and reputation. And if, at the conclusion, or during the acquisition of these accomplishments, he will afford himself here a year or two's farther leisure, to lay the foundation of his future labours in a solid scientifical method, without thirsting too early to attend that practice which it is impossible he should rightly comprehend, he will afterwards proceed with the greatest ease, and will unfold the most intricate points with an intuitive rapidity and clearness.

I shall not insist upon such motives as might be drawn from principles of economy, and are applicable to particulars only: I reason upon more general topics. And therefore to the qualities of the head, which I have just enumerated, I cannot but add those of the heart; affectionate loyalty to the king, a zeal for liberty and the constitution, a sense of real honour, and well grounded principles of religion; as necessary to form a truly valuable English lawyer, a Hyde, a Hale, or a Talbot. And, whatever the ignorance of some, or unkindness of others, may have heretofore untruly suggested, experience will warrant us to affirm, that these endowments of loyalty and public spirit, of honour and religion, are no where to be found in more high perfection than in the two universities of this kingdom.

Before I conclude, it may perhaps be expected, that I lay before you a short and general account of the method I propose to follow, in endeavouring to execute the trust you have been pleased to repose in my hands. And in these solemn lectures, which are ordained to be read at the entrance of every term, (more perhaps to do public honour to this laudable institution, than for the private instruction of individuals) I presume it will best answer the intent of our benefactor and the expectation of this learned body, if I attempt to illustrate at times such detached titles of the law, as are the most easy to be understood, and most capable of historical or critical ornament. But in reading the complete course, which is annually consigned to my care, a more regular method will be necessary; and, till a better is proposed, I shall take the liberty to follow the same that I have already submitted to the public. To fill up and finish that outline with propriety and correctness, and to render the whole intelligible to the uninformed minds of beginners, (whom we are too apt to suppose
acquainted with terms and ideas, which they never had opportunity to learn) this must be my ardent endeavour, though by no means my promise to accomplish. You will permit me however very briefly to describe, rather what I conceive an academical expounder of the laws should do, than what I have ever known to be done.

/p See Lowth's Oratio Crewiana, p. 365.

/q The Analysis of the laws of England, first published, A.D. 1756, and exhibiting the order and principal divisions of the ensuing Commentaries; which were originally submitted to the university in a private course of lectures, A.D. 1753.

He should consider his course as a general map of the law, marking out the shape of the country, its connexions and boundaries, its greater divisions and principal cities: it is not his business to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet. His attention should be engaged, like that of the readers in Fortescue's inns of chancery, "in tracing out the originals and as it were the elements of the law." For if, as Justinian has observed, the tender understanding of the student be loaded at the first with a multitude and variety of matter, it will either occasion him to desert his studies, or will carry him heavily through them, with much labour, delay, and despondence. /r These originals should be traced to their fountains, as well as our distance will permit; to the customs of the Britons and Germans, as recorded by Caesar and Tacitus; to the codes of the northern nations on the continent, and more especially to those of our own Saxon princes; to the rules of the Roman law, either left here in the days of Papinian, or imported by Vacarius and his followers; but, above all, to that inexhaustible reservoir of legal antiquities and learning, the feodal law, or, as Spelman has entitled it, the law of nations in our western orb. /s These primary rules and fundamental principles should be weighed and compared with the precepts of the law of nature, and the practice of other countries; should be explained by reasons, illustrated by examples, and confirmed by undoubted authorities; their history should be deduced, their changes and revolutions observed, and it should be shewn how far they are connected with, or have at any time been affected by, the civil transactions of the kingdom.

/r Incipientibus nobis exponere jura populi Romani, ita videntur tradi posse commodissime, si primo levi ac simplici via singula tradantur: Alioqui, si statim ab initio rudem adhuc & infirmum animum studiosi multitudine ac varietate rerum oneravimus, duorum alterum, aut desertorem studiorum efficiemus, aut cum magno labore, saepe etiam cum
diffidentia (quae plerumque juvenes avertit) serius ad id perducemus, ad quod leviore via ductus, sine magno labore & sine ulla diffidentia maturius perduci potuisset. Inst. 1. 1. 2.
/s Of Parliaments. 57.
A plan of this nature, if executed with care and ability, cannot fail of administering a most useful and rational entertainment to students of all ranks and professions; and yet it must be confessed that the study of the laws is not merely a matter of amusement: for as a very judicious writer has observed upon a similar occasion, the learner "will be considerably disappointed if he looks for entertainment without the expence of attention." /t An attention, however, not greater than is usually bestowed in mastering the rudiments of other sciences, or sometimes in pursuing a favorite recreation or exercise. And this attention is not equally necessary to be exerted by every student upon every occasion. Some branches of the law, as the formal process of civil suits, and the subtile distinctions incident to landed property, which are the most difficult to be thoroughly understood, are the least worth the pains of understanding, except to such gentlemen as intend to pursue the profession. To others I may venture to apply, with a slight alteration, the words of sir John Fortescue, when first his royal pupil determines to engage in this study. /u "It will not be necessary for a gentleman, as such, to examine with a close application the critical niceties of the law. It will fully be sufficient, and he may well enough be denominated a lawyer, if under the instruction of a master he traces up the principles and grounds of the law, even to their original elements. Therefore in a very short period, and with very little labour, he may be sufficiently informed in the laws of his country, if he will but apply his mind in good earnest to receive and apprehend them. For, though such knowledge as is necessary for a judge is hardly to be acquired by the lucubrations of twenty years, yet with a genius of tolerable perspicacity, that knowledge which is fit for a person of birth or condition may be learned in a single year, without neglecting his other improvements." /t Dr Taylor's preface to Elem. of civil law.
/u Tibi, princeps, necesse non erit mysteria legis Angliae longo disciplinatu rimare. Sufficiet tibi, et fatis denominari legista mereberis, si legum principia & causas, usque ad elementa, discipuli more indagaveris. Quare tu, princeps serenissime, parvo tempore, parva industria, sufficienter eris in legibus regni Angliae eruditus, dummodo ad ejus apprehensionem tu conferas animum tuum? Nosco namque ingenii tui perspicacitatem, quo audacter pronuntio quod in legibus illis (licet earum peritia, qualis judicibus necessaria est, vix viginti annorum
lucubrationibus acquiratur) tu doctrinam principi congruam in anno uno
sufficienter nancisceris; nec interim militarem disciplinam, ad quam tam
ardenter anhelas, negliges; sed ea, recreationis loco, etiam anno illo tu ad
libitum perfrueris. c. 8.

To the few therefore (the very few, I am persuaded,) that entertain such
unworthy notions of an university, as to suppose it intended for mere
dissipation of thought; to such as mean only to while away the awkward
interval from childhood to twenty one, between the restraints of the school
and the licentiousness of politer life, in a calm middle state of mental and
of moral inactivity; to these Mr Viner gives no invitation to an
entertainment which they never can relish. But to the long and illustrious
train of noble and ingenious youth, who are not more distinguished
among us by their birth and possessions, than by the regularity of their
conduct and their thirst after useful knowledge, to these our benefactor
has consecrated the fruits of a long and laborious life, worn out in the
duties of his calling; and will joyfully reflect (if such reflexions can be now
the employment of his thoughts) that he could not more effectually have
benefited posterity, or contributed to the service of the public, than by
founding an institution which may instruct the rising generation in the
wisdom of our civil polity, and inform them with a desire to be still better
acquainted with the laws and constitution of their country.

Section the second.
Of the NATURE of LAWS in general.

LAW, in it's most general and comprehensive sense, signifies a rule of
action; and is applied indiscriminately to all kinds of action, whether
animate, or inanimate, rational or irrational. Thus we say, the laws of
motion, of gravitation, of optics, or mechanics, as well as the laws of
nature and of nations. And it is that rule of action, which is prescribed by
some superior, and which the inferior is bound to obey.

Thus 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. When he put
that matter into motion, he established certain laws of motion, to which all
moveable bodies must conform. And, to descend from the greatest
operations to the smallest, when a workman forms a clock, or other piece
of mechanism, he establishes at his own pleasure certain arbitrary laws for
it's direction; as that the hand shall describe a given space in a given time;
to which law as long as the work conforms, so long it continues in perfection, and answers the end of it's formation.
If we farther advance, from mere inactive matter to vegetable and animal life, we shall find them still governed by laws; more numerous indeed, 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 economy; are not left to chance, or the will of the creature itself, but are performed in a wondrous involuntary manner, and guided by unerring rules laid down by the great creator.
This then is the general signification of law, a rule of action dictated by some superior being; and in those creatures that have neither the power to think, nor to will, such laws must be invariably obeyed, so long as the creature itself subsists, for it's existence depends on that obedience. But laws, in their more confined sense, and in which it is our present business to consider them, denote the rules, not of action in general, but of human action or conduct: that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and freewill, is commanded to make use of those faculties in the general regulation of his behaviour.
Man, considered as a creature, must necessarily be subject to the laws of his creator, for he is entirely a dependent being. A being, independent of any other, has no rule to pursue, but such as he prescribes to himself; but a state of dependance will inevitably oblige the inferior to take the will of him, on whom he depends, as the rule of his conduct: not indeed in every particular, but in all those points wherein his dependance consists. This principle therefore has more or less extent and effect, in proportion as the superiority of the one and the dependance of the other is greater or less, absolute or limited. And consequently as man depends absolutely upon his maker for every thing, it is necessary that he should in all points conform to his maker's will.
This will of his maker is called the law of nature. For as God, when he created matter, and endowed it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endowed him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.
Considering the creator only as a being of infinite power, he was able unquestionably to have prescribed whatever laws he pleased to his
creature, man, however unjust or severe. But as he is also a being of infinite wisdom, he has laid down only such laws as were founded in those relations of justice, that existed in the nature of things antecedent to any positive precept. These are the eternal, immutable 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 as they are necessary for the conduct of human actions. Such among others are these principles: that we should live honestly, should hurt nobody, and should render to every one it's due; to which three general precepts Justinian has reduced the whole doctrine of law. /a
/a Juris praecepta sunt haec, honeste vivere, alterum non laedere, suum cuique tribuere. Inst. 1. 1. 3.

But if the discovery of these first principles of the law of nature depended only upon the due exertion of right reason, and could not otherwise be attained than by a chain of metaphysical disquisitions, mankind would have wanted some inducement to have quickened their inquiries, and the greater part of the world would have rested content in mental indolence, and ignorance it's inseparable companion. As therefore the creator is a being, not only of infinite power, and wisdom, but also of infinite goodness, he has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to enquire after and pursue the rule of right, but only our own self-love, that universal principle of action. For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connection of justice and human felicity, he has not perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised; but has graciously reduced the rule of obedience to this one paternal precept, "that man should pursue his own happiness." This is the foundation of what we call ethics, or natural law. For the several articles into which it is branched in our systems, amount to no more than demonstrating, that this or that action tends to man's real happiness, and therefore very justly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is destructive of man's real happiness, and therefore that the law of nature forbids it. This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any
validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original. But in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason; whose office it is to discover, as was before observed, what the law of nature directs in every circumstance of life; by considering, what method will tend the most effectually to our own substantial happiness. And if our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.

This has given manifold occasion for the benign interposition of divine providence; which, in companion to the frailty, the imperfection, and the blindness of human reason, hath been pleased, at sundry times and in divers manners, to discover and enforce it's laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in it's present corrupted state; since we find that, until they were revealed, they were hid from the wisdom of ages. As then the moral precepts of this law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is (humanly speaking) of infinitely more authority than what we generally call the natural law. Because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority; but, till then, they can never be put in any competition together.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. There is, it is true, a great number of indifferent points, in 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 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 this crime. Those human

laws, that annex a punishment to it, do not at all increase it's moral guilt,

or superadd any fresh obligation in foro conscientiae to abstain from it's

perpetration. Nay, if any human law should allow or injoin 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 exporting of wool into foreign
countries; here the inferior legislature has scope and opportunity to
interpose, and to make that action unlawful which before was not so.

If man were to live in a state of nature, unconnected with other
individuals, there would be no occasion for any other laws, than the law of
nature, and the law of God. Neither could any other law possibly exist; for
a law always supposes some superior who is to make it; and in a state of
nature we are all equal, without any other superior but him who is the
author of our being. But man was formed for society; and, as is
demonstrated by the writers on this subject, is neither capable of living
alone, nor indeed has the courage to do it. /bHowever, as it is impossible
for the whole race of mankind to be united in one great society, they must
necessarily divide into many; and form separate states, commonwealths,
and nations; entirely independent of each other, and yet liable to a mutual
intercourse. Hence arises a third kind of law to regulate this mutual
intercourse, called "the law of nations," which, as none of these states will
acknowledge a superiority in the other, cannot be dictated by either; but
depends entirely upon the rules of natural law, or upon mutual compacts,
treaties, leagues, and agreements between these several communities: in
the construction also of which compacts we have no other rule to resort to,
but the law of nature; being the only one to which both communities are
equally subject: and therefore the civil law very justly observes, that quod
naturalis ratio inter omnes homines constituit, vocatur jus gentium. /c
/b Puffendorf, l. 7. c. 1. compared with Barbeyrac's commentary.
/c Ff. 1. 1. 9.

Thus much I thought it necessary to premise concerning the law of nature,
the revealed law, and the law of nations, before I proceeded to treat more
fully of the principal subject of this section, municipal or civil law; that is,
the rule by which particular districts, communities, or nations are
governed; being thus defined by Justinian, "jus civile est quod quisque sibi
populus constituit." I call it municipal law, in compliance with common speech; for, tho' strictly that expression denotes the particular customs of one single municipium or free town, yet it may with sufficient propriety be applied to any one state or nation, which is governed by the same laws and customs. Inst. 1. 2. 1.

Municipal law, thus understood, is properly defined to be "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." Let us endeavour to explain it's several properties, as they arise out of this definition. And, first, it is a rule; not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attain him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an act to declare that the crime of which Titius is accused shall be deemed high treason; this has permanency, uniformity, and universality, and therefore is properly a rule. It is also called a rule, to distinguish it from advice or counsel, which we are at liberty to follow or not, as we see proper; and to judge upon the reasonableness or unreasonableness of the thing advised. Whereas our obedience to the law depends not upon our approbation, but upon the maker's will. Counsel is only matter of persuasion, law is matter of injunction; counsel acts only upon the willing, law upon the unwilling also.

It is also called a rule, to distinguish it from a compact or agreement; for a compact is a promise proceeding from us, law is a command directed to us. The language of a compact is, "I will, or will not, do this;" that of a law is, "thou shalt, or shalt not, do it." It is true there is an obligation which a compact carries with it, equal in point of conscience to that of a law; but then the original of the obligation is different. In compacts, we ourselves determine and promise what shall be done, before we are obliged to do it; in laws, we are obliged to act, without ourselves determining or promising anything at all. Upon these accounts law is defined to be "a rule."

Municipal law is also "a rule of civil conduct." This distinguishes municipal law from the natural, or revealed; the former of which is the rule of moral conduct, and the latter not only the rule of moral conduct, but also the rule of faith. These regard man as a creature, and point out his duty to God, to himself, and to his neighbour, considered in the light of an individual. But municipal or civil law regards him also as a citizen, and bound to other
duties towards his neighbour, than those of mere nature and religion: duties, which he has engaged in by enjoying the benefits of the common union; and which amount to no more, than that he do contribute, on his part, to the subsistence and peace of the society.

It is likewise "a rule prescribed." Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be notified, viva voce, by officers appointed for that purpose, as is done with regard to proclamations, and such acts of parliament as are appointed to be publicly read in churches and other assemblies. It may lastly be notified by writing, printing, or the like; which is the general course taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people. There is still a more unreasonable method than this, which is called making of laws ex post facto; when after an action is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it; here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. /e All laws should be therefore made to commence in futuro, and be notified before their commencement; which is implied in the term "prescribed." But when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance, of what he might know, were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.

/e Such laws among the Romans were denominated privilegia, or private laws, of which Cicero de leg. 3. 19. and in his oration pro domo, 17. thus speaks; "Vetant leges sacrae, vetant duodecim tabulae, leges privatis hominibus irrogari; id enim est privilegium. Nemo unquam tulit, nihil est crudelius, nihil perniciosius, nihil quod minus haec civitas ferre possit." But farther: municipal law is "a rule of civil conduct prescribed by the supreme power in a state." For legislature, as was before observed, is the
greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other. This will naturally lead us into a short enquiry concerning the nature of society and civil government; and the natural, inherent right that belongs to the sovereignty of a state, wherever that sovereignty be lodged, of making and enforcing laws.

The only true and natural foundations of society are the wants and the fears of individuals. Not that we can believe, with some theoretical writers, that there ever was a time when there was no such thing as society; and that, from the impulse of reason, and through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an original contract, and chose the tallest man present to be their governor. This notion, of an actually existing unconnected state of nature, is too wild to be seriously admitted; and besides it is plainly contradictory to the revealed accounts of the primitive origin of mankind, and their preservation two thousand years afterwards; both which were effected by the means of single families. These formed the first society, among themselves; which every day extended it's limits, and when it grew too large to subsist with convenience in that pastoral state, wherein the patriarchs appear to have lived, it necessarily subdivided itself by various migrations into more. Afterwards, as agriculture increased, which employs and can maintain a much greater number of hands, migrations became less frequent; and various tribes, which had formerly separated, re-united again; sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact. But though society had not it's formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the sense of their weakness and imperfection that keeps mankind together; that demonstrates the necessity of this union; and that therefore is the solid and natural foundation, as well as the cement, of society. And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied, in the very act of associating together: namely, that the whole should protect all it's parts, and that every part should pay obedience to the will of the whole; or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of
the community; without which submission of all it was impossible that protection could be certainly extended to any. For when society is once formed, government results of course, as necessary to preserve and to keep that society in order. Unless some superior were constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature, without any judge upon earth to define their several rights, and redress their several wrongs. But, as all the members of society are naturally equal, it may be asked, in whose hands are the reins of government to be entrusted? To this the general answer is easy; but the application of it to particular cases has occasioned one half of those mischiefs which are apt to proceed from misguided political zeal. In general, all mankind will agree that government should be reposed in such persons, in whom those qualities are most likely to be found, the perfection of which are among the attributes of him who is emphatically stiled the supreme being; the three grand requisites, I mean, of wisdom, of goodness, and of power: wisdom, to discern the real interest of the community; goodness, to endeavour always to pursue that real interest; and strength, or power, to carry this knowledge and intention into action. These are the natural foundations of sovereignty, and these are the requisites that ought to be found in every well constituted frame of government. How the several forms of government we now see in the world at first actually began, is matter of great uncertainty, and has occasioned infinite disputes. It is not my business or intention to enter into any of them. However they began, or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the jura summi imperii, or the rights of sovereignty, reside. And this authority is placed in those hands, wherein (according to the opinion of the founders of such respective states, either expressly given, or collected from their tacit approbation) the qualities requisite for supremacy, wisdom, goodness, and power, are the most likely to be found. The political writers of antiquity will not allow more than three regular forms of government; the first, when the sovereign power is lodged in an aggregate assembly consisting of all the members of a community, which is called a democracy; the second, when it is lodged in a council, composed of select members, and then it is stiled an aristocracy; the last, when it is entrusted in the hands of a single person, and then it takes the name of a monarchy. All other species of government, they say, are either corruptions of, or reducible to, these three.
By the sovereign power, as was before observed, is meant the making of
laws; for wherever that power resides, all others must conform to, and be
directed by it, whatever appearance the outward form and administration
of the government may put on. For it is at any time in the option of the
legislature to alter that form and administration by a new edict or rule,
and to put the execution of the laws into whatever hands it pleases: and all
the other powers of the state must obey the legislative power in the
execution of their several functions, or else the constitution is at an end.
In a democracy, where the right of making laws resides in the people at
large, public virtue, or goodness of intention, is more likely to be found,
than either of the other qualities of government. Popular assemblies are
frequently foolish in their contrivance, and weak in their execution; but
generally mean to do the thing that is right and just, and have always a
degree of patriotism or public spirit. In aristocracies there is more wisdom
to be found, than in the other frames of government; being composed, or
intended to be composed, of the most experienced citizens; but there is
less honesty than in a republic, and less strength than in a monarchy. A
monarchy is indeed the most powerful of any, all the sinews of government
being knit together, and united in the hand of the prince; but then there is
imminent danger of his employing that strength to improvident or
oppressive purposes.
Thus these three species of government have, all of them, their several
perfections and imperfections. Democracies are usually the best calculated
to direct the end of a law; aristocracies to invent the means by which that
end shall be obtained; and monarchies to carry those means into
execution. And the ancients, as was observed, had in general no idea of any
other permanent form of government but these three; for though Cicero
declares himself of opinion, "esse optime constitutam rempublicam, quae ex
tribus generibus illis, regali, optimo, et populari, sit modice confusa;"
yet Tacitus treats this notion of a mixed government, formed out of them
all, and partaking of the advantages of each, as a visionary whim; and one
that, if effected, could never be lasting or secure. /f /g
/f In his fragments de rep. l. 2.
/g "Cunctas nationes et urbes populus, aut primores, aut singuli regunt:
delecta ex his, et constituta reipublicae forma laudari facilius quam
evenire, vel, si evenit, hand diurne esse potest." Ann. l. 4.
But happily for us of this island, the British constitution has long
remained, and I trust will long continue, a standing exception to the truth
of this observation. For, as with us the executive power of the laws is
lodged in a single person, they have all the advantages of strength and
dispatch, that are to be found in the most absolute monarchy; and, as the legislature of the kingdom is entrusted to three distinct powers, entirely independent of each other; first, the king; secondly, the lords spiritual and temporal, which is an aristocratical assembly of persons selected for their piety, their birth, their wisdom, their valour, or their property; and, thirdly, the house of commons, freely chosen by the people from among themselves, which makes it a kind of democracy; as this aggregate body, actuated by different springs, and attentive to different interests, composes the British parliament, and has the supreme disposal of everything; there can no inconvenience be attempted by either of the three branches, but will be withstood by one of the other two; each branch being armed with a negative power, sufficient to repel any innovation which it shall think inexpedient or dangerous.

Here then is lodged the sovereignty of the British constitution; and lodged as beneficially as is possible for society. For in no other shape could we be so certain of finding the three great qualities of government so well and so happily united. If the supreme power were lodged in any one of the three branches separately, we must be exposed to the inconveniences of either absolute monarchy, aristocracy, or democracy; and so want two of the three principal ingredients of good polity, either virtue, wisdom, or power. If it were lodged in any two of the branches; for instance, in the king and house of lords, our laws might be providently made, and well executed, but they might not always have the good of the people in view: if lodged in the king and commons, we should want that circumspection and mediatory caution, which the wisdom of the peers is to afford: if the supreme rights of legislature were lodged in the two houses only, and the king had no negative upon their proceedings, they might be tempted to encroach upon the royal prerogative, or perhaps to abolish the kingly office, and thereby weaken (if not totally destroy) the strength of the executive power. But the constitutional government of this island is so admirably tempered and compounded, that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest. For if ever it should happen that the independence of any one of the three should be lost, or that it should become subservient to the views of either of the other two, there would soon be an end of our constitution. The legislature would be changed from that, which was originally set up by the general consent and fundamental act of the society; and such a change, however effected, is according to Mr Locke (who perhaps carries his theory too far) at once an entire dissolution of the bands of government; and the
people would be reduced to a state of anarchy, with liberty to constitute to
themselves a new legislative power. /h
/h On government, part 2. 212.
Having thus cursorily considered the three usual species of government,
and our own singular constitution, selected and compounded from them
all, I proceed to observe, that, as the power of making laws constitutes the
supreme authority, so wherever the supreme authority in any state resides,
it is the right of that authority to make laws; that is, in the words of our
definition, to prescribe the rule of civil action. And this may be discovered
from the very end and institution of civil states. For a state is a collective
body, composed of a multitude of individuals, united for their safety and
convenience, and intending to act together as one man. If it therefore is to
act as one man, it ought to act by one uniform will. But, inasmuch as
political communities are made up of many natural persons, each of whom
has his particular will and inclination, these several wills cannot by any
natural union be joined together, or tempered and disposed into a lasting
harmony, so as to constitute and produce that one uniform will of the
whole. It can therefore be no otherwise produced than by a political union;
by the consent of all persons to submit their own private wills to the will of
one man, or of one or more assemblages of men, to whom the supreme
authority is entrusted: and this will of that one man, or assemblage of
men, is in different states, according to their different constitutions,
understood to be law.
Thus far as to the right of the supreme power to make laws; but farther, it
is it's duty likewise. For since the respective members are bound to
conform themselves to the will of the state, it is expedient that they receive
directions from the state declaratory of that it's will. But since it is
impossible, in so great a multitude, to give injunctions to every particular
man, relative to each particular action, therefore the state establishes
general rules, for the perpetual information and direction of all persons in
all points, whether of positive or negative duty. And this, in order that
every man may know what to look upon as his own, what as another's;
what absolute and what relative duties are required at his hands; what is to
be esteemed honest, dishonest, or indifferent; what degree every man
retains of his natural liberty; what he has given up as the price of the
benefits of society; and after what manner each person is to moderate the
use and exercise of those rights which the state assigns him, in order to
promote and secure the public tranquillity.
From what has been advanced, the truth of the former branch of our
definition, is (I trust) sufficiently evident; that "municipal law is a rule of
civil conduct prescribed by the supreme power in a state." I proceed now
to the latter branch of it; that it is a rule so prescribed, "commanding what
is right, and prohibiting what is wrong."
Now in order to do this completely, it is first of all necessary that the
boundaries of right and wrong be established and ascertained by law. And
when this is once done, it will follow of course that it is likewise the
business of the law, considered as a rule of civil conduct, to enforce these
rights and to restrain or redress these wrongs. It remains therefore only to
consider in what manner the law is said to ascertain the boundaries of
right and wrong; and the methods which it takes to command the one and
prohibit the other.
For this purpose every law may be said to consist of several parts: one,
declaratory; whereby the rights to be observed, and the wrongs to be
eschewed, are clearly defined and laid down: another, directory, whereby
the subject is instructed and enjoined to observe those rights, and to
abstain from the commission of those wrongs: a third, remedial; whereby
a method is pointed out to recover a man's private rights, or redress his
private wrongs: to which may be added a fourth, usually termed the
sanction, or vindicatory branch of the law; whereby it is signified what evil
or penalty shall be incurred by such as commit any public wrongs, and
transgress or neglect their duty.
With regard to the first of these, the declaratory part of the municipal law,
this depends not so much upon the law of revelation or of nature, as upon
the wisdom and will of the legislator. This doctrine, which before was
slightly touched, deserves a more particular explication. Those rights then
which God and nature have established, and are therefore called natural
rights, such as are life and liberty, need not the aid of human laws to be
more effectually invested in every man than they are; neither do they
receive any additional strength when declared by the municipal laws to be
inviolable. On the contrary, no human legislature has power to abridge or
destroy them, unless the owner shall himself commit some act that
amounts to a forfeiture. Neither do divine or natural duties (such as, for
instance, the worship of God, the maintenance of children, and the like)
receive any stronger sanction from being also declared to be duties by the
law of the land. The case is the same as to crimes and misdeemors, that
are forbidden by the superior laws, and therefore stiled mala in se, such as
murder, theft, and perjury; which contract no additional turpitude from
being declared unlawful by the inferior legislature. For that legislature in
all these cases acts only, as was before observed, in subordination to the
great lawgiver, transcribing and publishing his precepts. So that, upon the
whole, the declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and intrinsically right or wrong.

But with regard to things in themselves indifferent, the case is entirely altered. These become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life. Thus our own common law has declared, that the goods of the wife do instantly upon marriage become the property and right of the husband; and our statute law has declared all monopolies a public offence: yet that right, and this offence, have no foundation in nature; but are merely created by the law, for the purposes of civil society. And sometimes, where the thing itself has it's rise from the law of nature, the particular circumstances and mode of doing it become right or wrong, as the laws of the land shall direct. Thus, for instance, in civil duties; obedience to superiors is the doctrine of revealed as well as natural religion: but who those superiors shall be, and in what circumstances, or to what degrees they shall be obeyed, is the province of human laws to determine. And so, as to injuries or crimes, it must be left to our own legislature to decide, in what cases the seising another's cattle shall amount to the crime of robbery; and where it shall be a justifiable action, as when a landlord takes them by way of distress for rent.

Thus much for the declaratory part of the municipal law: and the directory stands much upon the same footing; for this virtually includes the former, the declaration being usually collected from the direction. The law that says, "thou shalt not steal," implies a declaration that stealing is a crime. And we have seen that, in things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or to omit it. The remedial part of a law is so necessary a consequence of the former two, that laws must be very vague and imperfect without it. For in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law. When, for instance, the declaratory part of the law has said "that the field or inheritance, which belonged to Titius's father, is vested by his death in Titius;" and the directory part has "forbidden any one to enter on another's property without the leave of the owner;" if Gaius after this will presume to take possession of the land, the remedial part of the law will then interpose it's office; will make Gaius restore the possession to Titius, and also pay him damages for the invasion.
With regard to the sanction of laws, or the evil that may attend the breach of public duties; it is observed, that human legislators have for the most part chosen to make the sanction of their laws rather vindicatory than remuneratory, or to consist rather in punishments, than in actual particular rewards. Because, in the first place, the quiet enjoyment and protection of all our civil rights and liberties, which are the sure and general consequence of obedience to the municipal law, are in themselves the best and most valuable of all rewards. Because also, were the exercise of every virtue to be enforced by the proposal of particular rewards, it were impossible for any state to furnish stock enough for so profuse a bounty. And farther, because the dread of evil is a much more forcible principle of human actions than the prospect of good. /i For which reasons, though a prudent bestowing of rewards is sometimes of exquisite use, yet we find that those civil laws, which enforce and enjoin our duty, do seldom, if ever, propose any privilege or gift to such as obey the law; but do constantly come armed with a penalty denounced against transgressors, either expressly defining the nature and quantity of the punishment, or else leaving it to the discretion of the judges, and those who are entrusted with the care of putting the laws in execution.

/i Locke, Hum. Und. b. 2. c. 21.

Of all the parts of a law the most effectual is the vindicatory. For it is but lost labour to say, "do this, or avoid that," unless we also declare, "this shall be the consequence of your noncompliance." We must therefore observe, that the main strength and force of a law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws.

Legislators and their laws are said to compel and oblige; not that by any natural violence they so constrain a man, as to render it impossible for him to act otherwise than as they direct, which is the strict sense of obligation: but because, by declaring and exhibiting a penalty against offenders, they bring it to pass that no man can easily choose to transgress the law; since, by reason of the impending correction, compliance is in a high degree preferable to disobedience. And, even where rewards are proposed as well as punishments threatened, the obligation of the law seems chiefly to consist in the penalty: for rewards, in their nature, can only persuade and allure; nothing is compulsory but punishment.

It is held, it is true, and very justly, by the principal of our ethical writers, that human laws are binding upon mens consciences. But if that were the only, or most forcible obligation, the good only would regard the laws, and the bad would set them at defiance. And, true as this principle is, it must
still be understood with some restriction. It holds, I apprehend, as to rights; and that, when the law has determined the field to belong to Titius, it is matter of conscience no longer to withhold or to invade it. So also in regard to natural duties, and such offences as are mala in se: here we are bound in conscience, because we are bound by superior laws, before those human laws were in being, to perform the one and abstain from the other. But in relation to those laws which enjoin only positive duties, and forbid only such things as are not mala in se but mala prohibita merely, annexing a penalty to noncompliance, here I apprehend conscience is no farther concerned, than by directing a submission to the penalty, in case of our breach of those laws: for otherwise the multitude of penal laws in a state would not only be looked upon as an impolitic, but would also be a very wicked thing; if every such law were a snare for the conscience of the subject. But in these cases the alternative is offered to every man; "either abstain from this, or submit to such a penalty;" and his conscience will be clear, whichever side of the alternative he thinks proper to embrace. Thus, by the statutes for preserving the game, a penalty is denounced against every unqualified person that kills a hare. Now this prohibitory law does not make the transgression a moral offence: the only obligation in conscience is to submit to the penalty if levied.

I have now gone through the definition laid down of a municipal law; and have shewn that it is "a rule of civil conduct prescribed by the supreme power in a state commanding what is right, and prohibiting what is wrong:" in the explication of which I have endeavoured to interweave a few useful principles, concerning the nature of civil government, and the obligation of human laws. Before I conclude this section, it may not be amiss to add a few observations concerning the interpretation of laws. When any doubt arose upon the construction of the Roman laws, the usage was to state the case to the emperor in writing, and take his opinion upon it. This was certainly a bad method of interpretation. To interrogate the legislature to decide particular disputes, is not only endless, but affords great room for partiality and oppression. The answers of the emperor were called his rescripts, and these had in succeeding cases the force of perpetual laws; though they ought to be carefully distinguished, by every rational civilian, from those general constitutions, which had only the nature of things for their guide. The emperor Macrinus, as his historian Capitolinus informs us, had once resolved to abolish these rescripts, and retain only the general edicts; he could not bear that the hasty and crude answers of such princes as Commodus and Caracalla should be reverenced as laws. But Justinian thought otherwise, and he has preserved them all.
In like manner the canon laws, or decretal epistles of the popes, are all of them rescripts in the strictest sense. Contrary to all true forms of reasoning, they argue from particulars to generals.

The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law. Let us take a short view of them all.

1. Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. Thus the law mentioned by Puffendorf, which forbad a layman to lay hands on a priest, was adjudged to extend to him, who had hurt a priest with a weapon. Again; terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science. So in the act of settlement, where the crown of England is limited "to the princess Sophia, and the heirs of her body, being protestants," it becomes necessary to call in the assistance of lawyers, to ascertain the precise idea of the words "heirs of her body;" which in a legal sense comprize only certain of her lineal descendants. Lastly, where words are clearly repugnant in two laws, the later law takes place of the elder: leges posteriores priori contrarias abrogant is a maxim of universal law, as well as of our own constitutions. And accordingly it was laid down by a law of the twelve tables at Rome, quod populus postremum jussit, id jus ratum esto.

2. If words happen to be still dubious, we may establish their meaning from the context; with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point. Thus, when the law of England declares murder to be felony without benefit of clergy, we must resort to the same law of England to learn what the benefit of clergy is: and, when the common law censures simoniacal contracts, it affords great light to the subject to consider what the canon law has adjudged to be simony.

3. As to the subject matter, words are always to be understood as having a regard thereto; for that is always supposed to be in the eye of the
legislator, and all his expressions directed to that end. Thus, when a law of our Edward III. forbids all ecclesiastical persons to purchase provisions at Rome, it might seem to prohibit the buying of grain and other victual; but when we consider that the statute was made to repress the usurpations of the papal see, and that the nominations to vacant benefices by the pope were called provisions, we shall see that the restraint is intended to be laid upon such provisions only.

4. As to the effects and consequence, the rule is, where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned by Puffendorf, which enacted "that whoever drew blood in the streets should be punished with the utmost severity," was held after long debate not to extend to the surgeon, who opened the vein of a person that fell down in the street with a fit. /m

/m l. 5. c. 12. 8.

5. But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it. An instance of this is given in a case put by Cicero, or whoever was the author of the rhetorical treatise inscribed to Herennius. /n There was a law, that those who in a storm forsook the ship should forfeit all property therein; and the ship and lading should belong entirely to those who staid in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who by reason of his disease was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession and claimed the benefit of the law. Now here all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel: but this is a merit, which he could never pretend to, who neither staid in the ship upon that account, nor contributed any thing to it's preservation.

/n l. 1. c. 11.

From this method of interpreting laws, by the reason of them, arises what we call equity; which is thus defined by Grotius, "the correction of that, wherein the law (by reason of its universality) is deficient." /o For since in laws all cases 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 excepting those circumstances, which (had they been foreseen) the legislator himself would have excepted.
And these are the cases, which, as Grotius expresses it, "lex non exacte definit, sed arbitrio boni viri permittit."

Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying it's very essence, and reducing it to a positive law. And, on the other hand, the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, tho' hard and disagreeable, is much more desirable for the public good, than equity without law; which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.

Section the third.
Of the LAWS of ENGLAND.
THE municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds; the lex non scripta, the unwritten, or common law; and the lex scripta, the written, or statute law.
The lex non scripta, or unwritten law, includes not only general customs, or the common law properly so called; but also the particular customs of certain parts of the kingdom; and likewise those particular laws, that are by custom observed only in certain courts and jurisdictions.
When I call these parts of our law leges non scriptae, I would not be understood as if all those laws were at present merely oral, or communicated from the former ages to the present solely by word of mouth. It is true indeed that, in the profound ignorance of letters which formerly overspread the whole western world, all laws were entirely traditional, for this plain reason, that the nations among which they prevailed had but little idea of writing. Thus the British as well as the Gallic druids committed all their laws as well as learning to memory; and it is said of the primitive Saxons here, as well as their brethren on the continent, that leges sola memoria et usu retinebant. But with us at present the monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession,
preserved and handed down to us from the times of highest antiquity. However I therefore stile these parts of our law leges non scriptae, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom. In like manner as Aulus Gellius defines the jus non scriptum to be that, which is "tacito et illiterato hominum consensu et moribus expressum."

/a Caes. de b. G. lib. 6. c. 13.
/b Spelm. Gl. 362.

Our ancient lawyers, and particularly Fortescue, insist with abundance of warmth, that these customs are as old as the primitive Britons, and continued down, through the several mutations of government and inhabitants, to the present time, unchanged and unadulterated. /c This may be the case as to some; but in general, as Mr Selden in his notes observes, this assertion must be understood with many grains of allowance; and ought only to signify, as the truth seems to be, that there never was any formal exchange of one system of laws for another: though doubtless by the intermixture of adventitious nations, the Romans, the Picts, the Saxons, the Danes, and the Normans, they must have insensibly introduced and incorporated many of their own customs with those that were before established: thereby in all probability improving the texture and wisdom of the whole, by the accumulated wisdom of divers particular countries. Our laws, saith lord Bacon, are mixed as our language: and as our language is so much the richer, the laws are the more complete. /d

c c. 17.
/d See his proposals for a digest.

And indeed our antiquarians and first historians do all positively assure us, that our body of laws is of this compounded nature. For they tell us, that in the time of Alfred the local customs of the several provinces of the kingdom were grown so various, that he found it expedient to compile his dome-book or liber judicialis, for the general use of the whole kingdom. This book is said to have been extant so late as the reign of king Edward the fourth, but is now unfortunately lost. It contained, we may probably suppose, the principal maxims of the common law, the penalties for misdemesnors, and the forms of judicial proceedings. Thus much may at least be collected from that injunction to observe it, which we find in the laws of king Edward the elder, the son of Alfred. /e "Omnibus qui reipublicae praesunt, etiam atque etiam mando, ut omnibus aequos se
praebant judices, perinde ac in judiciali libro (Saxonice, ) scriptum
habetur; nec quicquam formident quin jus commune (Saxonice, ) audacter
libereque dicant."

/e c. 1.
But the irruption and establishment of the Danes in England which
followed soon after, introduced new customs and caused this code of
Alfred in many provinces to fall into disuse; or at least to be mixed and
debased with other laws of a coarser alloy. So that about the beginning of
the eleventh century there were three principal systems of laws prevailing
in different districts. 1. The Mercen-Lage, or Mercian laws, which were
observed in many of the midland counties, and those bordering on the
principality of Wales; the retreat of the ancient Britons; and therefore very
probably intermixed with the British or Druidical customs. 2. The West-
Saxon-Lage, or laws of the west Saxons, which obtained in the counties to
the south and west of the island, from Kent to Devonshire. These were
probably much the same with the laws of Alfred abovementioned, being
the municipal law of the far most considerable part of his dominions, and
particularly including Berkshire, the seat of his peculiar residence. 3. The
Dane-Lage, or Danish law, the very name of which speaks it's original and
composition. This was principally maintained in the rest of the midland
counties, and also on the eastern coast, the seat of that piratical people. As
for the very northern provinces, they were at that time under a distinct
government. /f
Out of these three laws, Roger Hoveden/g and Ranulphus Cestrensis/h
inform us, king Edward the confessor extracted one uniform law or digest
of laws, to be observed throughout the whole kingdom; though Hoveden
and the author of an old manuscript chronicle/i assure us likewise, that
this work was projected and begun by his grandfather king Edgar. /g /h /i
And indeed a general digest of the same nature has been constantly found
expedient, and therefore put in practice by other great nations, formed
from an assemblage of little provinces, governed by peculiar customs. As
in Portugal, under king Edward, about the beginning of the fifteenth
century. /k In Spain under Alonzo X, who about the year 1250 executed
the plan of his father St. Ferdinand, and collected all the provincial
customs into one uniform law, in the celebrated code entitled las partidas.
/l And in Sweden about the same aera, a universal body of common law
was compiled out of the particular customs established by the laghman of
every province, and intitled the land's lagh, being analogous to the
common law of England. /m
Both these undertakings, of king Edgar and Edward the confessor, seem to have been no more than a new edition, or fresh promulgation, of Alfred's code or dome-book, with such additions and improvements as the experience of a century and an half had suggested. For Alfred is generally stiled by the same historians the legum Anglicanarum conditor, as Edward the confessor is the restitutor. These however are the laws which our histories so often mention under the name of the laws of Edward the confessor; which our ancestors struggled so hardly to maintain, under the first princes of the Norman line; and which subsequent princes so frequently promised to keep and to restore, as the most popular act they could do, when pressed by foreign emergencies or domestic discontents. These are the laws, that so vigorously withstood the repeated attacks of the civil law; which established in the twelfth century a new Roman empire over most of the states on the continent: states that have lost, and perhaps upon that account, their political liberties; while the free constitution of England, perhaps upon the same account, has been rather improved than debased. These, in short, are the laws which gave rise and original to that collection of maxims and customs, which is now known by the name of the common law. A name either given to it, in contradistinction to other laws, as the statute law, the civil law, the law merchant, and the like; or, more probably, as a law common to all the realm, the jus commune or folcright mentioned by king Edward the elder, after the abolition of the several provincial customs and particular laws beforementioned. But though this is the most likely foundation of this collection of maxims and customs, yet the maxims and customs, so collected, are of higher antiquity than memory or history can reach: nothing being more difficult than to ascertain the precise beginning and first spring of an ancient and long established custom. Whence it is that in our law the goodness of a custom depends upon it's having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it it's weight and authority; and of this nature are the maxims and customs which compose the common law, or lex non scripta, of this kingdom.
This unwritten, or common, law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification. 2. Particular customs; which for the most part affect only the inhabitants of particular districts. 3. Certain particular laws; which by custom are adopted and used by some particular courts, of pretty general and extensive jurisdiction.

I. As to general customs, or the common law, properly so called; this is that law, by which proceedings and determinations in the king's ordinary courts of justice are guided and directed. This, for the most part, settles the course in which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries; the several species of temporal offences, with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. Thus, for example, that there shall be four superior courts of record, the chancery, the king's bench, the common pleas, and the exchequer; that the eldest son alone is heir to his ancestor; that property may be acquired and transferred by writing; that a deed is of no validity unless sealed; that wills shall be construed more favorably, and deeds more strictly; that money lent upon bond is recoverable by action of debt; 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 common law, for their support.

Some have divided the common law into two principal grounds or foundations: 1. established customs; such as that where there are three brothers, the eldest brother shall be heir to the second, in exclusion of the youngest; and 2. established rules and maxims; as, "that the king can do no wrong, that no man shall be bound to accuse himself," and the like. But I take these to be one and the same thing. For the authority of these maxims rests entirely upon general reception and usage; and the only method of proving, that this or that maxim is a rule of the common law, is by shewing that it hath been always the custom to observe it.

But here a very natural, and very material, question arises: how are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositary 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. Their knowledge of that law is derived from experience and study; from the "viginti annorum lucubrationes," which Fortescue mentions; and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law. The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of records, in publick repositories set apart for that particular purpose; and to them frequent recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance. And therefore, even so early as the conquest, we find the "praeteritorum memoria eventorum" reckoned up as one of the chief qualifications of those who were held to be "legibus patriae optime instituti." For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm, as has been erroneously determined. And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that what is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded. And it hath been an ancient observation in the laws of England, that whenever a standing rule of law, of which the
reason perhaps could not be remembered or discerned, hath been wantonly broke in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.

/n cap. 8.
/o Seld. review of Tith. c. 8.
/p Herein agreeing with the civil law, Ff. 1. 3. 20, 21. "Non omnium, quae a majoribus nostris constituta sunt, ratio reddi potest. Et ideo rationes eorum quae constituuuntur, inquiri non oportet: alioquin multa ex his, quae certa sunt, subvertuntur."
The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration. To illustrate this doctrine by examples. It has been determined, time out of mind, that a brother of the half blood (i.e. where they have only one parent the same, and the other different) shall never succeed as heir to the estate of his half brother, but it shall rather escheat to the king, or other superior lord. Now this is a positive law, fixed and established by custom, which custom is evidenced by judicial decisions; and therefore can never be departed from by any modern judge without a breach of his oath and the law. For herein there is nothing repugnant to natural justice; though the reason of it, drawn from the feodal law, may not be quite obvious to every body. And therefore, on account of a supposed hardship upon the half brother, a modern judge might wish it had been otherwise settled; yet it is not in his power to alter it. But if any court were now to determine, that an elder brother of the half blood might enter upon and seise any lands that were purchased by his younger brother, no subsequent judges would scruple to declare that such prior determination was unjust, was unreasonable, and therefore was not law. So that the law, and the opinion of the judge are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law. Upon the whole however, we may take it as a general rule, "that the decisions of courts of justice are the evidence of what is common law:" in the same manner as, in the civil law, what the emperor had once determined was to serve for a guide for the future.

/q "Si imperialis majestas causam cognitionaliter examinaverit, et partibus cominus constitutis sententiam dixerit, omnes omnino judices, qui sub nostro imperio sunt, sciant hanc esse legem, non solum illi causae pro qua producta est, sed et in omnibus similibus." C. 1. 14. 12.
The decisions therefore of courts are held in the highest regard, and are not only preserved as authentic records in the treasuries of the several courts, but are handed out to public view in the numerous volumes of reports which furnish the lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record; the arguments on both sides; and the reasons the court gave for their judgment; taken down in short notes by persons present at the determination. And these serve as indexes to, and also to explain, the records; which always, in matters of consequence and nicety, the judges direct to be searched. The reports are extant in a regular series from the reign of king Edward the second inclusive; and from his time to that of Henry the eighth were taken by the prothonotaries, or chief scribes of the court, at the expense of the crown, and published annually, whence they are known under the denomination of the year books. And it is much to be wished that this beneficial custom had, under proper regulations, been continued to this day: for, though king James the first at the instance of lord Bacon appointed two reporters with a handsome stipend for this purpose, yet that wise institution was soon neglected, and from the reign of Henry the eighth to the present time this task has been executed by many private and cotemporary hands; who sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination. Some of the most valuable of the ancient reports are those published by lord chief justice Coke; a man of infinite learning in his profession, though not a little infected with the pedantry and quaintness of the times he lived in, which appear strongly in all his works. However his writings are so highly esteemed, that they are generally cited without the author's name. 

His reports, for instance, are stiled, the reports; and in quoting them we usually say, 1 or 2 Rep. not 1 or 2 Coke's Rep. as in citing other authors. The reports of judge Croke are also cited in a peculiar manner, by the name of those princes, in whose reigns the cases reported in his three volumes were determined; viz. Qu. Elizabeth, K. James, and K. Charles the first; as well as by the number of each volume. For sometimes we call them, 1, 2, and 3 Cro. but more commonly Cro. Eliz. Cro. Jac. and Cro. Car.

Besides these reporters, there are also other authors, to whom great veneration and respect is paid by the students of the common law. Such are Glanvil and Bracton, Britton and Fleta, Littleton and Fitzherbert, with some others of ancient date, whose treatises are cited as authority; and are
evidence that cases have formerly happened in which such and such points
were determined, which are now become settled and first principles. One
of the last of these methodical writers in point of time, whose works are of
any intrinsic authority in the courts of justice, and do not entirely depend
on the strength of their quotations from older authors, is the same learned
judge we have just mentioned, sir Edward Coke; who hath written four
volumes of institutes, as he is pleased to call them, though they have little
of the institutional method to warrant such a title. The first volume is a
very extensive comment upon a little excellent treatise of tenures,
compiled by judge Littleton in the reign of Edward the fourth. This
comment is a rich mine of valuable common law learning, collected and
heaped together from the ancient reports and year books, but greatly
defective in method. The second volume is a comment upon many old
acts of parliament, without any systematical order; the third a more
methodical treatise of the pleas of the crown; and the fourth an account of
the several species of courts. It is usually cited either by the name of Co. Litt. or as 1 Inst.
These are cited as 2, 3, or 4 Inst. without any author's name. An
honorary distinction, which, we observed, was paid to the works of no
other writer; the generality of reports and other tracts being quoted in the
name of the compiler, as 2 Ventris, 4 Leonard, 1 Siderfin, and the like.
And thus much for the first ground and chief corner stone of the laws of
England, which is, general immemorial custom, or common law, from
time to time declared in the decisions of the courts of justice; which
decisions are preserved among our public records, explained in our
reports, and digested for general use in the authoritative writings of the
venerable sages of the law.
The Roman law, as practised in the times of it's liberty, paid also a great
regard to custom; but not so much as our law: it only then adopting it,
when the written law is deficient. Though the reasons alleged in the digest
will fully justify our practice, in making it of equal authority with, when it
is not contradicted by, the written law. "For since, says Julianus, the
written law binds us for no other reason but because it is approved by the
judgment of the people, therefore those laws which the people hath
approved without writing ought also to bind every body. For where is the
difference, whether the people declare their assent to a law by suffrage, or
by a uniform course of acting accordingly?" Thus did they reason while
Rome had some remains of her freedom; but when the imperial tyranny
came to be fully established, the civil laws speak a very different language.
"Quod principi placuit legis habet vigorem, cum populus ei et in eum omne
"suum imperium et potestatem conferat," says Ulpian. "Imperator solus et conditor et interpres legis existimatur," says the code. And again, "sacrilegii instar est rescripto principis obviare." And indeed it is one of the characteristic marks of English liberty, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people.

II. The second branch of the unwritten laws of England are particular customs, or laws which affect only the inhabitants of particular districts. These particular customs, or some of them, are without doubt the remains of that multitude of local customs before mentioned, out of which the common law, as it now stands, was collected at first by king Alfred, and afterwards by king Edgar and Edward the confessor: each district mutually sacrificing some of its own special usages, in order that the whole kingdom might enjoy the benefit of one uniform and universal system of laws. But, for reasons that have been now long forgotten, particular counties, cities, towns, manors, and lordships, were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large: which privilege is confirmed to them by several acts of parliament.

Such is the custom of gavelkind in Kent and some other parts of the kingdom (though perhaps it was also general till the Norman conquest) which ordains, among other things, that not the eldest son only of the father shall succeed to his inheritance, but all the sons alike: and that, though the ancestor be attainted and hanged, yet the heir shall succeed to his estate, without any escheat to the lord. Such is the custom that prevails in divers ancient boroughs, and therefore called borough-english, that the youngest son shall inherit the estate, in preference to all his elder brothers. Such is the custom in other boroughs that a widow shall be intitiled, for her dower, to all her husband's lands; whereas at the common law she shall be endowed of one third part only. Such also are the special and particular customs of manors, of which every one has more or less, and which bind all the copyhold-tenants that hold of the said manors. Such likewise is 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 upon immemorial and established usage. Such, lastly, are many particular customs within the city of London, with regard to trade, apprentices, widows, orphans, and a variety of other matters; which are all contrary to the general law of the land, and are good only by special custom, though those of London are also confirmed by act of parliament. /a 8 Rep. 126. Cro. Car. 347.

To this head may most properly be referred a particular system of customs used only among one set of the king's subjects, called the custom of merchants or lex mercatoria; which, however different from the common law, is allowed for the benefit of trade, to be of the utmost validity in all commercial transactions; the maxim of law being, that "cuilibet in sua arte credendum est."

The rules relating to particular customs regard either the proof of their existence; their legality when proved; or their usual method of allowance. And first we will consider the rules of proof.

As to gavelkind, and borough-english, the law takes particular notice of them, and there is no occasion to prove that such customs actually exist, but only that the lands in question are subject thereto. /b All other private customs must be particularly pleaded, and as well the existence of such customs must be shewn, as that the thing in dispute is within the custom alleged. /c The trial in both cases (both to shew the existence of the custom, as, "that in the manor of Dale lands shall descend only to the heirs male, and never to the heirs female;" and also to shew that the lands in question are within that manor) is by a jury of twelve men, and not by the judges, except the same particular custom has been before tried, determined, and recorded in the same court. /d /b Co. Litt. 175 b. /c Litt. 265. /d Dr and St. 1. 10.

The customs of London differ from all others in point of trial: for, if the existence of the custom be brought in question, it shall not be tried by a jury, but by certificate from the lord mayor and aldermen by the mouth of their recorder; unless it be such a custom as the corporation is itself interested in, as a right of taking toll, &c., for then the law permits them not to certify on their own behalf. /e /f /e Cro. Car. 516. /f Hob. 85.

When a custom is actually proved to exist, the next enquiry is into the legality of it; for if it is not a good custom it ought to be no longer used.
"Malus usus abolendus est" is an established maxim of the law. To make a particular custom good, the following are necessary requisites.

1. That it have been used so long, that the memory of man runneth not to the contrary. So that if any one can shew the beginning of it, it is no good custom. For which reason no custom can prevail against an express act of parliament; since the statute itself is a proof of a time when such a custom did not exist.

2. It must have been continued. Any interruption would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the right; for an interruption of the possession only, for ten or twenty years, will not destroy the custom.

3. It must have been peaceable, and acquiesced in; not subject to contention and dispute. For as customs owe their original to common consent, their being immemorially disputed either at law or otherwise is a proof that such consent was wanting.

4. Customs must be reasonable; or rather, taken negatively, they must not be unreasonable. Which is not always, as sir Edward Coke says, to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which account 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. Thus a custom in a parish, that no man shall put his beasts into the common till the third of october, would be good; and yet it would be hard to shew the reason why that day in particular is fixed upon, rather than the day before or after. But a custom that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad: for peradventure the lord will never put in his; and then the tenants will lose all their profits.
5. Customs ought to be certain. A custom, that lands shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? But a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good. A custom, to pay two pence an acre in lieu of tythes, is good; but to pay sometimes two pence and sometimes three pence, as the occupier of the land pleases, is bad for it's uncertainty. Yet a custom, to pay a year's improved value for a fine on a copyhold estate, is good: though the value is a thing uncertain. For the value may at any time be ascertained; and the maxim of law is, id certum est, quod certum reddi potest.

6. Customs, though established by consent, must be (when established) compulsory; and not left to the option of every man, whether he will use them or no. Therefore a custom, that all the inhabitants shall be rated toward the maintenance of a bridge, will be good; but a custom, that every man is to contribute thereto at his own pleasure, is idle and absurd, and, indeed, no custom at all.

7. Lastly, customs must be consistent with each other: one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd. Therefore, if one man prescribes that by custom he has a right to have windows looking into another's garden; the other cannot claim a right by custom to stop up or obstruct those windows: for these two contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom.

Next, as to the allowance of special customs. Customs, in derogation of the common law, must be construed strictly. Thus, by the custom of gavelkind, an infant of fifteen years may by one species of conveyance (called a deed of feoffment) convey away his lands in fee simple, or for ever. Yet this custom does not empower him to use any other conveyance, or even to lease them for seven years: for the custom must be strictly pursued. And, moreover, all special customs must submit to the king's prerogative. Therefore, if the king purchases lands of the nature of gavelkind, where all the sons inherit equally; yet, upon the king's demise, his eldest son shall succeed to those lands alone. And thus much for the second part of the leges non scriptae, or those particular customs which affect particular persons or districts only.
III. The third branch of them are those peculiar laws, which by custom are adopted and used only in certain peculiar courts and jurisdictions. And by these I understand the civil and canon laws.

It may seem a little improper at first view to rank these laws under the head of leges non scriptae, or unwritten laws, seeing they are set forth by authority in their pandects, their codes, and their institutions; their councils, decrees, and decretales; and enforced by an immense number of expositions, decisions, and treatises of the learned in both branches of the law. But I do this, after the example of sir Matthew Hale, because it is most plain, that it is not on account of their being written laws, that either the canon law, or the civil law, have any obligation within this kingdom; neither do their force and efficacy depend upon their own intrinsic authority; which is the case of our written laws, or acts of parliament. They bind not the subjects of England, because their materials were collected from popes or emperors; were digested by Justinian, or declared to be authentic by Gregory. These considerations give them no authority here: for the legislature of England doth not, nor ever did, recognize any foreign power, as superior or equal to it in this kingdom; or as having the right to give law to any, the meanest, of it's subjects. But all the strength that either the papal or imperial laws have obtained in this realm, or indeed in any other kingdom in Europe, is only because they have been admitted and received by immemorial usage and custom in some particular cases, and some particular courts; and then they form a branch of the leges non scriptae, or customary law: or else, because they are in some other cases introduced by consent of parliament, and then they owe their validity to the leges scriptae, or statute law. This is expressly declared in those remarkable words of the statute 25 Hen. VIII. c. 21. addressed to the king's royal majesty." This your grace's realm, recognizing no superior under God but only your grace, hath been and is free from subjection to any man's laws, but only to such as have been devised, made, and ordained within this realm for the wealth of the same; or to such other, as by sufferance of your grace and your progenitors, the people of this your realm, have taken at their free liberty, by their own consent, to be used among them; and have bound themselves by long use and custom to the observance of the same: not as to the observance of the laws of any foreign prince, potentate, or prelate: but as to the customed and ancient laws of this realm, originally established as laws of the same, by the said sufferance, consents, and custom; and none otherwise."
By the civil law, absolutely taken, is generally understood the civil or municipal law of the Roman empire, as comprised in the institutes, the code, and the digest of the emperor Justinian, and the novel constitutions of himself and some of his successors. Of which, as there will frequently be occasion to cite them, by way of illustrating our own laws, it may not be amiss to give a short and general account.

The Roman law (founded first upon the regal constitutions of their ancient kings, next upon the twelve tables of the decemviri, then upon the laws or statutes enacted by the senate or people, the edicts of the praetor, and the responsa prudentum or opinions of learned lawyers, and lastly upon the imperial decrees, or constitutions of successive emperors) had grown to so great a bulk, or as Livy expresses it, "tam immensus aliarum super alias acervatarum legum cumulus," that they were computed to be many camels' load by an author who preceded Justinian. This was in part remedied by the collections of three private lawyers, Gregorius, Hermogenes, and Papirius; and then by the emperor Theodosius the younger, by whose orders a code was compiled, A.D. 438, being a methodical collection of all the imperial constitutions then in force: which Theodosian code was the only book of civil law received as authentic in the western part of Europe till many centuries after; and to this it is probable that the Franks and Goths might frequently pay some regard, in framing legal constitutions for their newly erected kingdoms. For Justinian commanded only in the eastern remains of the empire; and it was under his auspices, that the present body of civil law was compiled and finished by Tribonian and other lawyers, about the year 533.

This consists of, 1. The institutes, which contain the elements or first principles of the Roman law, in four books. 2. The digests, or pandects, in fifty books, containing the opinions and writings of eminent lawyers, digested in a systematical method. 3. A new code, or collection of imperial constitutions, the lapse of a whole century having rendered the former code, of Theodosius, imperfect. 4. The novels, or new constitutions, posterior in time to the other books, and amounting to a supplement to the code; containing new decrees of successive emperors, as new questions happened to arise. These form the body of Roman law, or corpus juris civilis, as published about the time of Justinian: which however fell soon into neglect and oblivion, till about the year 1130, when a copy of the digests was found at Amalfi in Italy; which accident, concurring with the policy of the Romish ecclesiastics, suddenly gave new vogue and authority
to 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. /w
/w See 1. pag. 18.
The canon law is a body of Roman ecclesiastical law, relative to such matters as that church either has, or pretends to have, the proper jurisdiction over. This is compiled from the opinions of the ancient Latin fathers, the decrees of general councils, the decretal epistles and bulles of the holy see. All which lay in the same disorder and confusion as the Roman civil law, till about the year 1151, one Gratian an Italian monk, animated by the discovery of Justinian's pandects at Amalfi, reduced them into some method in three books, which he entitled concordia discordantium canonum, but which are generally known by the name of decretum Gratiani. These reached as low as the time of pope Alexander III. The subsequent papal decrees, to the pontificate of Gregory IX, were published in much the same method under the auspices of that pope, about the year 1230, in five books entitled decretalia Gregorii noni. A sixth book was added by Boniface VIII, about the year 1298, which is called sextus decretalium. The Clementine constitutions, or decrees of Clement V, were in like manner authenticated in 1317 by his successor John XXII; who also published twenty constitutions of his own, called the extravagantes Joannis: all which in some measure answer to the novels of the civil law. To these have been since added some decrees of later popes in five books, called extravagantes communes. And all these together, Gratian's decree, Gregory's decretals, the sixth decretal, the Clementine constitutions, and the extravagants of John and his successors, form the corpus juris canonici, or body of the Roman canon law.
Besides these pontifical collections, which during the times of popery were received 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 this church and kingdom. The legatine constitutions were ecclesiastical laws, enacted in national synods, held under the cardinals Otho and Othobon, legates from pope Gregory IX and pope Adrian IV, in the reign of king Henry III about the years 1220 and 1268. The provincial constitutions are principally the decrees of provincial synods, held under divers archbishops of Canterbury, from Stephen Langton in the reign of Henry III to Henry Chichele in the reign of Henry V; and adopted also by the province of York /x in the reign of Henry VI. At the dawn of the reformation, in the reign of king Henry VIII, it was enacted in parliament /y that a review
should be had of the canon law; and, till such review should be made, all
canons, constitutions, ordinances, and synodals provincial, being then
already made, and not repugnant to the law of the land or the king's
prerogative, should still be used and executed. And, as no such review has
yet been perfected, upon this statute now depends the authority of the
canon law in England.
/x Burn's eccl. law, pref. viii.
/y Statute 25 Hen. VIII. c. 19; revived and confirmed by 1 Eliz. c. 1.
As for the canons enacted by the clergy under James I, in the year 1603,
and never confirmed in parliament, it has been solemnly adjudged upon
the principles of law and the constitution, that where they are not merely
declaratory of the ancient canon law, but are introductory of new
regulations, they do not bind the laity; /z whatever regard the clergy may
think proper to pay them.
/z Stra. 1057.
There are four species of courts in which the civil and canon laws are
permitted under different restrictions to be used. 1. The courts of the arch-
bishops and bishops and their derivative officers, usually called in our law
courts christian, curiae christianitatis, or the ecclesiastical courts. 2. The
military courts. 3. The courts of admiralty. 4. The courts of the two
universities. In all, their reception in general, and the different degrees of
that reception, are grounded entirely upon custom; corroborated in the
latter instance by act of parliament, ratifying those charters which confirm
the customary law of the universities. The more minute consideration of
these will fall properly under that part of these commentaries which treats
of the jurisdiction of courts. It will suffice at present to remark a few
particulars relative to them all, which may serve to inculcate more strongly
the doctrine laid down concerning them. /a
/a Hale Hist. c. 2.
1. And, first, the courts of common law have the superintendency over
these courts; to keep them within their jurisdictions, to determine wherein
they exceed them, to restrain and prohibit such excess, and (in case of
contumacy) to punish the officer who executes, and in some cases the
judge who enforces, the sentence so declared to be illegal.
2. The common law has reserved to itself the exposition of all such acts of
parliament, as concern either the extent of these courts or the matters
depending before them. And therefore if these courts either refuse to allow
these acts of parliament, or will expound them in any other sense than
what the common law puts upon them, the king's courts at Westminster
will grant prohibitions to restrain and control them.
3. An appeal lies from all these courts to the king, in the last resort; which
proves that the jurisdiction exercised in them is derived from the crown of
England, and not from any foreign potentate, or intrinsic authority of their
own. And, from these three strong marks and ensigns of superiority, it
appears beyond a doubt that the civil and canon laws, though admitted in
some cases by custom in some courts, are only subordinate and leges sub
graviori lege; and that, thus admitted, restrained, altered, new-modelled,
and amended, they are by no means with us a distinct independent species
of laws, but are inferior branches of the customary or unwritten laws of
England, properly called, the king's ecclesiastical, the king's military, the
king's maritime, or the king's academical, laws.
Let us next proceed to the leges scriptae, the written laws of the kingdom,
which are statutes, acts, or edicts, made by the king's majesty by and with
the advice and content of the lords spiritual and temporal and commons in
parliament assembled. The oldest of these now extant, and printed in
our statute books, is the famous magna carta, as confirmed in parliament
9 Hen. III: though doubtless there were many acts before that time, the
records of which are now lost, and the determinations of them perhaps at
present currently received for the maxims of the old common law.

The manner of making these statutes will be better considered hereafter,
when we examine the constitution of parliaments. At present we will only
take notice of the different kinds of statutes; and of some general rules
with regard to their construction. The method of citing these acts of parliament is
various. Many of our
ancient statutes are called after the name of the place, where the
parliament was held that made them: as the statutes of Merton and
Marlbridge, of Westminster, Glocester, and Winchester. Others are
denominated entirely from their subj
ect; as the statutes of Wales and
Ireland, the articuli cleri, and the praerogativa regis. Some are
distinguished by their initial words, a method of citing very ancient; being
used by the Jews in denominating the books of the pentateuch; by the
christian church in distinguishing their hymns and divine offices; by the
Romanists in describing their papal bulles; and in short by the whole body
of ancient civilians and canonists, among whom this method of citation
generally prevailed, not only with regard to chapters, but inferior sections
also: in imitation of all which we still call some of our old statutes by their
initial words, as the statute of quia emptores, and that of circumspecte
agatis. But the most usual method of citing them, especially since the time
of Edward the second, is by naming the year of the king's reign in which
the statute was made, together with the chapter, or particular act, according to it's numeral order; as, 9 Geo. II. c. 4. For all the acts of one session of parliament taken together make properly but one statute; and therefore when two sessions have been held in one year, we usually mention stat. 1. or 2. Thus the bill of rights is cited, as 1 W. & M. st. 2. c. 2. signifying that it is the second chapter or act, of the second statute or the laws made in the second sessions of parliament, held in the first year of king William and queen Mary.

First, as to their several kinds. Statutes are either general or special, public or private. A general or public act is an universal rule, that regards the whole community; and of these the courts of law are bound to take notice judicially and ex officio; without the statute being particularly pleaded, or formally set forth by the party who claims an advantage under it. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons, and private concerns; such as the Romans intitled senatus-decreta, in contradistinction to the senatus-consulta, which regarded the whole community: and of these the judges are not bound to take notice, unless they be formally shewn and pleaded.

Thus, to shew the distinction, the statute 13 Eliz. c. 10. to prevent spiritual persons from making leases for longer terms 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 an exception to this rule; it concerns only the parties and the bishop's successors; and is therefore a private act.

Statutes also are either declaratory of the common law, or remedial of some defects therein. Declaratory, 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 and ever hath been. Thus the statute of treasons, 25 Edw. III. cap. 2. doth not make any new species of treasons; but only, for the benefit of the subject, declares and enumerates those several kinds of offence, which before were treason at the common law. 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 was too
narrow and circumscribed, or by restraining it where it was too lax and
luxuriant, this has occasioned another subordinate division of remedial
acts of parliament into enlarging and restraining statutes. To instance
again 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 statute 5 Eliz. c. 11. to make it high treason,
which it was not at the common law: so that this was an enlarging statute.
At common law also spiritual corporations might lease out their estates for
any term of years, till prevented by the statute 13 Eliz. beforementioned:
this was therefore a restraining statute.
Secondly, the rules to be observed with regard to the construction of
statutes are principally these which follow.
1. There are three points to be considered in the construction of all
remedial statutes; 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 it is the business of the judges so
to construe the act, as to suppress the mischief and advance the remedy. /e
Let us instance again in the same restraining statute of the 13 Eliz. By the
common law ecclesiastical corporations might let as long leases as they
thought proper: the mischief was, that they let long and unreasonable
leases, to the impoverishment of their successors: the remedy applied by
the statute was by making void all leases by ecclesiastical bodies for longer
terms than three lives or twenty one years. Now in the construction of this
statute it is held, that leases, though for a longer term, if made by a bishop,
are not void during the bishop's life; or, if made by a dean with
concurrence of his chapter, they are not void during the life of the dean:
for the act was made for the benefit and protection of the successor. /f The
mischief is therefore sufficiently suppressed by vacating them after the
death of the grantor; but the leases, during their lives, being not within the
mischief, are not within the remedy.
/f Co. Litt. 45. 3 Rep. 60.
2. A statute, which treats of things or persons of an inferior rank, cannot
by any general words be extended to those of a superior. So a statute,
treating of "deans, prebendaries, parsons, vicars, and others having
spiritual promotion," is held not to extend to bishops, though they have
spiritual promotion; deans being the highest persons named, and bishops
being of a still higher order. /g
/g 2 Rep. 46.
3. Penal statutes must be construed strictly. Thus a statute 1 Edw. VI.
having enacted that those who are convicted of stealing horses should not
have the benefit of clergy, the judges conceived that this did not extend to
him that should steal but one horse, and therefore procured a new act for
that purpose in the following year. /h And, to come nearer our own times,
by the statute 14 Geo. II. c. 6. stealing sheep, or other cattle, was made
felony without benefit of clergy. But these general words, "or other cattle,"
being looked upon as much too loose to create a capital offence, the act
was held to extend to nothing but mere sheep. And therefore, in the next
sessions, it was found necessary to make another statute, 15 Geo. II. c. 34.
extending the former to bulls, cows, oxen, steers, bullocks, heifers, calves,
and lambs, by name.
/h Bac. Elem. c. 12.

4. Statutes against frauds are to be liberally and beneficially expounded.
This may seem a contradiction to the last rule; most statutes against
frauds being in their consequences penal. But this difference is here to be
taken: where the statute acts upon the offender, and inflicts a penalty, as
the pillory or a fine, it is then to be taken strictly: but when the statute acts
upon the offence, by setting aside the fraudulent transaction, here it is to
be construed liberally. Upon this footing the statute of 13 Eliz. c. 5. which
avoids all gifts of goods, &c., made to defraud creditors and others, was
held to extend by the general words to a gift made to defraud the queen of
a forfeiture. /i
/i 3 Rep. 82.

5. One part of a statute must be so construed by another, that the whole
may if possible stand: ut res magis valeat, quam pereat. As if land be
vested 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 afterwards it shall go to the king. For this
interpretation furnishes matter for every clause of the statute to work and
operate upon. But

6. A saving, totally repugnant to the body of the act, is void. If therefore an
act of parliament vests land in the king and his heirs, saving the right of all
persons whatsoever; or vests the land of A in the king, saving the right of
A: in either of these cases the saving is totally repugnant to the body of the
statute, and (if good) would render the statute of no effect or operation;
and therefore the saving is void, and the land vests absolutely in the king.
/k
/k 1 Rep. 47.
7. Where the common law and a statute differ, the common law gives place to the statute; and an old statute gives place to a new one. And this upon the general principle laid down in the last section, that "leges posteriores priores contrarias abrogant." But this is to be understood, only when the latter statute is couched in negative terms, or by it's 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. /l But if both acts be merely affirmative, and the substance such that both may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. If by a former law an offence be indictable at the quarter sessions, and a latter law makes the same offence indictable at the assises; here the jurisdiction of the sessions is not taken away, but both have a concurrent jurisdiction, and the offender may be prosecuted at either; unless the new statute subjoins express negative words, as, that the offence shall be indictable at the assises, and not elsewhere. /m.

/l Jenk. Cent. 2. 73.
/m 11 Rep. 63.

8. If a statute, that repeals another, is itself repealed afterwards, the first statute is hereby revived, without any formal words for that purpose. So when the statutes of 26 and 35 Hen. VIII, declaring the king to be the supreme head of the church, were repealed by a statute 1 & 2 Ph. and Mary, and this latter statute was afterwards repealed by an act of 1 Eliz. there needed not any express words of revival in queen Elizabeth's statute, but these acts of king Henry were impliedly and virtually revived. /n

/n 4 Inst. 325.

9. Acts of parliament derogatory from the power of subsequent parliaments bind not. So the statute 11 Hen. VII. c. 1. which directs, that no person for assisting a king de facto shall be attainted of treason by act of parliament or otherwise, is held to be good only as to common prosecutions for high treason; but will not restrain or clog any parliamentary attainder. /o Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if it's ordinances could bind the present parliament. And upon the same principle Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses which endeavour to tie up the hands of
succeeding legislatures. "When you repeal the law itself, says he, you at the same time repeal the prohibitory clause, which guards against such repeal."/p
/o 4 Inst. 43.
/p Cum lex abrogatur, illud ipsum abrogatur, quo non eam abrogari oporteat. l. 3. ep. 23.
10. Lastly, 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. I lay down the rule with these restrictions; though I know it is generally laid down more largely, that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that where the main object of a statute is unreasonable the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government. But where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only quoad hoc disregard it. Thus if an act of parliament gives a man power to try all causes, that arise within his manor of Dale; yet, if a cause should arise in which he himself is party, the act is construed not to extend to that; because it is unreasonable that any man should determine his own quarrel. /q But, if we could conceive it possible for the parliament to enact, that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no. /q 8 Rep. 118.
These are the several grounds of the laws of England: over and above which, equity is also frequently called in to assist, to moderate, and to explain it. What equity is, and how impossible in its very essence to be reduced to stated rules, hath been shewn in the preceding section. I shall therefore only add, that there are courts of this kind established for the benefit of the subject, to correct and soften the rigor of the law, when through its generality it bears too hard in particular cases; to detect and punish latent frauds, which the law is not minute enough to reach; to enforce the execution of such matters of trust and confidence, as are
binding in conscience, though perhaps not strictly legal; to deliver from such dangers as are owing to misfortune or oversight; and, in short, to relieve in all such cases as are, bona fide, objects of relief. This is the business of our courts of equity, which however are only conversant in matters of property. For the freedom of our constitution will not permit, that in criminal cases a power should be lodged in any judge, to construe the law otherwise than according to the letter. This caution, while it admirably protects the public liberty, can never bear hard upon individuals. A man cannot suffer more punishment than the law assigns, but he may suffer less. The laws cannot be strained by partiality to inflict a penalty beyond what the letter will warrant; but in cases where the letter induces any apparent hardship, the crown has the power to pardon.

Section the fourth.
Of the COUNTRIES subject to the LAWS of ENGLAND.
THE kingdom of England, over which our municipal laws have jurisdiction, includes not, by the common law, either Wales, Scotland, or Ireland, or any other part of the king's dominions, except the territory of England only. And yet the civil laws and local customs of this territory do now obtain, in part or in all, with more or less restrictions, in these and many other adjacent countries; of which it will be proper first to take a review, before we consider the kingdom of England itself, the original and proper subject of these laws.
Wales had continued independent of England, unconquered and uncultivated, in the primitive pastoral state which Caesar and Tacitus ascribe to Britain in general, for many centuries; even from the time of the hostile invasions of the Saxons, when the ancient and christian inhabitants of the island retired to those natural intrenchments, for protection from their pagan visitants. But when these invaders themselves were converted to christianity, and settled into regular and potent governments, this retreat of the ancient Britons grew every day narrower; they were overrun by little and little, gradually driven from one fastness to another, and by repeated losses abridged of their wild independence. Very early in our history we find their princes doing homage to the crown of England; till at length in the reign of Edward the first, who may justly be stiled the conqueror of Wales, the line of their ancient princes was abolished, and the king of England's eldest son became, as a matter of course, their titular prince: the territory of Wales being then entirely annexed to the dominion of the crown of England, or, as the statute of Rutland expresses it, "terra Walliae cum incolis suis, prius regi jure feodali subjecta, (of which homage
was the sign) jam in proprietatis dominium totaliter et cum integritate conversa est, et coronae regni Angliae tanquam pars corporis ejusdem annexa et unita." /a /b By the statute also of Wales very material alterations were made in divers parts of their laws, so as to reduce them nearer to the English standard, especially in the forms of their judicial proceedings: but they still retained very much of their original polity, particularly their rule of inheritance, viz. that their lands were divided equally among all the issue male, and did not descend to the eldest son alone. /c By other subsequent statutes their provincial immunities were still farther abridged: but the finishing stroke to their independency, was given by the statute 27 Hen. VIII. c. 26. which at the same time gave the utmost advancement to their civil prosperity, by admitting them to a thorough communication of laws with the subjects of England. Thus were this brave people gradually conquered into the enjoyment of true liberty; being insensibly put upon the same footing, and made fellow-citizens with their conquerors. A generous method of triumph, which the republic of Rome practised with great success; till she reduced all Italy to her obedience, by admitting the vanquished states to partake of the Roman privileges.
/a Vaugh. 400.
/b 10 Edw. I.
/c 12 Edw. I.

It is enacted by this statute 27 Hen. VIII, 1. That the dominion of Wales shall be for ever united to the kingdom of England. 2. That all Welchmen born shall have the same liberties as other the king's subjects. 3. That lands in Wales shall be inheritable according to the English tenures and rules of descent. 4. That the laws of England, and no other, shall be used in Wales: besides many other regulations of the police of this principality. And the statute 34 & 35 Hen. VIII. c. 26. confirms the same, adds farther regulations, divides it 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 those too of 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.

The kingdom of Scotland, notwithstanding the union of the crowns on the accession of their king James VI to that of England, continued an entirely separate and distinct kingdom for above a century, though an union had been long projected; which was judged to be the more easy to be done, as both kingdoms were anciently under the same government, and still
retained a very great resemblance, though far from an identity, in their laws. By an act of parliament 1 Jac. I. c. 1. it is declared, that these two, mighty, famous, and ancient kingdoms were formerly one. And sir Edward Coke observes, how marvellous a conformity there was, not only in the religion and language of the two nations, but also in their ancient laws, the descent of the crown, their parliaments, their titles of nobility, their officers of state and of justice, their writs, their customs, and even the language of their laws. /d Upon which account he supposes the common law of each to have been originally the same, especially as their most ancient and authentic book, called regiam majestatem and containing the rules of their ancient common law, is extremely similar that of Glanvil, which contains the principles of ours, as it stood in the reign of Henry II. And the many diversities, subsisting between the two laws at present, may be well enough accounted for, from a diversity of practice in two large and uncommunicating jurisdictions, and from the acts of two distinct and independent parliaments, which have in many points altered and abrogated the old common law of both kingdoms. /d 4 Inst. 345.

However sir Edward Coke, and the politicians of that time, conceived great difficulties in carrying on the projected union: but these were at length overcome, and the great work was happily effected in 1707, 5 Anne; when twenty five articles of union were agreed to by the parliaments of both nations: the purport of the most considerable being as follows:
1. That on the first of May 1707, and for ever after, the kingdoms of England and Scotland, shall be united into one kingdom, by the name of Great Britain.
2. The succession to the monarchy of Great Britain shall be the same as was before settled with regard to that of England.
3. The united kingdom shall be represented by one parliament.
4. There shall be a communication of all rights and privileges between the subjects of both kingdoms, except where it is otherwise agreed.
9. When England raises 2,000,000l. by a land tax, Scotland shall raise 48,000l.
16, 17. The standards of the coin, of weights, and of measures, shall be reduced to those of England, throughout the united kingdoms.
18. The laws relating to trade, customs, and the excise, shall be the same in Scotland as in England. But all the other laws of Scotland shall remain in force; but alterable by the parliament of Great Britain. Yet with this caution; that laws relating to public policy are alterable at the discretion of the parliament; laws relating to private rights are not to be altered but for
the evident utility of the people of Scotland. 22. Sixteen peers are to be chosen to represent the peerage of Scotland in parliament, and forty five members to sit in the house of commons.

23. The sixteen peers of Scotland 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.

These are the principal of the twenty five articles of union, which are ratified and confirmed by statute 5 Ann. c. 8. in which statute there are also two acts of parliament recited; the one of Scotland, whereby the church of Scotland, and also the four universities of that kingdom, are established for ever, and all succeeding sovereigns are to take an oath inviolably to maintain the same; the other of England, 5 Ann. c. 6. whereby the acts of uniformity of 13 Eliz. and 13 Car. II. (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."

Upon these articles, and act of union, it is to be observed, 1. That the two kingdoms are now so inseparably united, that nothing can ever disunite them again, but an infringement of those points which, when they were separate and independent nations, it was mutually stipulated should be "fundamental and essential conditions of the union." 2. That whatever else may be deemed "fundamental and essential conditions," the preservation of the two churches, of England and Scotland, in the same state that they were in at the time of the union, and the maintenance of the acts of uniformity which establish our common prayer, are expressly declared so to be. 3. That therefore any alteration in the constitutions of either of those churches, or in the liturgy of the church of England, would be an infringement of these "fundamental and essential conditions," and greatly endanger the union. 4. That the municipal laws of Scotland are ordained to be still observed in that part of the island, unless altered by parliament; and, as the parliament has not yet thought proper, except in a few instances, to alter them, they still (with regard to the particulars unaltered) continue in full force. Wherefore the municipal or common laws of England are, generally speaking, of no force or validity in Scotland;
and, of consequence, in the ensuing commentaries, we shall have very little occasion to mention, any farther than sometimes by way of illustration, the municipal laws of that part of the united kingdoms. The town of Berwick upon Tweed, though subject to the crown of England ever since the conquest of it in the reign of Edward IV, is not part of the kingdom of England, nor subject to the common law; though it is subject to all acts of parliament, being represented by burgesses therein. And therefore it was declared by statute 20 Geo. II. c. 42. that where England only is mentioned in any act of parliament, the same notwithstanding shall be deemed to comprehend the dominion of Wales, and town of Berwick upon Tweed. But the general law there used is the Scots law, and the ordinary process of the courts of Westminster-hall is there of no authority.

As to Ireland, that is still a distinct kingdom; though a dependent, subordinate kingdom. It was only entitled the dominion or lordship of Ireland, and the king's stile was no other than dominus Hiberniae, lord of Ireland, till the thirty third year of king Henry the eighth; when he assumed the title of king, which is recognized by act of parliament 35 Hen. VIII. c. 3. But, as Scotland and England are now one and the same kingdom, and yet differ in their municipal laws; so England and Ireland are, on the other hand, distinct kingdoms, and yet in general agree in their laws. The inhabitants of Ireland are, for the most part, descended from the English, who planted it as a kind of colony, after the conquest of it by king Henry the second, at which time they carried over the English laws along with them. And as Ireland, thus conquered, planted, and governed, still continues in a state of dependence, it must necessarily conform to, and be obliged by such laws as the superior state thinks proper to prescribe.

At the time of this conquest the Irish were governed by what they called the Brehon law, so stiled from the Irish name of judges, who were denominated Brehons. But king John in the twelfth year of his reign went into Ireland, and carried over with him many able sages of the law; and there by his letters patent, in right of the dominion of conquest, is said to have ordained and established that Ireland should be governed by the laws of England: which letters patent sir Edward Coke apprehends to have been there confirmed in parliament. But to this ordinance many of the Irish were averse to conform, and still stuck to their Brehon law: so that both Henry the third and Edward the first were obliged to renew the injunction; and at length in a parliament holden at Kilkenny, 40 Edw. III,
under Lionel duke of Clarence, the then lieutenant of Ireland, the Brehon law was formally abolished, it being unanimously declared to be indeed no law, but a lewd custom crept in of later times. /k /l And yet, even in the reign of queen Elizabeth, the wild natives still kept and preserved their Brehon law; which is described to have been "a rule of right unwritten, but delivered by tradition from one to another, in which oftentimes there appeared great shew of equity in determining the right between party and party, but in many things repugnant quite both to God's law and man's." /m The latter part of which character is alone allowed it under Edward the first and his grandson.

/h Vaugh. 294. 2 Pryn. Rec. 85.
/i 1 Inst. 341.
/k A.R. 30. 1 Rym. Foed. 442.
/l A.R. 5.pro eo quod leges quibus utuntur Hybernici Deo detestabiles existunt, et omni juri dissonant, adeo quod leges censeri non debeant nobis et consilio nostro satis videtur expediens eisdem utendas concedere leges Anglicanas. 3 Pryn. Rec. 1218.
/m Edm. Spenser. ibid.

But as Ireland was a distinct dominion, and had parliaments of it's own, it is to be observed, that though the immemorial customs, or common law, of England were made the rule of justice in Ireland also, yet no acts of the English parliament, since the twelfth of king John, extended into that kingdom; unless it were specially named, or included under general words, such as, "within any of the king's dominions." And this is particularly expressed, and the reason given in the year book: "Ireland hath a parliament of it's own, and maketh and altereth laws; and our statutes do not bind them, because they do not send representatives to our parliament; but their persons are the king's subjects, like as the inhabitants of Calais, Gascoigny, and Guienne, while they continued under the king's subjection." /n The method made use of in Ireland, as stated by sir Edward Coke, of making statutes in their parliaments, according to Poynings' law, of which hereafter, is this: 1. The lord lieutenant and council of Ireland must certify to the king under the great seal of Ireland the acts proposed to be passed. /o 2. The king and council of England are to consider, approve, alter, or reject the said acts; and certify them back again under the great seal of England. And then, 3. They are to be proposed, received, or rejected in the parliament of Ireland. By this means nothing was left to the parliament in Ireland, but a bare negative or power of rejecting, not of proposing, any law. But the usage now is, that bills are
often framed in either house of parliament under the denomination of heads for a bill or bills; and in that shape they are offered to the consideration of the lord lieutenant and privy council, who then reject them at pleasure, without transmitting them to England.

2 Ric. III. pl. 12.

But the Irish nation, being excluded from the benefit of the English statutes, were deprived of many good and profitable laws, made for the improvement of the common law: and, the measure of justice in both kingdoms becoming thereby no longer uniform, therefore in the 10 Hen. VII. a set of statutes passed in Ireland, (sir Edward Poynings being then lord deputy, whence it is called Poynings' law) by which it was, among other things, enacted, that all acts of parliament before made in England, should be of force within the realm of Ireland. But, by the same rule that no laws made in England, between king John's time and Poynings' law, were then binding in Ireland, it follows that no acts of the English parliament made since the 10 Hen. VII. do now bind the people of Ireland, unless specially named or included under general words. And on the other hand it is equally clear, that where Ireland is particularly named, or is included under general words, they are bound by such acts of parliament. For this follows from the very nature and constitution of a dependent state: dependence being very little else, but an obligation to conform to the will or law of that superior person or state, upon which the inferior depends. The original and true ground of this superiority is the right of conquest: a right allowed by the law of nations, if not by that of nature; and founded upon a compact either expressly or tacitly made between the conqueror and the conquered, that if they will acknowledge the victor for their master, he will treat them for the future as subjects, and not as enemies.

But this state of dependence being almost forgotten, and ready to be disputed by the Irish nation, it became necessary some years ago to declare how that matter really stood: and therefore by statute 6 Geo. I. c. 5. it is declared, that the kingdom of Ireland ought to be subordinate to, and dependent upon, the imperial crown of Great Britain, as being inseparably united thereto; and that the king's majesty, with the consent of the lords and commons of Great Britain in parliament, hath power to make laws to bind the people of Ireland.
Thus we see how extensively the laws of Ireland communicate with those of England: and indeed such communication is highly necessary, as the ultimate resort from the courts of justice in Ireland is, as in Wales, to those in England; a writ of error (in the nature of an appeal) lying from the king's bench in Ireland to the king's bench in England, as the appeal from all other courts in Ireland lies immediately to the house of lords here: it being expressly declared, by the same statute 6 Geo. I. c. 5. that the peers of Ireland have no jurisdiction to affirm or reverse any judgments or decrees whatsoever. /s The propriety, and even necessity, in all inferior dominions, of this constitution, "that, though justice be in general administered by courts of their own, yet that the appeal in the last resort ought to be to the courts of the superior state," is founded upon these two reasons. 1. Because otherwise the law, appointed or permitted to such inferior dominion, might be insensibly changed within itself, without the assent of the superior. 2. Because otherwise judgments might be given to the disadvantage or diminution of the superiority; or to make the dependence to be only of the person of the king, and not of the crown of England. /t

/s This was law in the time of Hen. VIII. as appears by the ancient book, entitled, diversity of courts, c. bank le roy.

/t Vaugh. 402.

With regard to the other adjacent islands which are subject to the crown of Great Britain, some of them (as the isle of Wight, of Portland, of Thanet, &c.) are comprized within some neighbouring county, and are therefore to be looked upon as annexed to the mother island, and part of the kingdom of England. But there are others, which require a more particular consideration.

And, first, the isle of Man is a distinct territory from England and is not governed by our laws; neither doth any act of parliament extend to it, unless it be particularly named therein; and then an act of parliament is binding there. /u It was formerly a subordinate feudatory kingdom, subject to the kings of Norway; then to king John and Henry III of England; afterwards to the kings of Scotland; and then again to the crown of England: and at length we find king Henry IV claiming the island by right of conquest, and disposing of it to the earl of Northumberland; upon whose attainder it was granted (by the name of the lordship of Man) to sir John de Stanley by letters patent 7 Hen. IV. /w In his lineal descendants it continued for eight generations, till the death of Ferdinando earl of Derby, A.D. 1594; when a controversy arose concerning the inheritance thereof, between his daughters and William his surviving brother: upon which, and
a doubt that was started concerning the validity of the original patent, the island was seised into the queen's hands, and afterwards various grants were made of it by king James the first; all which being expired or surrendered, it was granted afresh in 7 Jac. I. to William earl of Derby, and the heirs male of his body, with remainder to his heirs general; which grant was the next year confirmed by act of parliament, with a restraint of the power of alienation by the said earl and his issue male. On the death of James earl of Derby, A.D. 1735, the male line of earl William failing, the duke of Atholl succeeded to the island as heir general by a female branch. In the mean time, though the title of king had long been disused, the earls of Derby, as lords of Man, had maintained a sort of royal authority therein; by assenting or dissenting to laws, and exercising an appellate jurisdiction. Yet, though no English writ, or process from the courts of Westminster, was of any authority in Man, an appeal lay from a decree of the lord of the island to the king of Great Britain in council. But, the distinct jurisdiction of this little subordinate royalty being found inconvenient for the purposes of public justice, and for the revenue, (it affording a convenient asylum for debtors, outlaws, and smugglers) authority was given to the treasury by statute 12 Geo. I. c. 28. to purchase the interest of the then proprietors for the use of the crown: which purchase hath at length been completed in this present year 1765, and confirmed by statutes 5 Geo. III. c. 26, & 39. whereby the whole island and all its dependencies, so granted as aforesaid, (except the landed property of the Atholl family, their manorial rights and emoluments, and the patronage of the bishoprick and other ecclesiastical benefices) are unalienably vested in the crown, and subjected to the regulations of the British excise and customs.
bound by common acts of our parliaments, unless particularly named. /a
All causes are originally determined by their own officers, the bailiffs and
jurats of the islands; but an appeal lies from them to the king in council, in
the last resort.
/a 4 Inst. 286.
Besides these adjacent islands, our more distant plantations in America,
and elsewhere, are also in some respects subject to the English laws.
Plantations, or colonies in distant countries, are either such where the
lands are claimed by right of occupancy only, by finding them desart and
uncultivated, and peopling them from the mother country; or where, when
already cultivated, they have been either gained by conquest, or ceded to
us by treaties. And both these rights are founded upon the law of nature,
or at least upon that of nations. But there is a difference between these two
species of colonies, with respect to the laws by which they are bound. For it
is held, that if an uninhabited country be discovered and planted by
English subjects, all the English laws are immediately there in force. /b
For as the law is the birthright of every subject, so wherever they go they
carry their laws with them. /c But in conquered or ceded countries, that
have already laws of their own, the king may indeed alter and change those
laws; but, till he does actually change them, the ancient laws of the country
remain, unless such as are against the law of God, as in the case of an
infidel country. /d
/b Salk. 411. 666.
/c 2 P. Wms. 75.
Our American plantations are principally of this latter sort, being obtained
in the last century either by right of conquest and driving out the natives
(with what natural justice I shall not at present enquire) or by treaties.
And therefore the common law of England, as such, has no allowance or
authority there; they being no part of the mother country, but distinct
(though dependent) dominions. They are subject however to the control of
the parliament; though (like Ireland, Man, and the rest) not bound by any
acts of parliament, unless particularly named. The form of government in
most of them is borrowed from that of England. They have a governor
named by the king, (or in some proprietary colonies by the proprietor)
who is his representative or deputy. They have courts of justice of their
own, from whose decisions an appeal lies to the king in council here in
England. Their general assemblies which are their house of commons,
together with their council of state being their upper house, with the
concurrence of the king or his representative the governor, make laws
suited to their own emergencies. But it is particularly declared by statute 7 & 8 W. III. c. 22. That all laws, by-laws, usages, and customs, which shall be in practice in any of the plantations, repugnant to any law, made or to be made in this kingdom relative to the said plantations, shall be utterly void and of none effect.

These are the several parts of the dominions of the crown of Great Britain, in which the municipal laws of England are not of force or authority, merely as the municipal laws of England. Most of them have probably copied the spirit of their own law from this original; but then it receives it's obligation, and authoritative force, from being the law of the country. As to any foreign dominions which may belong to the person of the king by hereditary 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 kingdoms, they are entirely unconnected with the laws of England, and do not communicate with this nation in any respect whatsoever. The English legislature had wisely remarked the inconveniences that had formerly resulted from dominions on the continent of Europe; from the Norman territory which William the conqueror brought with him, and held in conjunction with the English throne; and from Anjou, and it's appendages, which fell to Henry the second by hereditary descent. They had seen the nation engaged for near four hundred years together in ruinous wars for defence of these foreign dominions; till, happily for this country, they were lost under the reign of Henry the sixth. They observed that from that time the maritime interests of England were better understood and more closely pursued: that, in consequence of this attention, the nation, as soon as she had rested from her civil wars, began at this period to flourish all at once; and became much more considerable in Europe than when her princes were possessed of a larger territory, and her counsels distracted by foreign interests. This experience and these considerations gave birth to a conditional clause in the act/e of settlement, which vested the crown in his present majesty's illustrious house, "That in case the crown and imperial dignity of this realm shall hereafter come to any person not being a native of this kingdom of England, this nation shall not be obliged to engage in any war for the defence of any dominions or territories which do not belong to the crown of England, without consent of parliament." /e /e Stat. 12 & 13 W. III. c. 3.

We come now to consider the kingdom of England in particular, the direct and immediate subject of those laws, concerning which we are to treat in the ensuing commentaries. And this comprehends not only Wales, of
which enough has been already said, but also part of the sea. The main or
high seas are part of the realm of England, for thereon our courts of
admiralty have jurisdiction, as will be shewn hereafter; but they are not
subject to the common law. /f 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 admiralty have divisum
imperium, an alternate jurisdiction; one upon the water, when it is full
sea; the other upon the land, when it is an ebb. /g
/f Co. Litt. 260.
/g Finch. L. 78.
The territory of England is liable to two divisions; the one ecclesiastical,
the other civil.
1. The ecclesiastical division is, primarily, into two provinces, those of
Canterbury and York. A province is the circuit of an arch-bishop's
jurisdiction. Each province contains divers dioceses, or sees of suffragan
bishops; whereof Canterbury includes twenty one, and York three; besides
the bishoprick of the isle of Man, which was annexed to the province of
York by king Henry VIII. Every diocese is divided into archdeaconries,
whereof there are sixty in all; each archdeaconry into rural deaneries, which
are the circuit of the archdeacon's and rural dean's jurisdiction, of whom
hereafter; and every deanry is divided into parishes. /h
/h Co. Litt. 94.
A parish is that circuit of ground in which the souls under the care of one
parson or vicar do inhabit. These are computed to be near ten thousand in
number. How ancient the division of parishes is, may at present be
difficult to ascertain; for it seems to be agreed on all hands, that in the
early ages of christianity in this island, parishes were unknown, or at least
signified the same that a diocese does now. There was then no
appropriation of ecclesiastical dues to any particular church; but every
man was at liberty to contribute his tithes to whatever priest or church he
pleased, provided only that he did it to some: or, if he made no special
appointment or appropriation thereof, they were paid into the hands of
the bishop, whose duty it was to distribute them among the clergy and for
other pious purposes according to his own discretion. /i
/i Seld. of tith. 9. 4. 2 Inst. 646. Hob. 296.
Mr Camden says England was divided into parishes by arch-bishop
Honorius about the year 630. /k Sir Henry Hobart lays it down that
parishes were first erected by the council of Lateran, which was held A.D.
1179. /l Each widely differing from the other, and both of them perhaps
from the truth; which will probably be found in the medium between the
two extremes. For Mr Selden has clearly shewn, that the clergy lived in common without any division of parishes, long after the time mentioned by Camden. And it appears from the Saxon laws, that parishes were in being long before the date of that council of Lateran, to which they are ascribed by Hobart.

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in his Britannia.

Hob. 296.
of tithes. c. 9.

We find the distinction of parishes, nay even of mother-churches, so early as in the laws of king Edgar, about the year 970. Before that time the consecration of tithes was in general arbitrary; that is, every man paid his own (as was before observed) to what church or parish he pleased. But this being liable to be attended with either fraud, or at least caprice, in the persons paying; and with either jealousies or mean compliances in such as were competitors for receiving them; it was now ordered by the law of king Edgar, that "dentur omnes decimae primariae ecclesiae ad quam parochia pertinet." However, if any thane, or great lord, had a church within his own demesnes, distinct from the mother-church, in the nature of a private chapel; then, provided such church had a coemitery or consecrated place of burial belonging to it, he might allot one third of his tithes for the maintenance of the officiating minister: but, if it had no coemitery, the thane must himself have maintained his chaplain by some other means; for in such case all his tithes were ordained to be paid to the primariae ecclesiae or mother-church.

Ibid. c. 2. See also the laws of king Canute, c. 11. about the year 1030. This proves that the kingdom was then universally divided into parishes; which division happened probably not all at once, but by degrees. For it seems pretty clear and certain that the boundaries of parishes were originally ascertained by those of a manor or manors: since it very seldom happens that a manor extends itself over more parishes than one, though there are often many manors in one parish. The lords, as christianity spread itself, began to build churches upon their own demesnes or wastes, to accommodate their tenants in one or two adjoining lordships; and, in order to have divine service regularly performed therein, obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general: and this tract of land, the tithes whereof were so appropriated, formed a distinct parish. Which will well enough account for the frequent intermixture of parishes one with
another. For if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself, it was natural for him to endow his newly erected church with the tithes of those disjointed lands; especially if no church was then built in any lordship adjoining to those out-lying parcels.

Thus parishes were gradually formed, and parish churches endowed with the tithes that arose within the circuit assigned. But some lands, either because they were in the hands of irreligious and careless owners, or were situate in forests and desart places, or for other now unsearchable reasons, were never united to any parish, and therefore continue to this day extrapolarchial; and their tithes are now by immemorial custom payable to the king instead of the bishop, in trust and confidence that he will distribute them, for the general good of the church. /p And thus much for the ecclesiastical division of this kingdom.

/p 2 Inst. 647. 2 Rep. 44. Cro. Eliz. 512.

2. The civil division of the territory of England is into counties, of those counties into hundreds, of those hundreds into tithings or towns. Which division, as it now stands, seems to owe it's original to king Alfred; who, to prevent the rapines and disorders which formerly prevailed in the realm, instituted tithings; so called, from the Saxon, because ten freeholders with their families composed one. These all dwelt together, and were sureties or free pledges to the king for the good behaviour of each other; and, if any offence were committed in their district, they were bound to have the offender forthcoming. /q And therefore anciently no man was suffered to abide in England above forty days, unless he were enrolled in some tithing or decennary. /r One of the principal inhabitants of the tithing is annually appointed to preside over the rest, being called the tithing-man, the headborough, (words which speak their own etymology) and in some countries the borsholder, or borough's-ealder, being supposed the discreetest man in the borough, town, or tithing. /s

/q Flet. 1. 47. This the laws of king Edward the confessor, c. 20. very justly intitle "summa et maxima securitas, per quam omnes statu firmissimo sustinentur;?quae hoc modo fiebat, quod sub decennali fidejussione debebant esse universi, &c."

/r Mirr. c. 1. 3.

/s Finch. L. 8.

Tithings, towns, or vills, are of the same signification in law; and had, each of them, originally a church and celebration of divine service, sacraments, and burials; which to have, or have had, separate to itself, is the essential distinction of a town, according to sir Edward Coke. /t 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. /u A borough is now
understood to be a town, either corporate or not, that sendeth burgesses to
parliament. /w Other towns there are, to the number sir Edward Coke says
of 8803, which are neither cities nor boroughs; some of which have the
privileges of markets, and others not; but both are equally towns in law. /x
To several of these towns there are small appendages belonging, called
hamlets; which are taken notice of in the statute of Exeter, which makes
frequent mention of entire vills, demi-vills, and hamlets. /y Entire vills sir
Henry Spelman conjectures to have consisted of ten freemen, or frank-
pledges, demi-vills of five, and hamlets of less than five. /z These little
collections of houses are sometimes under the same administration as the
town itself, sometimes governed by separate officers; in which last case it
is, to some purposes in law, looked upon as a distinct township. These
towns, as was before hinted, contained each originally but one parish, and
one tithing; though many of them now, by the encrease 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.
/t 1 Inst. 115 b.
/u Co. Litt. 109 b.
/w Litt. 164.
/x 1 Inst. 116.
/y 14 Edw. I.
/z Gloss. 274.
As ten families of freeholders made up a town or tithing, so ten tithings
composed a superior division, called a hundred, as consisting of ten times
ten families. The hundred is governed by an high constable or bailiff, and
formerly there was regularly held in it the hundred court for the trial of
causes, though now fallen into disuse. In some of the more northern
counties these hundreds are called wapentakes. /a
/a Seld. in Fortesc. c. 24.
The subdivision of hundreds into tithings seems to be most peculiarly the
invention of Alfred: the institution of hundreds themselves he rather
introduced than invented. For they seem to have obtained in Denmark:
and we find that in France a regulation of this sort was made above two
hundred years before; set on foot by Clotharius and Childebert, with a view
of obliging each district to answer for the robberies committed in it's own
division. These divisions were, in that country, as well military as civil; and each contained a hundred freemen; who were subject to an officer called the centenarius; a number of which centenarii were themselves subject to a superior officer called the count or comes. 

And indeed this institution of hundreds may be traced back as far as the ancient Germans, from whom were derived both the Franks who became masters of Gaul, and the Saxons who settled in England. For we read in Tacitus, that both the thing and the name were well known to that warlike people.

"Centeni ex singulis pagis sunt, idque ipsum inter suos vocantur; et quod primo numerus fuit, jam nomen et honor est."

Seld. tit. of hon. 2. 5. 3.
d de morib. German. 6.

An indefinite number of these hundreds make up a county or shire. Shire is a Saxon word signifying a division; but a county, comitatus, is plainly derived from comes, the count of the Franks; that is, the earl, or alderman (as the Saxons called him) of the shire, to whom the government of it was intrusted. This he usually exercised by his deputy, still called in Latin vicecomes, and in English the sheriff, shrieve, or shire-reeve, signifying the officer of the shire; upon whom by process of time the civil administration of it is now totally devolved. In some counties there is an intermediate division, between the shire and the hundreds, as lathes in Kent, and rapes in Sussex, each of them containing about three or four hundreds apiece. These had formerly their lathe-reeves and rape-reeves, acting in subordination to the shire-reeve. Where a county is divided into three of these intermediate jurisdictions, they are called trithings, which were anciently governed by a trithing-reeve.

These trithings still subsist in the large county of York, where by an easy corruption they are denominated ridings; the north, the east, and the west-riding. 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.

LL. Edw. c. 34.

Three of these counties, Chester, Durham, and Lancaster, are called counties palatine. The two former are such by prescription, or immemorial custom; or, at least as old as the Norman conquest: the latter was created by king Edward III, in favour of Henry Plantagenet, first earl and then duke of Lancaster, whose heiress John of Gant the king's son had married; and afterwards confirmed in parliament, to honour John of Gant himself; whom, on the death of his father-in-law, he had also created duke of Lancaster.

Counties palatine are so called a palatio; because the
owners thereof, the earl of Chester, the bishop of Durham, and the duke of Lancaster, had in those counties jura regalia, as fully as the king hath in his palace; regalem potestatem in omnibus, as Bracton expresses it. /h They might pardon treasons, murders, and felonies; they appointed all judges and justices of the peace; all writs and indictments ran in their names, as in other counties in the king’s; and all offences were said to be done against their peace, and not, as in other places, contra pacem domini regis. /i And indeed by the ancient law, in all peculiar jurisdictions, offences were said to be done against his peace in whose court they were tried; in a court leet, contra pacem domini; in the court of a corporation, contra pacem ballivorum; in the sheriff’s court or tourn, contra pacem vice-comitis. /k These palatine privileges were in all probability originally granted to the counties of Chester and Durham, because they bordered upon enemies countries, Wales and Scotland; in order that the owners, being encouraged by so large an authority, might be the more watchful in it's defence; and that the inhabitants, having justice administered at home, might not be obliged to go out of the county, and leave it open to the enemies incursions. And upon this account also there were formerly two other counties palatine, Pembrokeshire and Hexamshire, the latter now united with Northumberland: but these were abolished by parliament, the former in 27 Hen. VIII, the latter in 14 Eliz. And in 27 Hen. VIII likewise, the powers beforementioned of owners of counties palatine were abridged; the reason for their continuance in a manner ceasing: though still all writs are witnessed in their names, and all forfeitures for treason by the common law accrue to them. /l

Of these three, the county of Durham is now the only one remaining in the hands of a subject. For the earldom of Chester, as Camden testifies, was united to the crown by Henry III, and has ever since given title to the king's eldest son. And the county palatine, or duchy, of Lancaster was the property of Henry of Bolinbroke, the son of John of Gant, at the time when he wrested the crown from king Richard II, and assumed the title of Henry IV. But he was too prudent to suffer this to be united to the crown, lest, if he lost one, he should lose the other also. For, as Plowden and sir Edward Coke observe, "he knew he had the duchy of Lancaster by sure and
indefeasible title, but that his title to the crown was not so assured: for that after the decease of Richard II the right of the crown was in the heir of Lionel duke of Clarence, second son of Edward III; John of Gant, father to this Henry IV, being but the fourth son. "And therefore he procured an act of parliament, in the first year of his reign, to keep it distinct and separate from the crown, and so it descended to his son, and grandson, Henry V, and Henry VI. Henry VI being attainted in 1 Edw. IV, this duchy was declared in parliament to have become forfeited to the crown, and at the same time an act was made to keep it still distinct and separate from other inheritances of the crown. And in 1 Hen. VII another act was made to vest the inheritance thereof in Henry VII and his heirs; and in this state, say sir Edward Coke and Lambard, viz. in the natural heirs or posterity of Henry VII, did the right of the duchy remain to their days; a separate and distinct inheritance from that of the crown of England.

215. 4 Inst. 205.
1 Ventr. 155.
4 Inst. 206.
Archeion. 233.
If this notion of Lambard and Coke be well founded, it might have become a very curious question at the time of the revolution in 1688, in whom the right of the duchy remained after king James's abdication. The attainder indeed of the pretended prince of Wales (by statute 13 W. III. c. 3.) has now put the matter out of doubt. And yet, to give that attainder it's full force in this respect, the object of it must have been supposed legitimate, else he had no interest to forfeit.

The isle of Ely is not a county palatine, though sometimes erroneously called so; but only a royal franchise; the bishop having, by grant of king Henry the first, jura regalia within the isle of Ely, and thereby he exercises a jurisdiction over all causes, as well criminal, as civil.

There are also counties corporate; which are certain cities and towns, some with more, some with less territory annexed to them; to which out of special grace and favour the kings of England have granted to be counties of themselves, and not to be comprized in any other county; but to be governed by their own sheriffs and other magistrates, so that no officers of the county at large have any power to intermeddle therein. Such are London, York, Bristol, Norwich, Coventry, and many others. And thus much of the countries subject to the laws of England.

BOOK THE FIRST
CHAPTER THE FIRST.
OF THE ABSOLUTE RIGHTS OF INDIVIDUALS.

THE objects of the laws of England are so very numerous and extensive, that, in order to consider them with any tolerable ease and perspicuity, it will be necessary to distribute them methodically, under proper and distinct heads; avoiding as much as possible divisions too large and comprehensive on the one hand, and too trifling and minute on the other; both of which are equally productive of confusion.

NOW, as municipal law is a rule of civil conduct, commanding what is right, and prohibiting what is wrong; or, as Cicero, /a and after him our Bracton, /b has expressed it, sanctio justa, jubens honesta et prohibens contraria; it follows, that the primary and principal objects of the law are RIGHTS, and WRongs. In the prosecution therefore of these commentaries, I shall follow this very simple and obvious division; and shall in the first place consider the rights that are commanded, and secondly the wrongs that are forbidden by the laws of England.

/a 11 Philipp. 12.
/b l. 1. c. 3.

RIGHTS are however liable to another subdivision; being either, first, those which concern, and are annexed to the persons of men, and are then called jura personarum or the rights of persons; or they are, secondly, such as a man may acquire over external objects, or things unconnected with his person, which are styled jura rerumor the rights of things. Wrongs also are divisible into, first, private wrongs, which, being an infringement merely of particular rights, concern individuals only, and are called civil injuries; and secondly, public wrongs, which, being a breach of general and public rights, affect the whole community, and are called crimes and misdemesnors.

THE objects of the laws of England falling into this fourfold division, the present commentaries will therefore consist of the four following parts: 1. The rights of persons; with the means whereby such rights may be either acquired or lost. 2. The rights of things; with the means also of acquiring and losing them. 3. Private wrongs, or civil injuries; with the means of red

WE are now, first, to consider the rights of persons; with the means of acquiring and losing them.

NOW the rights of persons that are commanded to be observed by the municipal law are of two sorts; first, such as are due from every citizen, which are usually called civil duties; and, secondly, such as belong to him, which is the more popular acceptation of rights or jura. Both may indeed be comprized in this latter division; for, as all social duties are of a relative
nature, at the same time that they are due from one man, or set of men, they must also be due to another. But I apprehend it will be more clear and easy, to consider many of them as duties required from, rather than as rights belonging to, particular persons. Thus, for instance, allegiance is usually, and therefore most easily, considered as the duty of the people, and protection as the duty of the magistrate; and yet they are, reciprocally, the rights as well as duties of each other. Allegiance is the right of the magistrate, and protection the right of the people.

PERSONS also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us: artificial are such as created and devised by human laws for the purposes of society and government; which are called corporations or bodies politic. THE rights of persons considered in their natural capacities are also of two sorts, absolute, and relative. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons: relative, which are incident to them as members of society, and standing in various relations to each other. The first, that is, absolute rights, will be the subject of the present chapter.

BY the absolute rights of individuals we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is intitled to enjoy whether out of society or in it. But with regard to the absolute duties, which man is bound to perform considered as a mere individual, it is not to be expected that any human municipal laws should at all explain or enforce them. For the end and intent of such laws being only to regulate the behaviour of mankind, as they are members of society, and stand in various relations to each other, they have consequently no business or concern with any but social or relative duties. Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself, (as drunkenness, or the like) they then become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them. Here the circumstance of publication is what alters the nature of the case. Public sobriety is a relative duty, and therefore enjoined by our laws: private sobriety is an absolute duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never enforce it by any civil sanction. But, with respect to rights, the case is different. Human laws define and enforce as well those rights which belong to a man
FOR the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals. Such rights as are social and relative result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these, is clearly a subsequent consideration. And therefore the principal view of human laws is, or ought always to be, to explain, protect, and enforce such rights as are absolute, which in themselves are few and simple; and, then, such rights as are relative, which arising from a variety of connexions, will be far more numerous and more complicated. These will take up a greater space in any code of laws, and hence may appear to be more attended to, though in reality they are not, than the rights of the former kind. Let us therefore proceed to examine how far all laws ought, and how far the laws of England actually do, take notice of these absolute rights, and provide for their lasting security.

THE absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature: being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of freewill. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable, than that wild and savage liberty which is sacrificed to obtain it. For no man, that considers a moment, would wish to retain the absolute and uncontroled power of doing whatever he pleases; the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life. Political therefore, or civil, liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is
necessary and expedient for the general advantage of the public. Hence we may collect that the law, which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural, increases the civil liberty of mankind: but every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny. Nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are laws destructive of liberty: whereas if any public advantage can arise from observing such precepts, the control of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance; by supporting that state, of society, which alone can secure our independence. Thus the statute of king Edward IV, which forbad the fine gentlemen of those times (under the degree of a lord) to wear pikes upon their shoes or boots of more than two inches in length, was a law that savoured of oppression; because, however ridiculous the fashion then in use might appear, the restraining it by pecuniary penalties could serve no purpose of common utility. But the statute of king Charles II, which prescribes a thing seemingly as indifferent; viz. a dress for the dead, who are all ordered to be buried in woolen; is a law consistent with public liberty, for it encourages the staple trade, on which in great measure depends the universal good of the nation. So that laws, when prudently framed, are by no means subversive but rather introductive of liberty; for (as Mr. Locke has well observed) where there is no law, there is no freedom. But then, on the other hand, that constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.

Facultas ejus, quod cuique facere libet, nisi quid jure prohibitur. Inst. 1. 3. 1.

3 Edw. IV. c. 5.
30 Car. II. st. 1. c. 3.

THE idea and practice of this political or civil liberty flourish in their highest vigor in these kingdoms, where it falls little short of perfection, and can only be lost or destroyed by the folly or demerits of its owner: the legislature, and of course the laws of England, being peculiarly adapted to the preservation of this inestimable blessing even in the meanest subject. Very different from the modern constitutions of other states, on the
continent of Europe, and from the genius of the imperial law; which in
general are calculated to vest an arbitrary and despotic power of
controlling the actions of the subject in the prince, or in a few grandees.
And this spirit of liberty is so deeply implanted in our constitution, and
rooted even in our very soil, that a slave or a negro, the moment he lands
in England, falls under the protection of the laws, and with regard to all
natural rights becomes a freeman. /g
/g Salk. 666.
THE absolute rights of every Englishman (which, taken in a political and
extensive sense, are usually called their liberties) as they are founded on
nature and reason, so they are coeval with our form of government;
though subject at times to fluctuate and change: their establishment
(excellent as it is) being still human. At some times we have seen them
depressed by overbearing and tyrannical princes; at others so luxuriant as
even to tend to anarchy, a worse state than tyranny itself, as any
government is better than none at all. But the vigor of our free constitution
has always delivered the nation from these embarrassments, and, as soon
as the convulsions consequent on the struggle have been over, the balance
of our rights and liberties has settled to its proper level; and their
fundamental articles have been from time to time asserted in parliament,
as often as they were thought to be in danger.
FIRST, by the great charter of liberties, which was obtained, sword in
hand, from king John; and afterwards, with some alterations, confirmed in
parliament by king Henry the third, his son. Which charter contained very
few new grants; but, as sir Edward Coke /h observes, was for the most part
declaratory of the principal grounds of the fundamental laws of England.
Afterwards by the statute called confirmatio cartarum /i, whereby the
great charter is directed to be allowed as the common law; all judgments
contrary to it are declared void; copies of it are ordered to be sent to all
cathedral churches, and read twice a year to the people; and sentence of
excommunication is directed to be as constantly denounced against all
those that by word, deed, or counsel act contrary thereto, or in any degree
infringe it. Next by a multitude of subsequent corroborating statutes, (sir
Edward Coke, I think, reckons thirty two /k,) from the first Edward to
Henry the fourth. Then, after a long interval, by the petition of right;
which was a parliamentary declaration of the liberties of the people,
assented to by king Charles the first in the beginning of his reign. Which
was closely followed by the still more ample concessions made by that
unhappy prince to his parliament, before the fatal rupture between them;
and by the many salutary laws, particularly the habeas corpus act, passed
under Charles the second. To these succeeded the bill of rights, or
declaration delivered by the lords and commons to the prince and princess
of Orange 13 February 1688; and afterwards enacted in parliament, when
they became king and queen: which declaration concludes in these
remarkable words; "and they do claim, demand, and insist upon all and
singular the premises, as their undoubted rights and liberties." And the act
of parliament itself /l recognizes "all and singular the rights and liberties
asserted and claimed in the said declaration to be the true, ancient, and
indubitable rights of the people of this kingdom." Lastly, these liberties
were again asserted at the commencement of the present century, in the
act of settlement, /m whereby the crown is limited to his present majesty's
illustrious house, and some new provisions were added at the same
fortunate era for better securing our religion, laws, and liberties; which the
statute declares to be "the birthright of the people of England;" according
to the ancient doctrine of the common law. /n
/h 2 Inst. proem.
/i 25 Edw. I.
/k 2 Inst. proem.
/l 1 W. and M. st. 2. c. 2.
/m 12 & 13 W. III. c. 2.
/n Plowd. 55.
THUS much for the declaration of our rights and liberties. The rights
themselves thus defined by these several statutes, consist in a number of
private immunities; which will appear, from what has been premised, to be
indeed no other, than either that residuum of natural liberty, which is not
required by the laws of society to be sacrificed to public convenience; or
else those civil privileges, which society hath engaged to provide, in lieu of
the natural liberties so given up by individuals. These therefore were
formerly, either by inheritance or purchase, the rights of all mankind; but,
in most other countries of the world being now more or less debased and
destroyed, they at present may be said to remain, in a peculiar and
emphatical manner, the rights of the people of England. And these may be
reduced to three principal or primary articles; the right of personal
security, the right of personal liberty; and the right of private property:
because as there is no other known method of compulsion, or of abridging
man's natural free will, but by an infringement or diminution of one or
other of these important rights, the preservation of these, inviolate, may
justly be said to include the preservation of our civil immunities in their
largest and most extensive sense.
I. THE right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

1. LIFE is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter. /o But at present it is not looked upon in quite so atrocious a light, though it remains a very heinous misdemesnor. /p

/o Si aliquis mulierem praegnantem percusserit, vel ei venenum dederit, per quod fecerit abortivam; si puerperium jam formatum suerit, et maxime si suerit animatum, facit homicidium. Bracton. l. 3. c. 21.

/p 3 Inst. 90.

AN infant in ventre sa mere, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it; /q and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. /r And in this point the civil law agrees with ours. /s

/q Stat. 12 Car. II. c. 24.
/r Stat. 10 & 11 W. III. c. 16.
/s Qui in utero sunt, in jure civili intelliguntur in rerum natura esse, cum de eorum commodo agatur. Ff. 1. 5. 26.

2. A MANS limbs, (by which for the present we only understand those members which may be useful to him in fight, and the loss of which only amounts to mayhem by the common law) are also the gift of the wise creator; to enable man to protect himself from external injuries in a state of nature. To these therefore he has a natural inherent right; and they cannot be wantonly destroyed or disabled without a manifest breach of civil liberty.

BOTH the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed se defendendo, or in order to preserve them. For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore if a man through fear of death or mayhem is prevailed upon to execute a deed, or do any other legal act; these, though accompanied with all other the requisite solemnities, are totally void in law, if forced upon him by a well-grounded apprehension of
losing his life, or even his limbs, in case of his non-compliance. And the same is also a sufficient excuse for the commission of many misdemeanors, as will appear in the fourth book. The constraint a man is under in these circumstances is called in law duress, from the Latin durities, of which there are two sorts; duress of imprisonment, where a man actually loses his liberty, of which we shall presently speak; and duress per minas, where the hardship is only threatened and impending, which is that we are now discoursing of. Duress per minas is either for fear of loss of life, or else for fear of mayhem, or loss of limb. And this fear must be upon sufficient reason; "non," as Bracton expresses it, "suspicio cujuslibet vani et meticulosi hominis, sed talis qui possit cadere in virum constantem; talis enim debet esse metus, qui in se contineat vitae periculum, aut corporis cruciatum." A fear of battery, or being beaten, though never so well grounded, is no duress; neither is the fear of having one's house burnt, or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages; but no suitable atonement can be made for the loss of life, or limb. And the indulgence shewn to a man under this, the principal, sort of duress, the fear of losing his life or limbs, agrees also with that maxim of the civil law; ignoscitur ei qui sanguinem suum qualiter qualiter redemptum voluit. 

2 Inst. 483.
l. 2. c. 5.
2 Inst. 483.
Ff. 48. 21. 1.

THE law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with every thing necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life, from the more opulent part of the community, by means of the several statutes enacted for the relief of the poor, of which in their proper places. A humane provision; yet, though dictated by the principles of society, discountenanced by the Roman laws. For the edicts of the emperor Constantine, commanding the public to maintain the children of those who were unable to provide for them, in order to prevent the murder and exposure of infants, an institution founded on the same principle as our foundling hospitals, though comprized in the Theodosian code, were rejected in Justinian's collection.

l. 11. t. 27.
 THESE rights, of life and member, can only be determined by the death of the person; which is either a civil or natural death. The civil death commences if any man be banished the realm /z by the process of the common law, or enters into religion; that is, goes into a monastery, and becomes there a monk professed: in which cases he is absolutely dead in law, and his next heir shall have his estate. For, such banished man is entirely cut off from society; and such a monk, upon his profession, renounces solemnly all secular concerns: and besides, as the popish clergy claimed an exemption from the duties of civil life, and the commands of the temporal magistrate, the genius of the English law would not suffer those persons to enjoy the benefits of society, who secluded themselves from it, and refused to submit to its regulations. /a A monk is therefore accounted civiliter mortuus, and when he enters into religion may, like other dying men, make his testament and executors; or, if he makes none, the ordinary may grant administration to his next of kin, as if he were actually dead intestate. And such executors and administrators shall have the same power, and may bring the same actions for debts due to the religious, and are liable to the same actions for those due from him, as if he were naturally deceased. /b Nay, so far has this principle been carried, that when one was bound in a bond to an abbot and his successors, and afterwards made his executors and professed himself a monk of the same abbey, and in process of time was himself made abbot thereof; here the law gave him, in the capacity of abbot, an action of debt against his own executors to recover the money due. /c In short, a monk or religious is so effectually dead in law, that a lease made even to a third person, during the life (generally) of one who afterwards becomes a monk, determines by such his entry into religion: for which reason leases, and other conveyances, for life, are usually made to have and to hold for the term of one's natural life. /d
/z Co. Litt. 133.
/a This was also a rule in the feodal law, l. 2. t. 21. desiit esse miles seculi, qui factus est miles Christi; nec beneficium pertinet ad eum qui non debet gerere officium.
/b Litt. 200.
/c Co. Litt. 133 b.

THIS natural life being, as was before observed, the immediate donation of the great creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority. Yet nevertheless it may, by the
divine permission, be frequently forfeited for the breach of those laws of society, which are enforced by the sanction of capital punishments; of the nature, restrictions, expedience, and legality of which, we may hereafter more conveniently enquire in the concluding book of these commentaries. At present, I shall only observe, that whenever the constitution of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical: and that whenever any laws direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree; because here the subject is aware of the danger he is exposed to, and may by prudent caution provide against it. The statute law of England does therefore very seldom, and the common law does never, inflict any punishment extending to life or limb, unless upon the highest necessity: and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law. "Nullus liber homo, says the great charter /e, aliquo modo destruatur, nisi per legale judicium parium suorum aut per legem terrae." Which words, "aliquo modo destruatur," according to sir Edward Coke /f, include a prohibition not only of killing, and maiming, but also of torturing (to which our laws are strangers) and of every oppression by colour of an illegal authority. And it is enacted by the statute 5 Edw. III. c. 9. that no man shall be forejudged of life or limb, contrary to the great charter and the law of the land: and again, by statute 28 Ed. III, c. 3. that no man shall be put to death, without being brought to answer by due process of law.
/e c. 29.
/f 2 Inst. 48.
3. BESIDES those limbs and members that may be necessary to man, in order to defend himself or annoy his enemy, the rest of his person or body is also entitled by the same natural right to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member.
4. THE preservation of a man's health from such practices as may prejudice or annoy it, and
5. THE security of his reputation or good name from the arts of detraction and slander, are rights to which every man is intitled, by reason and natural justice; since without these it is impossible to have the perfect enjoyment of any other advantage or right. But these three last articles (being of much less importance than those which have gone before, and those which are yet to come) it will suffice to have barely mentioned
among the rights of persons; referring the more minute discussion of their several branches, to those parts of our commentaries which treat of the infringement of these rights, under the head of personal wrongs.

II. NEXT to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of loco-motion, 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. Concerning which we may make the same observations as upon the preceding article; that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and, that in this kingdom it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here again the language of the great charter /g is, that no freeman shall be taken or imprisoned, but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes /h expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king, or his council, unless it be by legal indictment, or the process of the common law. By the petition of right, 3 Car. I, it is enacted, that no freeman shall be imprisoned or detained without cause shewn, to which he may make answer according to law. By 16 Car. I. 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, or of any of the privy council; 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 31 Car. II. c. 2. commonly called the habeas corpus act, the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer. And, lest this act should be evaded by demanding unreasonable bail, or sureties for the prisoner's appearance, it is declared by 1 W. & M. st. 2. c. 2. that excessive bail ought not to be required.

/g c. 29.
/h 5 Edw. III. c. 9. 25 Edw. III. st. 5. c. 4. and 28 Edw. III. c. 3.

OF great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper, (as in France it is daily practiced by the crown) there would soon be an end of all
other rights and immunities. Some have thought, that unjust attacks, even upon life, or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth, than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient. For the parliament only, or legislative power, whenever it sees proper, can authorize the crown, by suspending the habeas corpus act for a short and limited time, to imprison suspected persons without giving any reason for so doing. As the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger. The decree of the senate, which usually preceded the nomination of this magistrate, "dent operam consules, nequid respublica detrimenti capiat," was called the senatus consultum ultimae necessitatis. In like manner this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with its liberty for a while, in order to preserve it for ever.

The confinement of the person, in any wise, is an imprisonment. So that the 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. And the law so much discourages unlawful confinement, that if a man is under duress of imprisonment, which we before explained to mean a compulsion by an illegal restraint of liberty, until he seals a bond or the like; he may alledge this duress, and avoid the extorted bond. But if a man be lawfully imprisoned, and either to procure his discharge, or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it. To make imprisonment lawful, it must either be, by process from the courts of judicature, or by warrant from some legal officer, having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a habeas corpus. If there be no cause expressed, the gaoler is not bound to detain the prisoner. For the
law judges in this respect, saith sir Edward Coke, like Festus the Roman governor; that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him.

Inst. 589.
Inst. 482.
Inst. 52, 53.

A NATURAL and regular consequence of this personal liberty, is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law. The king indeed, 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. This may be necessary for the public service, and safeguard of the commonwealth. But no power on earth, except the authority of parliament, can send any subject of England out of the land against his will; no not even a criminal. For exile, or transportation, is a punishment unknown to the common law; and, wherever it is now inflicted, it is either by the choice of the criminal himself, to escape a capital punishment, or else by the express direction of some modern act of parliament. To this purpose the great charter declares that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land. And by the habeas corpus act, 31 Car. II. c. 2. (that second magna carta, and stable bulwark of our liberties) it is enacted, that no subject of this realm, who is an inhabitant of England, Wales, or Berwick, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, or places beyond the seas; (where they cannot have the benefit and protection of the common law) but that all such imprisonments shall be illegal; that the person, who shall dare to commit another contrary to this law, shall be disabled from bearing any office, shall incur the penalty of a praemunire, and be incapable of receiving the king's pardon: and the party suffering shall also have his private action against the person committing, and all his aiders, advisers and abettors, and shall recover treble costs; besides his damages, which no jury shall assess at less than five hundred pounds.

F.N.B. 85.
cap. 29.

THE law is in this respect so benignly and liberally construed for the benefit of the subject, that, though within the realm the king may command the attendance and service of all his liege-men, yet he cannot send any man out of the realm, even upon the public service: he cannot even constitute a man lord deputy or lieutenant of Ireland against his will,
nor make him a foreign ambassador. /o For this might in reality be no
more than an honorable exile.
/o 2 Inst. 47.
III. THE third absolute right, inherent in every Englishman, is that of
property; which consists in the free use, enjoyment, and disposal of all his
acquisitions, without any control or diminution, save only by the laws of
the land. The original of private property is probably founded in nature, as
will be more fully explained in the second book of the ensuing
commentaries: but certainly the modifications under which we at present
find it, the method of conserving it in the present owner, and of translating
it from man to man, are entirely derived from society; and are some of
those civil advantages, in exchange for which every individual has resigned
a part of his natural liberty. The laws of England are therefore, in point of
honor and justice, extremely watchful in ascertaining and protecting this
right. Upon this principle the great charter /p has declared that no
freeman shall be disseised, or divested, of his freehold, or of his liberties,
or free customs, but by the judgment of his peers, or by the law of the land.
And by a variety of ancient statutes /q it is enacted, that no man's lands or
goods shall be seised into the king's hands, against the great charter, and
the law of the land; and that no man shall be disinherited, nor put out of
his franchises or freehold, unless he be duly brought to answer, and be
forejudged by course of law; and if any thing be done to the contrary, it
shall be redressed, and holden for none.
/p c. 29.
/q 5 Edw. III. c. 9. 25 Edw. III. st. 5. c. 4. 28 Edw. III. c. 3.
SO great moreover is the regard of the law for private property, that it will
not authorize the least violation of it; no, not even for the general good of
the whole community. If a new road, for instance, were to be made
through the grounds of a private person, it might perhaps be extensively
beneficial to the public; but the law permits no man, or set of men, to do
this without consent of the owner of the land. In vain may it be urged, that
the good of the individual ought to yield to that of the community; for it
would be dangerous to allow any private man, or even any public tribunal,
to be the judge of this common good, and to decide whether it be
expedient or no. Besides, the public good is in nothing more essentially
interested, than in the protection of every individual's private rights, as
modelled by the municipal law. In this, and similar cases the legislature
alone can, and indeed frequently does, interpose, and compel the
individual to acquiesce. But how does it interpose and compel? Not by
absolutely stripping the subject of his property in an arbitrary manner; but
by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.

Nor is this the only instance in which the law of the land has postponed even public necessity to the sacred and inviolable rights of private property. For no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament. By the statute 25 Edw. I. c. 5 and 6. it is provided, that the king shall not take any aids or tasks, but by the common assent of the realm. And what that common assent is, is more fully explained by 34 Edw. I. st. 4. cap. 1. which enacts, that no talliage or aid shall be taken without assent of the arch-bishops, bishops, earls, barons, knights, burgesses, and other freemen of the land: and again by 14 Edw. III. st. 2. c. 1. the prelates, earls, barons, and commons, citizens, burgesses, and merchants shall not be charged to make any aid, if it be not by the common assent of the great men and commons in parliament. And as this fundamental law had been shamefully evaded under many succeeding princes, by compulsive loans, and benevolences extorted without a real and voluntary consent, it was made an article in the petition of right 3 Car. I, that no man shall be compelled to yield any gift, loan, or benevolence, tax, or such like charge, without common consent by act of parliament. And, lastly, by the statute 1 W. & M. st. 2. c. 2. it is declared, that levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament; or for longer time, or in other manner, than the same is or shall be granted, is illegal.

See the historical introduction to the great charter, &c., sub anno 1297; wherein it is shewn that this statute de talliagio non concedendo, supposed to have been made in 34 Edw. I, is in reality nothing more than a sort of translation into Latin of the confirmatio cartarum, 25 Edw. I, which was originally published in the Norman language.

In the three preceding articles we have taken a short view of the principal absolute rights which appertain to every Englishman. But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as barriers to
protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property. These are,

1. THE constitution, powers, and privileges of parliament, of which I shall treat at large in the ensuing chapter.

2. THE limitation of the king's prerogative, by bounds so certain and notorious, that it is impossible he should exceed them without the consent of the people. Of this also I shall treat in its proper place. The former of these keeps the legislative power in due health and vigor, so as to make it improbable that laws should be enacted destructive of general liberty; the latter is a guard upon the executive power, by restraining it from acting either beyond or in contradiction to the laws, that are framed and established by the other.

3. A THIRD subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein. The emphatical words of magna carta /s, spoken in the person of the king, who in judgment of law (says sir Edward Coke /t) is ever present and repeating them in all his courts, are these; "nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam: and therefore every subject," continues the same learned author, "for injury done to him in bonis, in terris, vel persona, by any other subject, be he ecclesiastical or temporal without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." It were endless to enumerate all the affirmative acts of parliament wherein justice is directed to be done according to the law of the land: and what that law is, every subject knows; or may know if he pleases: for it depends not upon the arbitrary will of any judge; but is permanent, fixed, and unchangeable, unless by authority of parliament. I shall however just mention a few negative statutes, whereby abuses, perversions, or delays of justice, especially by the prerogative, are restrained. It is ordained by magna carta /u, that no freeman shall be outlawed, that is, put out of the protection and benefit of the laws, but according to the law of the land. By 2 Edw. III. c. 8. and 11 Ric. II. c. 10. it is enacted, that no commands or letters shall be sent under the great seal, or the little seal, the signet, or privy seal, in disturbance of the law; or to disturb or delay common right: and, though such commandments should come, the judges shall not cease to do right. And by 1 W. & M. st. 2. c. 2. it is declared, that the pretended power of
suspending, or dispensing with laws, or the execution of laws, by regal authority without consent of parliament, is illegal.

/s c. 29.
/t 2 Inst. 55.
/u c. 29.

NOT only the substantial part, or judicial decisions, of the law, but also the formal part, or method of proceeding, cannot be altered but by parliament: for if once those outworks were demolished, there would be no inlet to all manner of innovation in the body of the law itself. The king, it is true, may erect new courts of justice; but then they must proceed according to the old established forms of the common law. For which reason it is declared in the statute 16 Car. I. c. 10. upon the dissolution of the court of starchamber, that neither his majesty, nor his privy council, have any jurisdiction, power, or authority by English bill, petition, articles, libel (which were the course of proceeding in the starchamber, borrowed from the civil law) or by any other arbitrary way whatsoever, to examine, or draw into question, determine or dispose of the lands or goods of any subjects of this kingdom; but that the same ought to be tried and determined in the ordinary courts of justice, and by course of law.

4. IF there should happen any uncommon injury, or infringement of the rights beforementioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right appertaining to every individual, namely, the right of petitioning the king, or either house of parliament, for the redress of grievances. In Russia we are told that the czar Peter established a law, that no subject might petition the throne, till he had first petitioned two different ministers of state. In case he obtained justice from neither, he might then present a third petition to the prince; but upon pain of death, if found to be in the wrong. The consequence of which was, that no one dared to offer such third petition; and grievances seldom falling under the notice of the sovereign, he had little opportunity to redress them. The restrictions, for some there are, which are laid upon petitioning in England, are of a nature extremely different; and while they promote the spirit of peace, they are no check upon that of liberty. Care only must be taken, lest, under the pretence of petitioning, the subject be guilty of any riot or tumult; as happened in the opening of the memorable parliament in 1640: and, to prevent this, it is provided by the statute 13 Car. II. st. 1. c. 5. that no petition to the king, or either house of parliament, for any alterations in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace or the major part of the grand jury, in the
country; and in London by the lord mayor, aldermen, and common
council; nor shall any petition be presented by more than two persons at a
time. But under these regulations, it is declared by the statute 1 W. & M. st.
2. c. 2. that the subject hath a right to petition; and that all commitments
and prosecutions for such petitioning are illegal.


5. THE fifth and last auxiliary right of the subject, that I shall at present
mention, is that of having arms for their defence, suitable to their
condition and degree, and such as are allowed by law. Which is also
declared by the same statute 1 W. & M. st. 2. c. 2. and is indeed a public
allowance, under due restrictions, of the natural right of resistance and
self-preservation, when the sanctions of society and laws are found
insufficient to restrain the violence of oppression.

IN these several articles consist the rights, or, as they are frequently
termed, the liberties of Englishmen: liberties more generally talked of,
than thoroughly understood; and yet highly necessary to be perfectly
known and considered by every man of rank or property, lest his ignorance
of the points whereon it is founded should hurry him into faction and
licentiousness on the one hand, or a pusillanimous indifference and
criminal submission on the other. And we have seen that these rights
consist, primarily, in the free enjoyment of personal security, of personal
liberty, and of private property. So long as these remain inviolate, the
subject is perfectly free; for every species of compulsive tyranny and
oppression must act in opposition to one or other of these rights, having
no other object upon which it can possibly be employed. To preserve these
from violation, it is necessary that the constitution of parliaments be
supported in its full vigor; and limits certainly known, be set to the royal
prerogative. And, lastly, to vindicate these rights, when actually violated or
attacked, the subjects of England are entitled, in the first place, to the
regular administration and free course of justice in the courts of law; next
to the right of petitioning the king and parliament for redress of
grievances; and lastly to the right of having and using arms for self-
preservation and defence. And all these rights and liberties it is our
birthright to enjoy entire; unless where the laws of our country have laid
them under necessary restraints. Restraints in themselves so gentle and
moderate, as will appear upon farther enquiry, that no man of sense or
probity would wish to see them slackened. For all of us have it in our
choice to do every thing that a good man would desire to do; and are
restrained from nothing, but what would be pernicious either to ourselves
or our fellow citizens. So that this review of our situation may fully justify
the observation of a learned French author, who indeed generally both thought and wrote in the spirit of genuine freedom; and who hath not scrupled to profess, even in the very bosom of his native country, that the English is the only nation in the world, where political or civil liberty is the direct end of its constitution. Recommending therefore to the student in our laws a farther and more accurate search into this extensive and important title, I shall close my remarks upon it with the expiring wish of the famous father Paul to his country, "ESTO PERPETUA!"


CHAPTER THE SECOND.
OF THE PARLIAMENT.

WE are next to treat of the rights and duties of persons, as they are members of society, and stand in various relations to each other. These relations are either public or private: and we will first consider those that are public.

THE most universal public relation, by which men are connected together, is that of government; namely, as governors and governed, or, in other words, as magistrates and people. Of magistrates also some are supreme, in whom the sovereign power of the state resides; others are subordinate, deriving all their authority from the supreme magistrate, accountable to him for their conduct, and acting in an inferior secondary sphere.

IN all tyrannical governments the supreme magistracy, or the right both of making and of enforcing the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself. But, where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of its own independence, and therewith of the liberty of the subject. With us therefore in England this supreme power is divided into two branches; the one legislative, to wit, the parliament, consisting of king, lords, and commons; the other executive, consisting of the king alone. It will be the business of this chapter to consider the British parliament; in which the legislative power, and (of course) the supreme and absolute authority of the state, is vested by our constitution.

THE original or first institution of parliaments is one of those matters that lie so far hidden in the dark ages of antiquity, that the tracing of it out is a thing equally difficult and uncertain. The word, parliament, itself (or
colloquium, as some of our historians translate it) is comparatively of modern date, derived from the French, and signifying the place where they met and conferred together. It was first applied to general assemblies of the states under Louis VII in France, about the middle of the twelfth century. /a But it is certain that, long before the introduction of the Norman language into England, all matters of importance were debated and settled in the great councils of the realm. A practice, which seems to have been universal among the northern nations, particularly the Germans; /b and carried by them into all the countries of Europe, which they overran at the dissolution of the Roman empire. Relics of which constitution, under various modifications and changes, are still to be met with in the diets of Poland, Germany, and Sweden, and the assembly of the estates in France; for what is there now called the parliament is only the supreme court of justice, composed of judges and advocates; which neither is in practice, nor is supposed to be in theory, a general council of the realm.

/b De minoribus rebus principes consultant, de majoribus omnes. Tac. de mor. Germ. c. 11.

WITH us 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 wittenagemote or the meeting of wise men. It was also styled in Latin, commune concilium regni, magnum concilium regis, curia magna, conventus magnatum vel procerum, assisa generalis, and sometimes communitas regni Angliae. /c We have instances of its meeting to order the affairs of the kingdom, to make new laws, and to amend the old, or, as Fleta /d expresses it, "novis injuriis emersis nova constituere remedias," so early as the reign of Ina king of the west Saxons, Offa king of the Mercians, and Ethelbert king of Kent, in the several realms of the heptarchy. And, after their union, the mirror /e informs us, that king Alfred ordained for a perpetual usage, that these councils should meet twice in the year, or oftener, if need be, to treat of the government of God's people; how they should keep themselves from sin, should live in quiet, and should receive right. Our succeeding Saxon and Danish monarchs held frequent councils of this sort, as appears from their respective codes of laws; the titles whereof usually speak them to be enacted, either by the king with the advice of his wittenagemote, or wise men, as, "haec sunt instituta, quae Edgarus rex consilio sapientum suorum instituit;" or to be enacted by those sages with the advice of the king, as, "haec sunt judicia, quae sapientes consilio regis Ethelstani instituerunt;" or lastly, to be
enacted by them both together, as; "hae sunt institutiones, quas rex Edmundus et episcopi sui cum sapientibus suis instituerunt."

/c Glanvil. l. 13 c. 32. l. 9. c. 10. Pref. 9 Rep. 2 Inst. 526.
/d l. 2. c. 2.
/e c. 1. 3.

THERE is also no doubt but these great councils were held regularly under the first princes of the Norman line. Glanvil, who wrote in the reign of Henry the second, speaking of the particular amount of an amercement in the sheriff's court, says, it had never yet been ascertained by the general assise, or assembly, but was left to the custom of particular counties. /f Here the general assise is spoken of as a meeting well known, and its statutes or decisions are put in a manifest contradistinction to customs, or the common law. And in Edward the third's time an act of parliament, made in the reign of William the conqueror, was pleaded in the case of the abbey of St Edmund's-bury, and judicially allowed by the court. /g

/f Quanta esse debeat per nullam assisam generalem determinatum est, sed pro consuetudine singulorum comitatuum debetur. l. 9. c. 10.
/g Year book, 21 Edw. III. 60.

HENCE it indisputably appears, that parliaments, or general councils, are coeval with the kingdom itself. How those parliaments were constituted and composed, is another question, which has been matter of great dispute among our learned antiquarians; and, particularly, whether the commons were summoned at all; or, if summoned, at what period they began to form a distinct assembly. But it is not my intention here to enter into controversies of this sort. I hold it sufficient that it is generally agreed, that in the main the constitution of parliament, as it now stands, was marked out so long ago as the seventeenth year of king John, A.D. 1215, in the great charter granted by that prince; wherein he promises to summon all arch-bishops, bishops, abbots, earls, and greater barons, personally; and all other tenants in chief under the crown, by the sheriff and bailiffs; to meet at a 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. III: there being still extant writs of that date, to summon knights, citizens, and burgesses to parliament. I proceed therefore to enquire wherein consists this constitution of parliament, as it now stands, and has stood for the space of five hundred years. And in the prosecution of this enquiry, I shall consider, first, the manner and time of its assembling: secondly, its constituent parts: thirdly, the laws and customs relating to parliament, considered as one aggregate body: fourthly and fifthly, the laws and customs relating to each house, separately and
distinctly taken: sixthly, the methods of proceeding, and of making statutes, in both houses: and lastly, the manner of the parliament's adjournment, prorogation, and dissolution.

I. AS to the manner and time of assembling. The parliament is regularly to be summoned by the king's writ or letter, issued out of chancery by advice of the privy council, at least forty days before it begins to sit. 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 alone. And this prerogative is founded upon very good reason. For, supposing it had a right to meet spontaneously, without being called together, it is impossible to conceive that all the members, and each of the houses, would agree unanimously upon the proper time and place of meeting: and if half of the members met, and half absented themselves, who shall determine which is really the legislative body, the part assembled, or that which stays away? It is therefore necessary that the parliament should be called together at a determinate time and place; and highly becoming its dignity and independence, that it should be called together by none but one of its own constituent parts; and, of the three constituent parts, this office can only appertain to the king; as he is a single person, whose will may be uniform and steady; the first person in the nation, being superior to both houses in dignity; and the only branch of the legislature that has a separate existence, and is capable of performing any act at a time when no parliament is in being. Nor is it an exception to this rule that, by some modern statutes, on the demise of a king or queen, if there be then no parliament in being, the last parliament revives, and is to sit again for six months, unless dissolved by the successor: for this revived parliament must have been originally summoned by the crown.

By motives somewhat similar to these the republic of Venice was actuated, when towards the end of the seventh century it abolished the tribunes of the people, who were annually chosen by the several districts of the Venetian territory, and constituted a doge in their stead; in whom the executive power of the state at present resides. For which their historians have assigned these, as the principal reasons. 1. The propriety of having the executive power a part of the legislative, or senate; to which the former annual magistrates were not admitted. 2. The necessity of having a single person to convene the great council when separated. Mod. Un. Hist. xxvii. 15.

IT is true, that by a statute, 16 Car. I. c. 1. it was enacted, that if the king neglected to call a parliament for three years, the peers might assemble and issue out writs for the choosing one; and, in case of neglect of the
peers, the constituents might meet and elect one themselves. But this, if ever put in practice, would have been liable to all the inconveniences I have just now stated; and the act itself was esteemed so highly detrimental and injurious to the royal prerogative, that it was repealed by statute 16 Car. II. c. 1. From thence therefore no precedent can be drawn.

IT is also true, that the convention-parliament, which restored king Charles the second, met above a month before his return; the lords by their own authority, and the commons in pursuance of writs issued in the name of the keepers of the liberty of England by authority of parliament: and that the said parliament sat till the twenty ninth of December, full seven months after the restoration; and enacted many laws, several of which are still in force. But this was for the necessity of the thing, which supersedes all law; for if they had not so met, it was morally impossible that the kingdom should have been settled in peace. And the first thing done after the king's return, was to pass an act declaring this to be a good parliament, notwithstanding the defect of the king's writs. /i So that, as the royal prerogative was chiefly wounded by their so meeting, and as the king himself, who alone had a right to object, consented to wave the objection, this cannot be drawn into an example in prejudice of the rights of the crown. Besides we should also remember, that it was at that time a great doubt among the lawyers /k, whether even this healing act made it a good parliament; and held by very many in the negative: though it seems to have been too nice a scruple. /i Stat. 12 Car. II. c. 1.

/i Stat. 12 Car. II. c. 1.

/k 1 Sid. 1.

IT is likewise true, that at the time of the revolution, A.D. 1688, the lords and commons by their own authority, and upon the summons of the prince of Orange, (afterwards king William) met in a convention and therein disposed of the crown and kingdom. But it must be remembered, that this assembling was upon a like principle of necessity as at the restoration; that is, upon an apprehension that king James the second had abdicated the government, and that the throne was thereby vacant: which apprehension of theirs was confirmed by their concurrent resolution, when they actually came together. And in such a case as the palpable vacancy of a throne, it follows ex necessitate rei, that the form of the royal writs must be laid aside, otherwise no parliament can ever meet again. For, let us put another possible case, and suppose, for the sake of argument, that the whole royal line should at any time fail, and become extinct, which would indisputably vacate the throne: in this situation it seems reasonable to presume, that the body of the nation, consisting of
lords and commons, would have a right to meet and settle the government; otherwise there must be no government at all. And upon this and no other principle did the convention in 1688 assemble. The vacancy of the throne was precedent to their meeting without any royal summons, not a consequence of it. They did not assemble without writ, and then make the throne vacant; but the throne being previously vacant by the king’s abdication, they assembled without writ, as they must do if they assembled at all. Had the throne been full, their meeting would not have been regular; but, as it was really empty, such meeting became absolutely necessary. And accordingly it is declared by statute 1 W. & M. st. 1. c. 1. that this convention was really the two houses of parliament, notwithstanding the want of writs or other defects of form. So that, notwithstanding these two capital exceptions, which were justifiable only on a principle of necessity, (and each of which, by the way, induced a revolution in the government) the rule laid down is in general certain, that the king, only, can convocate a parliament.

AND this by the ancient statutes of the realm /l, he is bound to do every year, or oftener, if need be. Not that he is, or ever was, obliged by these statutes to call a new parliament every year; but only to permit a parliament to sit annually for the redress of grievances, and dispatch of business, if need be. These last words are so loose and vague, that such of our monarchs as were enclined to govern without parliaments, neglected the convoking them, sometimes for a very considerable period, under pretence that there was no need of them. But, to remedy this, by the statute 16 Car. II. c. 1. it is enacted, that the sitting and holding of parliaments shall not be intermitted above three years at the most. And by the statute 1 W. & M. st. 2. c. 2. it is declared to be one of the rights of the people, that for redress of all grievances, and for the amending, strengthening, and preserving the laws, parliaments ought to be held frequently. And this indefinite frequency is again reduced to a certainty by statute 6 W. & M. c. 2. which enacts, as the statute of Charles the second had done before, that a new parliament shall be called within three years /m after the determination of the former.


/m This is the same period, that is allowed in Sweden for intermitting their general diets, or parliamentary assemblies. Mod. Un. Hist. xxxiii. 15.

II. THE constituent parts of a parliament are the next objects of our enquiry. And these 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. And 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 also has alone the power of dissolving them.


IT is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, though not the whole, of the legislature. The total union of them, we have seen, would be productive of tyranny; the total disjunction of them for the present, would in the end produce the same effects, by causing that union, against which it seems to provide. The legislature would soon become tyrannical, by making continual encroachments, and gradually assuming to itself the rights of the executive power. Thus the long parliament of Charles the first, while it acted in a constitutional manner, with the royal concurrence, redressed many heavy grievances and established many salutary laws. But when the two houses assumed the power of legislation, in exclusion of the royal authority, they soon after assumed likewise the reins of administration; and, in consequence of these united powers, overturned both church and state, and established a worse oppression than any they pretended to remedy. To hinder therefore any such encroachments, the king is himself a part of the parliament: and, as this is the reason of his being so, very properly therefore the share of legislation, which the constitution has placed in the crown, consists in the power of rejecting, rather than resolving; this being sufficient to answer the end proposed. For we may apply to the royal negative, in this instance, what Cicero observes of the negative of the Roman tribunes, that the crown has not any power of doing wrong, but merely of preventing wrong from being done. The crown cannot begin of itself any alterations in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two houses. The legislative therefore cannot abridge the executive power of any rights which it now has by law, without its own consent; since the law must perpetually stand as it now does, unless all the powers will agree to alter it. And herein indeed consists the true excellence of the English government, that all the parts of it form a mutual check upon each other. In the legislature, the people are a check upon the nobility, and the nobility a check upon the people; by the mutual privilege of rejecting what the other has resolved: while the king is a check upon both, which
preserves the executive power from encroachments. And this very executive power is again checked, and kept within due bounds by the two houses, through the privilege they have of enquiring into, impeaching, and punishing the conduct (not indeed of the king, which would destroy his constitutional independence; but, which is more beneficial to the public) of his evil and pernicious counsellors. Thus every branch of our civil polity supports and is supported, regulates and is regulated, by the rest; for the two houses naturally drawing in two directions of opposite interest, and the prerogative in another still different from them both, they mutually keep each other from exceeding their proper limits; while the whole is prevented from separation, and artificially connected together by the mixed nature of the crown, which is a part of the legislative, and the sole executive magistrate. Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by themselves, would have done; but at the same time in a direction partaking of each, and formed out of all; a direction which constitutes the true line of the liberty and happiness of the community.

Sulla tribunis plebis sua lege injuriae faciendae potestatem ademit, auxilii ferendi reliquit. de LL. 3. 9.

LET us now consider these constituent parts of the sovereign power, or parliament, each in a separate view. The king's majesty will be the subject of the next, and many subsequent chapters, to which we must at present refer.

THE next in order are the spiritual lords. These consist of two archbishops, and twenty four bishops; and, at the dissolution of monasteries by Henry VIII, consisted likewise of twenty six mitred abbots, and two priors: a very considerable body, and in those times equal in number to the temporal nobility. All these hold, or are supposed to hold, certain ancient baronies under the king: for William the conqueror thought proper to change the spiritual tenure, of frankalmoign or free alms, under which the bishops held their lands during the Saxon government, into the feodal or Norman tenure by barony; which subjected their estates to all civil charges and assessments, from which they were before exempt: and, in right of succession to those baronies, the bishops obtained their seat in the house of lords. But though these lords spiritual are in the eye of the law a distinct estate from the lords temporal, and are so distinguished in all our acts of parliament, yet in practice they are usually blended together under the one name of the lords; they intermix in their votes; and the majority of such intermixture binds both estates. For if a bill should pass their house, there is no doubt of its being effectual, though
every lord spiritual should vote against it; of which Selden /u, and sir
Edward Coke /w, give many instances: as, on the other hand, I presume it
would be equally good, if the lords temporal present were inferior to the
bishops in number, and every one of those temporal lords gave his vote to
reject the bill; though this sir Edward Coke seems to doubt of. /x
/q Seld. tit. hon. 2. 5. 27.
r Co. Litt. 97.
w 2 Inst. 585, 6, 7.
x 4 Inst. 25.

THE lords temporal consist of all the peers of the realm (the bishops not
being in strictness held to be such, but merely lords of parliament /y) by
whatever title of nobility distinguished; dukes, marquisses, earls,
viscounts, or barons; of which dignities 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 Scots
nobility. Their number is indefinite, and may be encreased at will by the
power of the crown: and once, in the reign of queen Anne, there was an
instance of creating no less than twelve together; in contemplation of
which, in the reign of king George the first, a bill passed the house of lords,
and was countenanced by the then ministry, for limiting the number of the
peerage. This was thought by some to promise a great acquisition to the
constitution, by restraining the prerogative from gaining the ascendant in
that august assembly, by pouring in at pleasure an unlimited number of
new created lords. But the bill was ill-relished and miscarried in the house
of commons, whose leading members were then desirous to keep the
avenues to the other house as open and easy as possible.
y Staunford. P.C. 153.

THE distinction of rank and honours is necessary in every well-governed
state; in order to reward such as are eminent for their services to the
public, in a manner the most desirable to individuals, and yet without
burden to the community; exciting thereby an ambitious yet laudable
ardor, and generous emulation in others. And emulation, or virtuous
ambition, is a spring of action which, however dangerous or invidious in a
mere republic or under a despotic sway, will certainly be attended with
good effects under a free monarchy; where, without destroying its
existence, its excesses may be continually restrained by that superior
power, from which all honour is derived. Such a spirit, when nationally diffused, gives life and vigor to the community; it sets all the wheels of government in motion, which under a wise regulator, may be directed to any beneficial purpose; and thereby every individual may be made subservient to the public good, while he principally means to promote his own particular views. A body of nobility is also more peculiarly necessary in our mixed and compounded constitution, in order to support the rights of both the crown and the people, by forming a barrier to withstand the encroachments of both. It creates and preserves that gradual scale of dignity, which proceeds from the peasant to the prince; rising like a pyramid from a broad foundation, and diminishing to a point as it rises. It is this ascending and contracting proportion that adds stability to any government; for when the departure is sudden from one extreme to another, we may pronounce that state to be precarious. The nobility therefore are the pillars, which are reared from among the people, more immediately to support the throne; and if that falls, they must also be buried under its ruins. Accordingly, when in the last century the commons had determined to extirpate monarchy, they also voted the house of lords to be useless and dangerous. And since titles of nobility are thus expedient in the state, it is also expedient that their owners should form an independent and separate branch of the legislature. If they were confounded with the mass of the people, and like them had only a vote in electing representatives, their privileges would soon be borne down and overwhelmed by the popular torrent, which would effectually level all distinctions. It is therefore highly necessary that the body of nobles should have a distinct assembly, distinct deliberations, and distinct powers from the commons.

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. In a free state, every man, who is supposed a free agent, ought to be, in some measure, his own governor; and therefore a branch at least of the legislative power should reside in the whole body of the people. And this power, when the territories of the state are small and its citizens easily known, should be exercised by the people in their aggregate or collective capacity, as was wisely ordained in the petty republics of Greece, and the first rudiments of the Roman state. But this will be highly inconvenient, when the public territory is extended to any considerable degree, and the number of citizens is encreased. Thus when, after the social war, all the burghers of Italy were admitted free citizens of Rome, and each had a vote in the
public assemblies, it became impossible to distinguish the spurious from the real voter, and from that time all elections and popular deliberations grew tumultuous and disorderly; which paved the way for Marius and Sylla, Pompey and Caesar, to trample on the liberties of their country, and at last to dissolve the commonwealth. In so large a state as ours it is therefore very wisely contrived, that the people should do that by their representatives, which it is impracticable to perform in person: representatives, chosen by a number of minute and separate districts, wherein all the voters are, or easily may be, distinguished. The counties are therefore represented by knights, elected by the proprietors of lands; the cities and boroughs are represented by citizens and burgesses, chosen by the mercantile part or supposed trading interest of the nation; much in the same manner as the burghers in the diet of Sweden are chosen by the corporate towns, Stockholm sending four, as London does with us, other cities two, and some only one. /z The number of English representatives is 513, and of Scots 45; in all 558. And every member, though chosen by one particular district, when elected and returned serves for the whole realm. For the end of his coming thither is not particular, but general; not barely to advantage his constituents, but the common wealth; to advise his majesty (as appears from the writ of summons /a) "de communi consilio super negotiis quibusdam arduis et urgentibus, regem, statum et defensionem regni Angliae et ecclesiae Anglicanae concernentibus." And therefore he is not bound, like a deputy in the united provinces, to consult with, or take the advice, of his constituents upon any particular point, unless he himself thinks it proper or prudent so to do.
/z Mod. Un. Hist. xxxiii. 18.

THESE are the constituent parts of a parliament, the king, the lords spiritual and temporal, and the commons. Parts, of which each is so necessary, that the consent of all three is required to make any new law that shall bind the subject. Whatever is enacted for law by one, or by two only, of the three is no statute; and to it no regard is due, unless in matters relating to their own privileges. For though, in the times of madness and anarchy, the commons once passed a vote /b, "that whatever is enacted or declared for law by the commons in parliament assembled hath the force of law; and all the people of this nation are concluded thereby, although the consent and concurrence of the king or house of peers be not had thereto;" yet, when the constitution was restored in all its forms, it was particularly enacted by statute 13 Car. II. c. 1. that if any person shall maliciously or advisedly affirm, that both or either of the houses of
parliament have any legislative authority without the king, such person shall incur all the penalties of a praemunire.
/b 4 Jan. 1648.

III. WE are next to examine the laws and customs relating to parliament, thus united together and considered as one aggregate body.
THE power and jurisdiction of parliament, says sir Edward Coke /c, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court he adds, it may be truly said "si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si juridictionem, est capacissima." It hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of 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. It can regulate or new model the succession to the crown; as was done in the reign of Henry VIII and William III. It can alter the established religion of the land; as was done in a variety of instances, in the reigns of king Henry VIII and his three children. It can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections. It can, in short, do every thing that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament. True it is, that what they do, no authority upon earth can undo. So that it is a matter most essential to the liberties of this kingdom, that such members be delegated to this important trust, as are most eminent for their probity, their fortitude, and their knowledge; for it was a known apothegm of the great lord treasurer Burleigh, "that England could never be ruined but by a parliament:" and, as sir Matthew Hale observes /d, this being the highest and greatest court, over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should any way fall upon it, the subjects of this kingdom are left without all manner of remedy. To the same purpose the president Montesquieu, though I trust too hastily, presages; /e that as Rome, Sparta, and Carthage have lost their liberty and perished, so the constitution of England will in time lose its liberty, will perish: it will
perish, whenever the legislative power shall become more corrupt than the executive.
/c 4 Inst. 36.
/d of parliaments, 49.
/e Sp. L. 11. 6.
IT must be owned that Mr Locke /f, and other theoretical writers, have held, that "there remains still inherent in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them: for when such trust is abused, it is thereby forfeited, and devolves to those who gave it." But however just this conclusion may be in theory, we cannot adopt it, nor argue from it, under any dispensation of government at present actually existing. For this devolution of power, to the people at large, includes in it a dissolution of the whole form of government established by that people, reduces all the members to their original state of equality, and by annihilating the sovereign power repeals all positive laws whatsoever before enacted. No human laws will therefore suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation; nor will they make provision for so desperate an event, as must render all legal provisions ineffectual. So long therefore as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.
/f on Gov. p. 2. 149, 227.
IN order to prevent the mischiefs that might arise, by placing this extensive authority in hands that are either incapable, or else improper, to manage it, it is provided that no one shall sit or vote in either house of parliament, unless he be twenty one years of age. This is expressly declared by statute 7 & 8 W. III. c. 25. with regard to the house of commons; though a minor was incapacitated before from sitting in either house, by the law and custom of parliament. /g To prevent crude innovations in religion and government, it is enacted by statute 30 Car. II. st. 2. and 1 Geo. I. c. 13. that no member shall vote or sit in either house, till he hath in the presence of the house taken the oaths of allegiance, supremacy, and abjuration, and subscribed and repeated the declaration against transubstantiation, and invocation of saints, and the sacrifice of the mass. To prevent dangers that may arise to the kingdom from foreign attachments, connexions, or dependencies, it is enacted by the 12 & 13 W. III. c. 2. that no alien, born out of the dominions of the crown of Great Britain, even though he be naturalized, shall be capable of being a member of either house of parliament.
FARTHER: as every court of justice hath laws and customs for its direction, some the civil and canon, some the common law, others their own peculiar laws and customs, so the high court of parliament hath also its own peculiar law, called the lex et consuetudo parliamenti; a law which sir Edward Coke observes, is "ab omnibus quaerenda, a multis ignorata, a paucis cognita." It will not therefore be expected that we should enter into the examination of this law, with any degree of minuteness; since, as the same learned author assures us, it is much better to be learned out of the rolls of parliament, and other records, and by precedents, and continual experience, than can be expressed by any one man. It will be sufficient to observe, that the whole of the law and custom of parliament has its original from this one maxim; "that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere." Hence, for instance, the lords will not suffer the commons to interfere in settling a claim of peerage; the commons will not allow the lords to judge of the election of a burgess; nor will either house permit the courts of law to examine the merits of either case. But the maxims upon which they proceed, together with their method of proceeding, rest entirely in the breast of the parliament itself; and are not defined and ascertained by any particular stated laws.

THE privileges of parliament are likewise very large and indefinite; which has occasioned an observation, that the principal privilege of parliament consisted in this, that its privileges were not certainly known to any but the parliament itself. And therefore when in 31 Hen. VI the house of lords propounded a question to the judges touching the privilege of parliament, the chief justice, in the name of his brethren, declared, "that they ought not to make answer to that question; for it hath not been used aforetime that the justices should in any wise determine the privileges of the high court of parliament; for it is so high and mighty in his nature, that it may make law; and that which is law, it may make no law; and the determination and knowledge of that privilege belongs to the lords of parliament, and not to the justices." Privilege of parliament was principally established, in order to protect its members not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the crown. If therefore all the privileges of parliament were once to be set down and ascertained, and no privilege to
be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under pretence thereof to harass any refractory member and violate the freedom of parliament. The dignity and independence of the two houses are therefore in great measure preserved by keeping their privileges indefinite. Some however of the more notorious privileges of the members of either house are, privilege of speech, of person, of their domestics, and of their lands and goods. As to the first, privilege of speech, it is declared by the statute 1 W. & M. st. 2. c. 2. as one of the liberties of the people, "that the freedom of speech, and debates, and proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament." And this freedom of speech is particularly demanded of the king in person, by the speaker of the house of commons, at the opening of every new parliament. So likewise are the other privileges, of person, servants, lands and goods; which are immunities as ancient as Edward the confessor, in whose laws /l we find this precept. "Ad synodos venientibus, sive summoniti sint, sive per se quid agendum habuerint, sit summa pax:" and so too, in the old Gothic constitutions, "extenditur haec pax et securitas ad quatuordecim dies, convocato regni senatu /m." This includes not only privilege from illegal violence, but also from legal arrests, and seizures by process from the courts of law. To assault by violence a member of either house, or his menial servants, is a high contempt of parliament, and there punished with the utmost severity. It has likewise peculiar penalties annexed to it in the courts of law, by the statutes 5 Hen. IV. c. 6. and 11 Hen. VI. c. 11. Neither can any member of either house be arrested and taken into custody, nor served with any process of the courts of law; nor can his menial servants be arrested; nor can any entry be made on his lands; nor can his goods be distrained or seised; without a breach of the privilege of parliament. These privileges however, which derogate from the common law, being only indulged to prevent the member's being diverted from the public business, endure no longer than the session of parliament, save only as to the freedom of his person: which in a peer is for ever sacred and inviolable; and in a commoner for forty days after every prorogation, and forty days before the next appointed meeting; /n which is now in effect as long as the parliament subsists, it seldom being prorogued for more than fourscore days at a time. But this privilege of person does not hold in crimes of such public malignity as treason, felony, or breach of the peace; /o or rather perhaps in such crimes for which surety of the peace may be required. As to all other privileges which obstruct the ordinary course of justice, they cease by the statutes 12 W. III.
c. 3. and 11 Geo. II. c. 24. immediately after the dissolution or prorogation of the parliament, or adjournment of the houses for above a fortnight; and during these recesses a peer, or member of the house of commons, may be sued like an ordinary subject, and in consequence of such suits may be dispossessed of his lands and goods. In these cases the king has also his prerogative: he may sue for his debts, though not arrest the person of a member, during the sitting of parliament; and by statute 2 & 3 Ann. c. 18. a member may be sued during the sitting of parliament for any misdemeanour or breach of trust in a public office. Likewise, for the benefit of commerce, it is provided by statute 4 Geo. III. c. 33, that any trader, having privilege of parliament, may be served with legal process for any just debt, (to the amount of 100l.) and unless he makes satisfaction within two months, it shall be deemed an act of bankruptcy; and that commissions of bankrupt may be issued against such privileged traders, in like manner as against any other.

The Seld. Baronage. part. 1. c. 4.

These are the general heads of the laws and customs relating to parliament, considered as one aggregate body. We will next proceed to

IV. THE laws and customs relating to the house of lords in particular.

These, if we exclude their judicial capacity, which will be more properly treated of in the third and fourth books of these commentaries, will take up but little of our time.

One very ancient privilege is that declared by the charter of the forest /p, confirmed in parliament 9 Hen. III; viz. that every lord spiritual or temporal summoned to parliament, and passing through the king's forests, may, both in going and returning, kill one or two of the king's deer without warrant; in view of the forester, if he be present; or on blowing a horn if he be absent, that he may not seem to take the king's venison by stealth.

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attend the house of peers, and have to this day their regular writs of summons issued out at the beginning of every parliament /q: but, as many of them have of late years been members of the house of commons, their attendance is fallen into disuse.


ANOTHER privilege is, that every peer, by licence obtained from the king, may make another lord of parliament his proxy, to vote for him in his absence. /r A privilege which a member of the other house can by no means have, as he is himself but a proxy for a multitude of other people. /s /r Seld. baronage. p. 1. c. 1.

/s 4 Inst. 12.

EACH peer has also a right, by leave of the house, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the house, with the reasons for such dissent; which is usually styled his protest.

ALL bills likewise, that may in their consequences any way affect the rights of the peerage, are by the custom of parliament to have their first rise and beginning in the house of peers, and to suffer no changes or amendments in the house of commons.

THERE is also one statute peculiarly relative to the house of lords; 6 Ann. c. 23. which regulates the election of the sixteen representative peers of North Britain, in consequence of the twenty second and twenty third articles of the union: and for that purpose prescribes the oaths, &c., to be taken by the electors; directs the mode of balloting; prohibits the peers electing from being attended in an unusual manner; and expressly provides, that no other matter shall be treated of in that assembly, save only the election, on pain of incurring a praemunire.

V. THE peculiar laws and customs of the house of commons relate principally to the raising of taxes, and the elections of members to serve in parliament.

FIRST, with regard to taxes: it is the ancient indisputable privilege and right of the house of commons, that all grants of subsidies or parliamentary aids do begin in their house, and are first bestowed by them; /t although their grants are not effectual to all intents and purposes, until they have the assent of the other two branches of the legislature. The general reason, given for this exclusive privilege of the house of commons, is, that the supplies are raised upon the body of the people, and therefore it is proper that they alone should have the right of taxing themselves. This reason would be unanswerable, if the commons taxed none but
themselves: but it is notorious, that a very large share of property is in the possession of the house of lords; that this property is equally taxable, and taxed, as the property of the commons; and therefore the commons not being the sole persons taxed, this cannot be the reason of their having the sole right of raising and modelling the supply. The true reason, arising from the spirit of our constitution, seems to be this. The lords being a permanent hereditary body, created at pleasure by the king, are supposed more liable to be influenced by the crown, and when once influenced to continue so, than the commons, who are a temporary elective body, freely nominated by the people. It would therefore be extremely dangerous, to give them any power of framing new taxes for the subject: it is sufficient, that they have a power of rejecting, if they think the commons too lavish or improvident in their grants. But so reasonably jealous are the commons of this valuable privilege, that herein they will not suffer the other house to exert any power but that of rejecting; they will not permit the least alteration or amendment to be made by the lords to the mode of taxing the people by a money bill; under which appellation are included all bills, by which money is directed to be raised upon the subject, for any purpose or in any shape whatsoever; either for the exigencies of government, and collected from the kingdom in general, as the land tax; or for private benefit, and collected in any particular district; as by turnpikes, parish rates, and the like. Yet sir Matthew Hale /u mentions one case, founded on the practice of parliament in the reign of Henry VI /w, wherein he thinks the lords may alter a money bill; and that is, if the commons grant a tax, as that of tonnage and poundage, for four years; and the lords alter it to a less time, as for two years; here, he says, the bill need not be sent back to the commons for their concurrence, but may receive the royal assent without farther ceremony; for the alteration of the lords is consistent with the grant of the commons. But such an experiment will hardly be repeated by the lords, under the present improved idea of the privilege of the house of commons: and, in any case where a money bill is remanded to the commons, all amendments in the mode of taxation are sure to be rejected. /t 4 Inst. 29. /u on parliaments, 65, 66. /w Year book, 33 Hen. VI. 17. NEXT, with regard to the elections of knights, citizens, and burgesses; we may observe that herein consists the exercise of the democratical part of our constitution: for in a democracy there can be no exercise of sovereignty but by suffrage, which is the declaration of the people's will. In all democracies therefore it is of the utmost importance to regulate by
whom, and in what manner, the suffrages are to be given. And the Athenians were so justly jealous of this prerogative, that a stranger, who interfered in the assemblies of the people, was punished by their laws with death: because such a man was esteemed guilty of high treason, by usurping those rights of sovereignty, to which he had no title. In England, where the people do not debate in a collective body but by representation, the exercise of this sovereignty consists in the choice of representatives. The laws have therefore very strictly guarded against usurpation or abuse of this power, by many salutary provisions; which may be reduced to these three points, 1. The qualifications of the electors. 2. The qualifications of the elected. 3. The proceedings at elections.

1. AS to the qualifications of the electors. The true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man, a larger share in elections than is consistent with general liberty. If it were probable that every man would give his vote freely, and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote in electing those delegates, to whose charge is committed the disposal of his property, his liberty, and his life. But, since that can hardly be expected in persons of indigent fortunes, or such as are under the immediate dominion of others, all popular states have been obliged to establish certain qualifications; whereby some, who are suspected to have no will of their own, are excluded from voting, in order to set other individuals, whose wills may be supposed independent, more thoroughly upon a level with each other.

AND this constitution of suffrages is framed upon a wiser principle than either of the methods of voting, by centuries, or by tribes, among the Romans. In the method by centuries, instituted by Servius Tullius, it was principally property, and not numbers that turned the scale: in the method by tribes, gradually introduced by the tribunes of the people, numbers only were regarded and property entirely overlooked. Hence the laws passed by the former method had usually too great a tendency to aggrandize the patricians or rich nobles; and those by the latter had too much of a levelling principle. Our constitution steers between the two extremes. Only such as are entirely excluded, as can have no will of their own: there is hardly a free agent to be found, but what is entitled to a vote in some place or other in the kingdom. Nor is comparative wealth, or property, entirely
disregarded in elections; for though the richest man has only one vote at one place, yet if his property be at all diffused, he has probably a right to vote at more places than one, and therefore has many representatives. This is the spirit of our constitution: not that I assert it is in fact quite so perfect as I have here endeavoured to describe it; for, if any alteration might be wished or suggested in the present frame of parliaments, it should be in favour of a more complete representation of the people.

BUT to return to our qualifications; and first those of electors for knights of the shire. 1. By statute 8 Hen. VI. c. 7. and 10 Hen. VI. c. 2. The knights of the shires shall be chosen of people dwelling in the same counties; whereof every man shall have freehold to the value of forty shillings by the year within the county; which by subsequent statutes is to be clear of all charges and deductions, except parliamentary and parochial taxes. The knights of shires are the representatives of the landholders, or landed interest, of the kingdom: their electors must therefore have estates in lands or tenements, within the county represented: these estates must be freehold, that is, for term of life at least; because beneficial leases for long terms of years were not in use at the making of these statutes, and copyholders were then little better than villeins, absolutely dependent upon their lord: this freehold must be of forty shillings annual value; because that sum would then, with proper industry, furnish all the necessaries of life, and render the freeholder, if he pleased, an independent man. For bishop Fleetwood, in his chronicon pretiosum written about sixty years since, has fully proved forty shillings in the reign of Henry VI to have been equal to twelve pounds per annum in the reign of queen Anne; and, as the value of money is very considerably lowered since the bishop wrote, I think we may fairly conclude, from this and other circumstances, that what was equivalent to twelve pounds in his days is equivalent to twenty at present. The other less important qualifications of the electors for counties in England and Wales may be collected from the statutes cited in the margin; which direct, 2. That no person under twenty one years of age shall be capable of voting for any member. This extends to all sorts of members, as well for boroughs as counties; as does also the next, viz. 3. That no person convicted of perjury, or subornation of perjury, shall be capable of voting in any election. 4. That no person shall vote in right of any freehold, granted to him fraudulently to qualify him to vote. Fraudulent grants are such as contain an agreement to reconvey, or to defeat the estate granted; which agreements are made void, and the estate is absolutely vested in the person to whom it is so granted. And, to guard the better against such frauds, it is farther provided, 5. That every
voter shall have been in the actual possession, or receipt of the profits, of his freehold to his own use for twelve calendar months before; except it came to him by descent, marriage, marriage settlement, will, or promotion to a benefice or office. 6. That no person shall vote in respect of an annuity or rentcharge, unless registered with the clerk of the peace twelve calendar months before. 7. That in mortgaged or trust-estates, the person in possession, under the abovementioned restrictions, shall have the vote. 8. That only one person shall be admitted to vote for any one house or tenement, to prevent the splitting of freeholds. 9. That no estate shall qualify a voter, unless the estate has been assessed to some land tax aid, at least twelve months before the election. 10. That no tenant by copy of court roll shall be permitted to vote as a freeholder. Thus much for the electors in counties.

/x 7 & 8 W. III. c. 25. 10 Ann. c. 23. 2 Geo. II. c. 21. 18 Geo. II. c. 18. 31 Geo. II. c. 14. 3 Geo. III. c. 24.

AS for the electors of citizens and burgesses, these are supposed to be the mercantile part or trading interest of this kingdom. But as trade is of a fluctuating nature, and seldom long fixed in a place, it was formerly left to the crown to summon, pro re nata, the most flourishing towns to send representatives to parliament. So that as towns increased in trade, and grew populous, they were admitted to a share in the legislature. But the misfortune is, that the deserted boroughs continued to be summoned, as well as those to whom their trade and inhabitants were transferred; except a few which petitioned to be eased of the expence, then usual, of maintaining their members: four shillings a day being allowed for a knight of the shire, and two shillings for a citizen or burgess; which was the rate of wages established in the reign of Edward III. /y Hence the members for boroughs now bear above a quadruple proportion to those for counties, and the number of parliament men is increased since Fortescue's time, in the reign of Henry the sixth, from 300 to upwards of 500, exclusive of those for Scotland. The universities were in general not empowered to send burgesses to parliament; though once, in 28 Edw. I. when a parliament was summoned to consider of the king's right to Scotland, there were issued writs, which required the university of Oxford to send up four or five, and that of Cambridge two or three, of their most discreet and learned lawyers for that purpose. /z But it was king James the first, who indulged them with the permanent privilege to send constantly two of their own body; to serve for those students who, though useful members of the community, were neither concerned in the landed nor the trading interest; and to protect in the legislature the rights of the republic of
letters. The right of election in boroughs is various, depending entirely on the several charters, customs, and constitutions of the respective places, which has occasioned infinite disputes; though now by statute 2 Geo. II. c. 24. the right of voting for the future shall be allowed according to the last determination of the house of commons concerning it. And by statute 3 Geo. III. c. 15. no freeman of any city or borough (other than such as claim by birth, marriage, or servitude) shall be intitled to vote therein unless he hath been admitted to his freedom twelve calendar months before. /y 4 Inst. 16.
/z Prynne parl. writs. I. 345.

2. OUR second point is the qualification of persons to be elected members of the house of commons. This depends upon the law and custom of parliaments /a, and the statutes referred to in the margin. /b And from these it appears, 1. That they must not be aliens born, or minors. 2. That they must not be any of the twelve judges, because they sit in the lords' house; nor of the clergy, for they sit in the convocation; nor persons attainted of treason or felony, for they are unfit to sit any where. /c 3. That sheriffs of counties, and mayors and bailiffs of boroughs, are not eligible in their respective jurisdictions, as being returning officers; /d but that sheriffs of one county are eligible to be knights of another. /e 4. That, in strictness, all members ought to be inhabitants of the places for which they are chosen: but this is entirely disregarded. 5. That no persons concerned in the management of any duties or taxes created since 1692, except the commissioners of the treasury, nor any of the officers following, (viz. commissioners of prizes, transports, sick and wounded, wine licences, navy, and victualling; secretaries or receivers of prizes; comptrollers of the army accounts; agents for regiments; governors of plantations and their deputies; officers of Minorca or Gibraltar; officers of the excise and customs; clerks or deputies in the several offices of the treasury, exchequer, navy, victualling, admiralty, pay of the army or navy, secretaries of state, salt, stamps, appeals, wine licences, hackney coaches, hawkers and pedlars) nor any persons that hold any new office under the crown created since 1705, are capable of being elected members. 6. That no person having a pension under the crown during pleasure, or for any term of years, is capable of being elected. 7. That if any member accepts an office under the crown, except an officer in the army or navy accepting a new commission, his seat is void; but such member is capable of being re-elected. 8. That all knights of the shire shall be actual knights, or such notable esquires and gentlemen, as have estates sufficient to be knights, and by no means of the degree of yeomen. This is reduced to a still greater
certainty, by ordaining, 9. That every knight of a shire shall have a clear estate of freehold or copyhold to the value of six hundred pounds per annum, and every citizen and burgess to the value of three hundred pounds; except the eldest sons of peers, and of persons qualified to be knights of shires, and except the members for the two universities: which somewhat balances the ascendant which the boroughs have gained over the counties, by obliging the trading interest to make choice of landed men: and of this qualification the member must make oath, and give in the particulars in writing, at the time of his taking his seat. But, subject to these restrictions and disqualifications, every subject of the realm is eligible of common right. It was therefore an unconstitutional prohibition, which was inserted in the king's writs, for the parliament holden at Coventry, 6 Hen. IV, that no apprentice or other man of the law should be elected a knight of the shire therein /f: in return for which, our law books and historians /g have branded this parliament with the name of parliamentum indoctum, or the lack-learning parliament; and sir Edward Coke observes with some spleen /h, that there was never a good law made thereat.

/a 4 Inst. 47.
/b 1 Hen. V. c. 1. 23 Hen. VI. c. 15. 1 W. & M. st. 2. c. 2. 5 & 6 W. & M. c. 7. 11 & 12 W. III. c. 2. 12 & 13 W. III. c. 10. 6 Ann. c. 7. 9 Ann. c. 5. 1 Geo. I. c. 56. 15 Geo. II. c. 22. 33 Geo. II. c. 20.
/c 4 Inst. 47.
/d Hale of parl. 114.
/e 4 Inst. 48.
/g Walsingh. A.D. 1405.
/h 4 Inst. 48.

3. THE third point regarding elections, is the method of proceeding therein. This is also regulated by the law of parliament, and the several statutes referred to in the margin; /i all which I shall endeavour to blend together, and extract out of them a summary account of the method of proceeding to elections.

/i 7 Hen. IV. c. 15. 8 Hen. VI. c. 7. 23 Hen. VI. c. 15. 1 W. & M. st. 1. c. 2. 2 W. & M. st. 1. c. 7. 5 & 6 W. & M. c. 20. 7 W. III. c. 4. 7 & 8 W. III. c. 7. and c. 25. 10 & 11 W. III. c. 7. 12 & 13 W. III. c. 10. 6 Ann. c. 23. 9 Ann. c. 5. 10 Ann. c. 19. and c. 23. 2 Geo. II. c. 24. 8 Geo. II. c. 30. 18 Geo. II. c. 18. 19 Geo. II. c. 28.

AS soon as the parliament is summoned, the lord chancellor, (or if a vacancy happens during parliament, the speaker, by order of the house)
sends his warrant to the clerk of the crown in chancery; who thereupon issues out writs to the sheriff of every county, for the election of all the members to serve for that county, and every city and borough therein. Within three days after the receipt of this writ, the sheriff is to send his precept, under his seal, to the proper returning officers of the cities and boroughs, commanding them to elect their members; and the said returning officers are to proceed to election within eight days from the receipt of the precept, giving four days notice of the same; and to return the persons chosen, together with the precept, to the sheriff. BUT elections of knights of the shire must be proceeded to by the sheriffs themselves in person, at the next county court that shall happen after the delivery of the writ. The county court is a court held every month or oftener by the sheriff, intended to try little causes not exceeding the value of forty shillings, in what part of the county he pleases to appoint for that purpose: but for the election of knights of the shire, it must be held at the most usual place. If the county court falls upon the day of delivering the writ, or within six days after, the sheriff may adjourn the court and election to some other convenient time, not longer than sixteen days, nor shorter than ten; but he cannot alter the place, without the consent of all the candidates; and in all such cases ten days public notice must be given of the time and place of the election.

AND, as it is essential to the very being of parliament that elections should be absolutely free, therefore all undue influences upon the electors are illegal, and strongly prohibited. For Mr Locke ranks it among those breaches of trust in the executive magistrate, which according to his notions amount to a dissolution of the government, "if he employs the force, treasure, and offices of the society to corrupt the representatives, or openly to preingeage the electors, and prescribe what manner of persons shall be chosen. For thus to regulate candidates and electors, and new model the ways of election, what is it, says he, but to cut up the government by the roots, and poison the very fountain of public security?"

As soon therefore as the time and place of election, either in counties or boroughs, are fixed, all soldiers quartered in the place are to remove, at least one day before the election, to the distance of two miles or more; and not return till one day after the poll is ended. Riots likewise have been frequently determined to make an election void. By vote also of the house of commons, to whom alone belongs the power of determining contested elections, no lord of parliament, or lord lieutenant of a county, hath any right to interfere in the election of commoners; and, by statute, the lord warden of the cinque ports shall not recommend any members there. If
any officer of the excise, customs, stamps, or certain other branches of the revenue, presumes to intermeddle in elections, by persuading any voter or dissuading him, he forfeits 100l, and is disabled to hold any office. 

THUS are the electors of one branch of the legislature secured from any undue influence from either of the other two, and from all external violence and compulsion. But the greatest danger is that in which themselves co-operate, by the infamous practice of bribery and corruption. To prevent which it is enacted that no candidate shall, after the date (usually called the teste) of the writs, or after the vacancy, give any money or entertainment to his electors, or promise to give any, either to particular persons, or to the place in general, in order to his being elected; on pain of being incapable to serve for that place in parliament. And if any money, gift, office, employment, or reward be given or promised to be given to any voter, at any time, in order to influence him to give or withhold his vote, both he that takes and he that offers such bribe forfeits 500l, and is for ever disabled from voting and holding any office in any corporation; unless, before conviction, he will discover some other offender of the same kind, and then he is indemnified for his own offence. 

The first instance that occurs of election bribery, was so early as 13 Eliz. when one Thomas Longe (being a simple man and of small capacity to serve in parliament) acknowledged that he had given the returning officer and others of the borough of Westbury four pounds to be returned member, and was for that premium elected. But for this offence the borough was amerced, the member was removed, and the officer fined and imprisoned. But, as this practice hath since taken much deeper and more universal root, it hath occasioned the making of these wholesome statutes; to complete the efficacy of which, there is nothing wanting but resolution and integrity to put them in strict execution.

In like manner the Julian law de ambitu inflicts fines and infamy upon all who were guilty of corruption at elections; but, if the person guilty convicted another offender, he was restored to his credit again. Ff. 48. 14. 1. 

UNDUE influence being thus (I wish the depravity of mankind would permit me to say, effectually) guarded against, the election is to be proceeded to on the day appointed; the sheriff or other returning officer first taking an oath against bribery, and for the due execution of his office. The candidates likewise, if required, must swear to their qualification; and the electors in counties to theirs; and the electors both in counties and
boroughs are also compellable to take the oath of abjuration and that against bribery and corruption. And it might not be amiss, if the members elected were bound to take the latter oath, as well as the former; which in all probability would be much more effectual, than administering it only to the electors.

The election being closed, the returning officer in boroughs returns his precept to the sheriff, with the persons elected by the majority: and the sheriff returns the whole, together with the writ for the county and the knights elected thereupon, to the clerk of the crown in chancery; before the day of meeting, if it be a new parliament, or within fourteen days after the election, if it be an occasional vacancy; and this under penalty of 500l. If the sheriff does not return such knights only as are duly elected, he forfeits, by the old statutes of Henry VI, 100l; and the returning officer in boroughs for a like false return 40l; and they are besides liable to an action, in which double damages shall be recovered, by the later statutes of king William: and any person bribing the returning officer shall also forfeit 300l. But the members returned by him are the sitting members, until the house of commons, upon petition, shall adjudge the return to be false and illegal. And this abstract of the proceedings at elections of knights, citizens, and burgesses, concludes our enquiries into the laws and customs more peculiarly relative to the house of commons.

VI. I proceed now, sixthly, to the method of making laws; which is much the same in both houses: and I shall touch it very briefly, beginning in the house of commons. But first I must premise, that for dispatch of business each house of parliament has its speaker. The speaker of the house of lords is the lord chancellor, or keeper of the king's great seal; whose office it is to preside there, and manage the formality of business. The speaker of the house of commons is chosen by the house; but must be approved by the king. And herein the usage of the two houses differs, that the speaker of the house of commons cannot give his opinion or argue any question in the house; but the speaker of the house of lords may. In each house the act of the majority binds the whole; and this majority is declared by votes openly and publicly given: not as at Venice, and many other senatorial assemblies, privately or by ballot. This latter method may be serviceable, to prevent intrigues and unconstitutional combinations: but is impossible to be practiced with us; at least in the house of commons, where every member's conduct is subject to the future censure of his constituents, and therefore should be openly submitted to their inspection.

To bring a bill into the house, if the relief sought by it is of a private nature, it is first necessary to prefer a petition; which must be presented by
a member, and usually sets forth the grievance desired to be remedied. This petition (when founded on facts that may be in their nature disputed) is referred to a committee of members, who examine the matter alleged, and accordingly report it to the house; and then (or, otherwise, upon the mere petition) leave is given to bring in the bill. In public matters the bill is brought in upon motion made to the house, without any petition at all. Formerly, all bills were drawn in the form of petitions, which were entered upon the parliament rolls, with the king's answer thereunto subjoined; not in any settled form of words, but as the circumstances of the case required: and at the end of each parliament the judges drew them into the form of a statute, which was entered on the statute-rolls. In the reign of Henry V, to prevent mistakes and abuses, the statutes were drawn up by the judges before the end of the parliament; and, in the reign of Henry VI, bills in the form of acts, according to the modern custom, were first introduced.

See, among numberless other instances, the articuli cleri, 9 Edw. II.

THE persons, directed to bring in the bill, present it in a competent time to the house, drawn out on paper, with a multitude of blanks, or void spaces, where any thing 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 begins there, it is (when of a private nature) perused by two of the judges, who settle all points of legal 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 farther. 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 dropt for that sessions; 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. 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 reconsider the whole bill again, and the
question is repeatedly put upon every clause and amendment. When the
house have agreed or disagreed to the amendments of the committee, and
sometimes added new amendments of their own, the bill is then ordered to
be engrossed, or written in a strong gross hand, on one or more long rolls
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 ryder. 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, 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 woolsack to receive it.
IT there passes through the same forms as in the other house, (except
ingrossing, 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 made no amendment to it. But if
any amendments are 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
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.
And when both houses have done with the bill, it always is deposited in the
house of peers, to wait the royal assent.
THIS may be given two ways: 1. In person; when the king comes to the
house of peers, in his crown and 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 désirè, 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."  
2. By statute 33 Hen. 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 high 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 needing 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 at the king's press, for the information of the whole land. And formerly, before the invention of printing, it was used to be published by the sheriff of every county; the king's writ being sent to him at the end of every session, together with a transcript of all the acts made at that session, commanding him "ut statuta illa, et omnes articulos in eisdem contentos, in singulis locis ubi expedire viderit, publice proclamari, et firmiter teneri et observari faciat." And the usage was to proclaim them at his county court, and there to keep them, that whoever would might read or take copies thereof; which custom continued till the reign of Henry the seventh.  

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 belonging; nay, even the king himself, if particularly named therein. And it cannot be altered, amended, 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 statute 1 W. & M. st. 2. c. 2. it is declared, that the suspending or dispensing with laws by regal authority, without consent of parliament, is illegal.  

VII. THERE remains only, in the seventh and last place, to add a word or two concerning the manner in which parliaments may be adjourned, prorogued, or dissolved.  

An adjournment is no more than a continuance of the session from one day to another, as the word itself signifies: and this is done by the authority of each house separately every day; and sometimes for a fortnight or a month together, as at Christmas or Easter, or upon other
particular occasions. But the adjournment of one house is no adjournment
of the other. /q It hath also been usual, when his majesty hath signified his
pleasure that both or either of the houses should adjourn themselves to a
certain day, to obey the king's pleasure so signified, and to adjourn
accordingly. /r Otherwise, besides the indecorum of a refusal, a
prorogation would assuredly follow; which would often be very
inconvenient to both public and private business. For prorogation puts an
end to the session; and then such bills, as are only begun and not
perfected, must be resumed de novo (if at all) in a subsequent session:
whereas, after an adjournment, all things continue in the same state as at
the time of the adjournment made, and may be proceeded on without any
fresh commencement.
/q 4 Inst. 28.
/r Com. Journ. passim: e.g. 11 Jun. 1572. 5 Apr. 1604. 4 Jun. 14 Nov. 18
A PROROGATION is the continuance of the parliament from one session
to another, as an adjournment is a continuance of the session from day to
day. This is done by the royal authority, expressed either by the lord
chancellor in his majesty's presence, or by commission from the crown, or
frequently by proclamation. Both houses are necessarily prorogued at the
same time; it not being a prorogation of the house of lords, or commons,
but of the parliament. The session is never understood to be at an end,
until a prorogation: though, unless some act be passed or some judgment
given in parliament, it is in truth no session at all. /s And formerly the
usage was, for the king to give the royal assent to all such bills as he
approved, at the end of every session, and then to prorogue the
parliament; though sometimes only for a day or two /t: after which all
business then depending in the houses was to be begun again. Which
custom obtained so strongly, that it once became a question /u, whether
giving the royal assent to a single bill did not of course put an end to the
session. And, though it was then resolved in the negative, yet the notion
was so deeply rooted, that the statute 1 Car. I. c. 7. was passed to declare,
that the king's assent to that and some other acts should not put an end to
the session; and, even so late as the restoration of Charles II, we find a
proviso tacked to the first bill then enacted /w that his majesty's assent
thereto should not determine the session of parliament. But it now seems
to be allowed, that a prorogation must be expressly made, in order to
determine the session. And, if at the time of an actual rebellion, or
imminent danger of invasion, the parliament shall be separated by
adjournment or prorogation, the king is empowered /x to call them
together by proclamation, with fourteen days notice of the time appointed
for their reassembling.
/u Ibid. 21 Nov. 1554.
/w Stat. 12 Car. II. c. 1.
/x Stat. 30 Geo. II. c. 25.
A DISSOLUTION is the civil death of the parliament; and this may be
effected three ways: 1. By the king's will, expressed either in person or by
representation. For, as the king has the sole right of convening the
parliament, so also it is a branch of the royal prerogative, that he may
(whenever he pleases) prorogue the parliament for a time, or put a final
period to its existence. If nothing had a right to prorogue or dissolve a
parliament but itself, it might happen to become perpetual. And this would
be extremely dangerous, if at any time it should attempt to encroach upon
the executive power: as was fatally experienced by the unfortunate king
Charles the first; who, having unadvisedly passed an act to continue the
parliament then in being till such time as it should please to dissolve itself,
at last fell a sacrifice to that inordinate power, which he himself had
consented to give them. It is therefore extremely necessary that the crown
should be empowered to regulate the duration
of these assemblies, under
the limitations which the English constitution has prescribed: so that, on
the one hand, they may frequently and regularly come together, for the
dispatch of business and redress of grievances; and may not, on the other,
even with the consent of the crown, be continued to an inconvenient or
unconstitutional length.
2. A PARLIAMENT may be dissolved by the demise of the crown. This
dissolution formerly happened immediately upon the death of the reigning
sovereign, for he being considered in law as the head of the parliament,
(caput, principium, et finis) that failing, the whole body was held to be
extinct. But, the calling a new parliament immediately on the inauguration
of the successor being found inconvenient, and dangers being
apprehended from having no parliament in being in case of a disputed
succession, it was enacted by the statutes 7 & 8 W. III. c. 15. and 6 Ann. c.
7. that the parliament in being shall continue for six months after the
death of any king or queen, unless sooner prorogued or dissolved by the
successor: that, if the parliament be, at the time of the king's death,
separated by adjournment or prorogation, it shall notwithstanding
assemble immediately: and that, if no parliament is then in being, the members of the last parliament shall assemble, and be again a parliament.

3. LASTLY, a parliament may be dissolved or expire by length of time. For if either the legislative body were perpetual; or might last for the life of the prince who convened them, as formerly; and were so to be supplied, by occasionally filling the vacancies with new representatives; in these cases, if it were once corrupted, the evil would be past all remedy: but when different bodies succeed each other, if the people see cause to disapprove of the present, they may rectify its faults in the next. A legislative assembly also, which is sure to be separated again, (whereby its members will themselves become private men, and subject to the full extent of the laws which they have enacted for others) will think themselves bound, in interest as well as duty, to make only such laws as are good. The utmost extent of time that the same parliament was allowed to sit, by the statute 6 W. & M. c. 2. Was three years; after the expiration of which, reckoning from the return of the first summons, the parliament was to have no longer continuance. But by the statute 1 Geo. I. st. 2. c. 38. (in order, professedly, to prevent the great and continued expenses of frequent elections, and the violent heats and animosities consequent thereupon, and for the peace and security of the government then just recovering from the late rebellion) this term was prolonged to seven years; and, what alone is an instance of the vast authority of parliament, the very same house, that was chosen for three years, enacted its own continuance for seven. So that, as our constitution now stands, the parliament must expire, or die a natural death, at the end of every seventh year; if not sooner dissolved by the royal prerogative.

CHAPTER THE THIRD.
OF THE KING, AND HIS TITLE.
The supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen: for it matters not to which sex the crown descends; but the person entitled to it, whether male or female, is immediately invested with all the ensigns, rights, and prerogatives of sovereign power; as is declared by statute 1 Mar. st. 3. c. 1.

IN discoursing of the royal rights and authority, I shall consider the king under six distinct views: 1. With regard to his title. 2. His royal family. 3. His councils. 4. His duties. 5. His prerogative. 6. His revenue. And, first, with regard to his title.

THE executive power of the English nation being vested in a single person, by the general consent of the people, the evidence of which general
consent is long and immemorial usage, it became necessary to the freedom and peace of the state, that a rule should be laid down, uniform, universal, and permanent; in order to mark out with precision, who is that single person, to whom are committed (in subservience to the law of the land) the care and protection of the community; and to whom, in return, the duty and allegiance of every individual are due. It is of the highest importance to the public tranquillity, and to the consciences of private men, that this rule should be clear and indisputable: and our constitution has not left us in the dark upon this material occasion. It will therefore be the endeavour of this chapter to trace out the constitutional doctrine of the royal succession, with that freedom and regard to truth, yet mixed with that reverence and respect, which the principles of liberty and the dignity of the subject require.

THE grand fundamental maxim upon which the jus coronae, or right of succession to the throne of these kingdoms, depends, I take to be this: "that the crown is, by common law and constitutional custom, hereditary; and this in a manner peculiar to itself: but that the right of inheritance may from time to time be changed or limited by act of parliament; under which limitations the crown still continues hereditary." And this proposition it will be the business of this chapter to prove, in all its branches: first, that the crown is hereditary; secondly, that it is hereditary in a manner peculiar to itself; thirdly, that this inheritance is subject to limitation by parliament; lastly, that when it is so limited, it is hereditary in the new proprietor.

1. FIRST, it is in general hereditary, or descendible to the next heir, on the death or demise of the last proprietor. All regal governments must be either hereditary or elective: and, as I believe there is no instance wherein the crown of England has ever been asserted to be elective, except by the regicides at the infamous and unparalleled trial of king Charles I, it must of consequence be hereditary. Yet while I assert an hereditary, I by no means intend a jure divino, title to the throne. Such a title may be allowed to have subsisted under the theocratic establishments of the children of Israel in Palestine: but it never yet subsisted in any other country; save only so far as kingdoms, like other human fabrics, are subject to the general and ordinary dispensations of providence. Nor indeed have a jure divino and an hereditary right any necessary connexion with each other; as some have very weakly imagined. The titles of David and Jehu were equally jure divino, as those of either Solomon or Ahab; and yet David slew the sons of his predecessor, and Jehu his predecessor himself. And when our kings have the same warrant as they had, whether it be to sit upon the
throned of their fathers, or to destroy the house of the preceding sovereign, they will then, and not before, possess the crown of England by a right like theirs, immediately derived from heaven. The hereditary right, which the laws of England acknowledge, owes its origin to the founders of our constitution, and to them only. It has no relation to, nor depends upon, the civil laws of the Jews, the Greeks, the Romans, or any other nation upon earth: the municipal laws of one society having no connexion with, or influence upon, the fundamental polity of another. The founders of our English monarchy might perhaps, if they had thought proper, have made it an elective monarchy: but they rather chose, and upon good reason, to establish originally a succession by inheritance. This has been acquiesced in by general consent; and ripened by degrees into common law: the very same title that every private man has to his own estate. Lands are not naturally descendible any more than thrones: but the law has thought proper, for the benefit and peace of the public, to establish hereditary succession in one as well as the other.

IT must be owned, an elective monarchy seems to be the most obvious, and best suited of any to the rational principles of government, and the freedom of human nature: and accordingly we find from history that, in the infancy and first rudiments of almost every state, the leader, chief magistrate, or prince, hath usually been elective. And, if the individuals who compose that state could always continue true to first principles, uninfluenced by passion or prejudice, unassailed by corruption, and unawed by violence, elective succession were as much to be desired in a kingdom, as in other inferior communities. The best, the wisest, and the bravest man would then be sure of receiving that crown, which his endowments have merited; and the sense of an unbiased majority would be dutifully acquiesced in by the few who were of different opinions. But history and observation will inform us, that elections of every kind (in the present state of human nature) are too frequently brought about by influence, partiality, and artifice: and, even where the case is otherwise, these practices will be often suspected, and as constantly charged upon the successful, by a splenetic disappointed minority. This is an evil, to which all societies are liable; as well those of a private and domestic kind, as the great community of the public, which regulates and includes the rest. But in the former there is this advantage; that such suspicions, if false, proceed no farther than jealousies and murmurs, which time will effectually suppress; and, if true, the injustice may be remedied by legal means, by an appeal to those tribunals to which every member of society has (by becoming such) virtually engaged to submit. Whereas, in the great and
independent society, which every nation composes, there is no superior to resort to but the law of nature; no method to redress the infringements of that law, but the actual exertion of private force. As therefore between two nations, complaining of mutual injuries, the quarrel can only be decided by the law of arms; so in one and the same nation, when the fundamental principles of their common union are supposed to be invaded, and more especially when the appointment of their chief magistrate is alleged to be unduly made, the only tribunal to which the complainants can appeal is that of the God of battles, the only process by which the appeal can be carried on is that of a civil and intestine war. An hereditary succession to the crown is therefore now established, in this and most other countries, in order to prevent that periodical bloodshed and misery, which the history of ancient imperial Rome, and the more modern experience of Poland and Germany, may shew us are the consequences of elective kingdoms.

2. BUT, secondly, as to the particular mode of inheritance, it in general corresponds with the feodal path of descents, 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 it did from king John to Richard II, through a regular pedigree of six lineal descents. As in them, the preference of males to females, and the right of primogeniture among the males, are strictly adhered to. Thus Edward V succeeded to the crown, in preference to Richard his younger brother and Elizabeth his elder sister. Like them, on failure of the male line, it descends to the issue female; according to the ancient British custom remarked by Tacitus /a, "solent foeminarum ductu bellare, et sexum in imperiis non discernere." Thus Mary I succeeded to Edward VI; and the line of Margaret queen of Scots, the daughter of Henry VII, succeeded on failure of the line of Henry VIII, his son. But, among the females, the crown descends by right of primogeniture to the eldest daughter only and her issue; and not, as in common inheritances, to all the daughters at once; the evident necessity of a sole succession to the throne having occasioned the royal law of descents to depart from the common law in this respect: and therefore queen Mary on the death of her brother succeeded to the crown alone, and not in partnership with her sister Elizabeth. Again: the doctrine of representation prevails in the descent of the crown, as it does in other inheritances; whereby the lineal descendants of any person deceased stand in the same place as their ancestor, if living, would have done. Thus Richard II succeeded his grandfather Edward III, in right of his father the black prince; to the exclusion of all his uncles, his grandfather's younger children. Lastly, on failure of lineal descendants, the
crown goes to the next collateral relations of the late king; provided they are lineally descended from the blood royal, that is, from that royal stock which originally acquired the crown. Thus Henry I succeeded to William II, John to Richard I, and James I to Elizabeth; being all derived from the conqueror, who was then the only regal stock. 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; that is, where the relationship proceeds not from the same couple of ancestors (which constitutes a kinsman of the whole blood) but from a single ancestor only; as when two persons are derived from the same father, and not from the same mother, or vice versa: provided only, that the one ancestor, from whom both are descended, be he from whose veins the blood royal is communicated to each. Thus Mary I inherited to Edward VI, and Elizabeth inherited to Mary; all born of the same father, king Henry VIII, but all by different mothers. The reason of which diversity, between royal and common descents, will be better understood hereafter, when we examine the nature of inheritances in general.

3. THE doctrine of hereditary right does by no means imply an indefeasible right to the throne. No man will, I think, assert this, that has considered our laws, constitution, and history, without prejudice, and with any degree of attention. 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 entails, limitations, and provisions, to exclude the immediate heir, and vest the inheritance in any one else. This is strictly consonant to our laws and constitution; as may be gathered from the expression so frequently used in our statute book, of "the king's majesty, his heirs, and successors." In which we may observe, that as the word, "heirs," necessarily implies an inheritance or hereditary right, generally subsisting in the royal person; so the word, "successors," distinctly taken, must imply that this inheritance may sometimes be broke through; or, that there may be a successor, without being the heir, of the king. And this is so extremely reasonable, that without such a power, lodged somewhere, our polity would be very defective. For, let us barely suppose so melancholy a case, as that the heir apparent should be a lunatic, an ideot, or otherwise incapable of reigning: how miserable would the condition of the nation be, if he were also incapable of being set aside! It is therefore necessary that this power should be lodged somewhere: and yet the inheritance, and regal dignity, would be very precarious indeed, if this power were expressly and
avowedly lodged in the hands of the subject only, to be exerted whenever prejudice, caprice, or discontent should happen to take the lead. Consequently it can no where be so properly lodged as in the two houses of parliament, by and with the consent of the reigning king; who, it is not to be supposed, will agree to any thing improperly prejudicial to the rights of his own descendants. And therefore in the king, lords, and commons, in parliament assembled, our laws have expressly lodged it.

4. BUT, fourthly; however the crown maybe limited or transferred, it still retains its descendible quality, and becomes hereditary in the wearer of it: and hence in our law 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 the natural death of Henry, William, or Edward, the king survives in his successor; and the right of the crown vests, eo instanti, upon his heir; either the haeres natus, if the course of descent remains unimpeached, or the haeres factus, if the inheritance be under any particular settlement. So that there can be no interregnum; but as sir Matthew Hale /b observes, the right of sovereignty is fully invested in the successor by the very descent of the crown. And therefore, however acquired, it becomes in him absolutely hereditary, unless by the rules of the limitation it is otherwise ordered and determined. In the same manner as landed estates, to continue our former comparison, are by the law hereditary, or descendible to the heirs of the owner; but still there exists a power, by which the property of those lands may be transferred to another person. If this transfer be made simply and absolutely, the lands will be hereditary in the new owner, and descend to his heirs at law: but if the transfer be clogged with any limitations, conditions, or entails, the lands must descend in that channel, so limited and prescribed, and no other. /b 1 Hist. P.C. 61.

IN these four points consists, as I take it, the constitutional notion of hereditary right to the throne: which will be still farther elucidated, and made clear beyond all dispute, from a short historical view of the successions to the crown of England, the doctrines of our ancient lawyers, and the several acts of parliament that have from time to time been made, to create, to declare, to confirm, to limit, or to bar, the hereditary title to the throne. And in the pursuit of this enquiry we shall find, that from the days of Egbert, the first sole monarch of this kingdom, even to the present, the four cardinal maxims above mentioned have ever been held the constitutional canons of succession. It is true, this succession, through fraud, or force, or sometimes through necessity, when in hostile times the crown descended on a minor or the like, has been very frequently
suspended; but has always at last returned back into the old hereditary channel, though sometimes a very considerable period has intervened. And, even in those instances where the succession has been violated, the crown has ever been looked upon as hereditary in the wearer of it. Of which the usurpers themselves were so sensible, that they for the most part endeavoured to vamp up some feeble shew of a title by descent, in order to amuse the people, while they gained the possession of the kingdom. And, when possession was once gained, they considered it as the purchase or acquisition of a new estate of inheritance, and transmitted or endeavoured to transmit it to their own posterity, by a kind of hereditary right of usurpation.

KING Egbert about the year 800, found himself in possession of the throne of the west Saxons, by a long and undisturbed descent from his ancestors of above three hundred years. How his ancestors acquired their title, whether by force, by fraud, by contract, or by election, it matters not much to enquire; and is indeed a point of such high antiquity, as must render all enquiries at best but plausible guesses. His right must be supposed indisputably good, because we know no better. The other kingdoms of the heptarchy he acquired, some by consent, but most by a voluntary submission. And it is an established maxim in civil polity, and the law of nations, that when one country is united to another in such a manner, as that one keeps its government and states, and the other loses them; the latter entirely assimilates or is melted down in the former, and must adopt its laws and customs. And in pursuance of this maxim there hath ever been, since the union of the heptarchy in king Egbert, a general acquiescence under the hereditary monarchy of the west Saxons, through all the united kingdoms.

FROM Egbert to the death of Edmund Ironside, a period of above two hundred years, the crown descended regularly, through a succession of fifteen princes, without any deviation or interruption; save only that king Edred, the uncle of Edwy, mounted the throne for about nine years, in the right of his nephew a minor, the times being very troublesome and dangerous. But this was with a view to preserve, and not to destroy, the succession; and accordingly Edwy succeeded him.

KING Edmund Ironside was obliged, by the hostile eruption of the Danes, at first to divide his kingdom with Canute, king of Denmark; and Canute, after his death, seised the whole of it, Edmund's sons being driven into foreign countries. Here the succession was suspended by actual force, and a new family introduced upon the throne: in whom however this new
acquired throne continued hereditary for three reigns; when, upon the
death of Hardiknute, the ancient Saxon line was restored in the person of
Edward the confessor.

HE was not indeed the true heir to the crown, being the younger brother of
king Edmund Ironside, who had a son Edward, surnamed (from his exile)
the outlaw, still living. But this son was then in Hungary; and, the English
having just shaken off the Danish yoke, it was necessary that somebody on
the spot should mount the throne; and the confessor was the next of the
royal line then in England. On his decease without issue, Harold II
usurped the throne, and almost at the same instant came on the Norman
invasion: the right to the crown being all the time in Edgar, surnamed
Atheling, (which signifies in the Saxon language the first of the blood
royal) who was the son of Edward the outlaw, and grandson of Edmund
Ironside; or, as Matthew Paris /d well expresses the sense of our old
constitution, "Edmundus autem latusferreum, rex naturalis de stirpe
regum, genuit Edwardum; et Edwardus genuit Edgarum, cui de jure
debatur regnum Anglorum."

A.D. 1066.

WILLIAM the Norman claimed the crown by virtue of a pretended grant
from king Edward the confessor; a grant which, if real, was in itself utterly
invalid: because it was made, as Harold well observed in his reply to
William's demand /e, "absque generali senatus et populi conventu et
edicto;" which also very plainly implies, that it then was generally
understood that the king, with consent of the general council, might
dispose of the crown and change the line of succession. William's title
however was altogether as good as Harold's, he being a mere private
subject, and an utter stranger to the royal blood. Edgar Atheling's
undoubted right was overwhelmed by the violence of the times; though
frequently asserted by the English nobility after the conquest, till such
time as he died without issue: but all their attempts proved unsuccessful,
and only served the more firmly to establish the crown in the family which
had newly acquired it.

A.D. 1066.

THIS conquest then by William of Normandy was, like that of Canute
before, a forcible transfer of the crown of England into a new family: but,
the crown being so transferred, all the inherent properties of the crown
were with it transferred also. For, the victory obtained at Hastings not
being /f a victory over the nation collectively, but only over the person of
Harold, the only right that the conqueror could pretend to acquire thereby,
was the right to possess the crown of England, not to alter the nature of
the government. And therefore, as the English laws still remained in force, he must necessarily take the crown subject to those laws, and with all its inherent properties; the first and principal of which was its descendibility. Here then we must drop our race of Saxon kings, at least for a while, and derive our descents from William the conqueror as from a new stock, who acquired by right of war (such as it is, yet still the dernier resort of kings) a strong and undisputed title to the inheritable crown of England.  

/Hale, Hist. C.L. c. 5. Seld. review of tithes, c. 8.  
ACCORDINGLY it descended from him to his sons William II and Henry I. Robert, it must be owned, his eldest son, was kept out of possession by the arts and violence of his brethren; who proceeded upon a notion, which prevailed for some time in the law of descents, that when the eldest son was already provided for (as Robert was constituted duke of Normandy by his father's will) in such a case the next brother was entitled to enjoy the rest of their father’s inheritance. But, as he died without issue, Henry at last had a good title to the throne, whatever he might have at first. STEPHEN of Blois, who succeeded him, was indeed the grandson of the conqueror, by Adelicia his daughter, and claimed the throne by a feeble kind of hereditary right; not as being the nearest of the male line, but as the nearest male of the blood royal. The real right was in the empress Matilda or Maud, the daughter of Henry I; the rule of succession being (where women are admitted at all) that the daughter of a son shall be preferred to the son of a daughter. So that Stephen was little better than a mere usurper; and the empress Maud did not fail to assert her right by the sword: which dispute was attended with various success, and ended at last in a compromise, that Stephen should keep the crown, but that Henry the son of Maud should succeed him; as he afterwards accordingly did. HENRY, the second of that name, was the undoubted heir of William the conqueror; but he had also another connexion in blood, which endeared him still farther to the English. He was lineally descended from Edmund Ironside, the last of the Saxon race of hereditary kings. For Edward the outlaw, the son of Edmund Ironside, had (besides Edgar Atheling, who died without issue) a daughter Margaret, who was married to Malcolm king of Scotland; and in her the Saxon hereditary right resided. By Malcolm she had several children, and among the rest Matilda the wife of Henry I, who by him had the empress Maud, the mother of Henry II. Upon which account the Saxon line is in our histories frequently said to have been restored in his person: though in reality that right subsisted in the sons of Malcolm by queen Margaret; king Henry's best title being as heir to the conqueror.
FROM Henry II the crown descended to his eldest son Richard I, who
dying childless, the right vested in his nephew Arthur, the son of Geoffrey
his next brother; but John, the youngest son of king Henry, seised the
throne: claiming, as appears from his charters, the crown by hereditary
right /g: that is to say, he was next of kin to the deceased king, being his
surviving brother; whereas Arthur was removed one degree farther, being
his brother's son, though by right of representation he stood in the place of
his father Geoffrey. And however flimzey this title, and those of William
Rufus and Stephen of Blois, may appear at this distance to us, after the law
of descents hath now been settled for so many centuries, they were
sufficient to puzzle the understandings of our brave, but unlettered,
ancestors. Nor indeed can we wonder at the number of partizans, who
espoused the pretensions of king John in particular; since even in the
reign of his father, king Henry II, it was a point undetermined /h, whether,
even in common inheritances, the child of an elder brother should succeed
to the land in right of representation, or the younger surviving brother in
right of proximity of blood. Nor is it to this day decided in the collateral
succession to the fiefs of the empire, whether the order of the stocks, or the
proximity of degree shall take place. /i However, on the death of Arthur
and his sister Eleanor without issue, a clear and indisputable title vested in
Henry III the son of John: and from him to Richard the second, a
succession of six generations, the crown descended in the true hereditary
line. Under one of which race of princes /k, we find it declared in
parliament, "that the law of the crown of England is, and always hath
been, that the children of the king of England, whether born in England, or
elsewhere, ought to bear the inheritance after the death of their ancestors.
Which law, our sovereign lord the king, the prelates, earls, and barons, and
other great men, together with all the commons, in parliament assembled,
do approve and affirm for ever."
/g "Regni Angliae; quod nobis jure competit haereditario." Spelm. Hist. R.
Joh. apud Wilkins. 354.
/h Glanv. l. 7. c. 3.
/i Mod. Un. Hist. xxx. 512.
/k Stat. 25 Edw. III. st. 2.
UPON Richard the second's resignation of the crown, he having no
children, the right resulted to the issue of his grandfather Edward III. That
king had many children, besides his eldest, Edward the black prince of
Wales, the father of Richard II: but to avoid confusion I shall only mention
three; William his second son, who died without issue; Lionel duke of
Clarence, his third son; and John of Gant duke of Lancaster, his fourth. By
the rules of succession therefore the posterity of Lionel duke of Clarence were entitled to the throne, upon the resignation of king Richard; and had accordingly been declared by the king, many years before, the presumptive heirs of the crown; which declaration was also confirmed in parliament. /l But Henry duke of Lancaster, the son of John of Gant, having then a large army in the kingdom, the pretence of raising which was to recover his patrimony from the king, and to redress the grievances of the subject, it was impossible for any other title to be asserted with any safety; and he became king under the title of Henry IV. But, as sir Matthew Hale remarks, /m though the people unjustly assisted Henry IV in his usurpation of the crown, yet he was not admitted thereto, until he had declared that he claimed, not as a conqueror, (which he very much inclined to do /n) but as a successor, descended by right line of the blood royal; as appears from the rolls of parliament in those times. And in order to this he set up a shew of two titles: the one upon the pretence of being the first of the blood royal in the entire male line, whereas the duke of Clarence left only one daughter Philippa; from which female branch, by a marriage with Edmond Mortimer earl of March, the house of York descended: the other, by reviving an exploded rumour, first propagated by John of Gant, that Edmond earl of Lancaster (to whom Henry's mother was heiress) was in reality the elder brother of king Edward I; though his parents, on account of his personal deformity, had imposed him on the world for the younger: and therefore Henry would be intitled to the crown, either as successor to Richard II, in case the entire male line was allowed a preference to the female; or, even prior to that unfortunate prince, if the crown could descend through a female, while an entire male line was existing.

/l Sandford's geneal. hist. 246.
/m Hist. C.L. c. 5.
/n Seld. tit. hon. 1. 3.

HOWEVER, as in Edward the third's time we find the parliament approving and affirming the right of the crown, as before stated, so in the reign of Henry IV they actually exerted their right of new-settling the succession to the crown. And this was done by the statute 7 Hen. IV. c. 2. whereby it is enacted, "that the inheritance of the crown and realms of England and France, and all other the king's dominions, shall be set and remain /o in the person of our sovereign lord the king, and in the heirs of his body issuing;" and prince Henry is declared heir apparent to the crown, to hold to him and the heirs of his body issuing, with remainder to lord Thomas, lord John, and lord Humphry, the king's sons, and the heirs
of their bodies respectively. Which is indeed nothing more than the law would have done before, provided Henry the fourth had been a rightful king. It however serves to shew that it was then generally understood, that the king and parliament had a right to new-model and regulate the succession to the crown. And we may observe, with what caution and delicacy the parliament then avoided declaring any sentiment of Henry's original title. However sir Edward Coke more than once expressly declares /p, that at the time of passing this act the right of the crown was in the descent from Philippa, daughter and heir of Lionel duke of Clarence. /o soit mys et demoerge. 
/p 4 Inst. 37, 205.

NEVERTHELESS the crown descended regularly from Henry IV to his son and grandson Henry V and VI; in the latter of whose reigns the house of York asserted their dormant title; and, after imbruing the kingdom in blood and confusion for seven years together, at last established it in the person of Edward IV. At his accession to the throne, after a breach of the succession that continued for three descents, and above threescore years, the distinction of a king de jure, and a king de facto began to be first taken; in order to indemnify such as had submitted to the late establishment, and to provide for the peace of the kingdom by confirming all honors conferred, and all acts done, by those who were now called the usurpers, not tending to the disherison of the rightful heir. In statute 1 Edw. IV. c. 1. the three Henrys are styled, "late kings of England successively in dede, and not of ryght." And, in all the charters which I have met with of king Edward, wherever he has occasion to speak of any of the line of Lancaster, he calls them "nuper de facto, et non de jure, reges Angliae."

EDWARD IV left two sons and a daughter; the eldest of which sons, king Edward V, enjoyed the regal dignity for a very short time, and was then deposed by Richard his unnatural uncle; who immediately usurped the royal dignity, having previously insinuated to the populace a suspicion of bastardy in the children of Edward IV, to make a shew of some hereditary title: after which he is generally believed to have murdered his two nephews; upon whose death the right of the crown devolved to their sister Elizabeth.

THE tyrannical reign of king Richard III gave occasion to Henry earl of Richmond to assert his title to the crown. A title the most remote and unaccountable that was ever set up, and which nothing could have given success to, but the universal detestation of the then usurper Richard. For, besides that he claimed under a descent from John of Gant, whose title was now exploded, the claim (such as it was) was through John earl of
Somerset, a bastard son, begotten by John of Gant upon Catherine Swinford. It is true, that, by an act of parliament 20 Ric. II, this son was, with others, legitimated and made inheritable to all lands, offices, and dignities, as if he had been born in wedlock: but still, with an express reservation of the crown, "excepta dignitate regali. /q"

/q 4 Inst. 36.

NOTWITHSTANDING all this, immediately after the battle of Bosworth field, he assumed the regal dignity; the right of the crown then being, as sir Edward Coke expressly declares /r, in Elizabeth, eldest daughter of Edward IV: and his possession was established by parliament, held the first year of his reign. In the act for which purpose, the parliament seems to have copied the caution of their predecessors in the reign of Henry IV; and therefore (as lord Bacon the historian of this reign observes) carefully avoided any recognition of Henry VII's right, which indeed was none at all; and the king would not have it by way of new law or ordinance, whereby a right might seem to be created and conferred upon him; and therefore a middle way was rather chosen, by way (as the noble historian expresses it) of establishment, and that under covert and indifferent words, "that the inheritance of the crown should rest, remain, and abide in king Henry VII and the heirs of his body:" thereby providing for the future, and at the same time acknowledging his present possession; but not determining either way, whether that possession was de jure or de facto merely.

However he soon after married Elizabeth of York, the undoubted heiress of the conqueror, and thereby gained (as sir Edward Coke /s declares) by much his best title to the crown. Whereupon the act made in his favour was so much disregarded, that it never was printed in our statute books.

/r 4 Inst. 37.  
/s Ibid.

HENRY the eighth, the issue of this marriage, succeeded to the crown by clear indisputable hereditary right, and transmitted it to his three children in successive order. But in his reign we at several times find the parliament busy in regulating the succession to the kingdom. And, first, by statute 25 Hen. VIII. c. 12. which recites the mischiefs, which have and may ensue by disputed titles, because no perfect and substantial provision hath been made by law concerning the succession; and then enacts, that the crown shall be entailed to his majesty, and the sons or heirs males of his body; and in default of such sons to the lady Elizabeth (who is declared to be the king's eldest issue female, in exclusion of the lady Mary, on account of her supposed illegitimacy by the divorce of her mother queen Catherine) and to the lady Elizabeth's heirs of her body; and so on from issue female to
issue female, and the heirs of their bodies, by course of inheritance according to their ages, as the crown of England hath been accustomed and ought to go, in case where there be heirs female of the same: and in default of issue female, then to the king's right heirs for ever. This single statute is an ample proof of all the four positions we at first set out with. BUT, upon the king's divorce from Ann Boleyn, this statute was, with regard to the settlement of the crown, repealed by statute 28 Hen. VIII. c. 7. wherein the lady Elizabeth is also, as well as the lady Mary, bastardized, and the crown settled on the king's children by queen Jane Seymour, and his future wives; and, in defect of such children, then with this remarkable remainder, to such persons as the king by letters patent, or last will and testament, should limit and appoint the same. A vast power; but, notwithstanding, as it was regularly vested in him by the supreme legislative authority, it was therefore indisputably valid. But this power was never carried into execution; for by statute 35 Hen. VIII. c. 1. the king's two daughters are legitimated again, and the crown is limited to prince Edward by name, after that to the lady Mary, and then to the lady Elizabeth, and the heirs of their respective bodies; which succession took effect accordingly, being indeed no other than the usual course of the law, with regard to the descent of the crown. BUT lest there should remain any doubt in the minds of the people, through this jumble of acts for limiting the succession, by statute 1 Mar. p. 2. c. 1. queen Mary's hereditary right to the throne is acknowledged and recognized in these words: "the crown of these realms is most lawfully, justly, and rightly descended and come to the queen's highness that now is, being the very, true, and undoubted heir and inheritrix thereof." And again, upon the queen's marriage with Philip of Spain, in the statute which settles the preliminaries of that match /t, the hereditary right to the crown is thus asserted and declared: "as touching the right of the queen's inheritance in the realm and dominions of England, the children, whether male or female, shall succeed in them, according to the known laws, statutes, and customs of the same." Which determination of the parliament, that the succession shall continue in the usual course, seems tacitly to imply a power of new-modelling and altering it, in case the legislature had thought proper. /t 1 Mar. p. 2. c. 2.

ON queen Elizabeth's accession, her right is recognized in still stronger terms than her sister's; the parliament acknowledging /u, "that the queen's highness is, and in very deed and of most mere right ought to be, by the laws of God, and the laws and statutes of this realm, our most lawful and
rightful sovereign liege lady and queen; and that her highness is rightly, lineally, and lawfully descended and come of the blood royal of this realm of England; in and to whose princely person, and to the heirs of her body lawfully to be begotten, after her, the imperial crown and dignity of this realm doth belong." And in the same reign, by statute 13 Eliz. c. 1. we find the right of parliament to direct the succession of the crown asserted in the most explicit words. "If any person shall hold, affirm, or maintain that the common laws of this realm, not altered by parliament, ought not to direct the right of the crown of England; or that the queen's majesty, with and by the authority of parliament, is not able to make laws and statutes of sufficient force and validity, to limit and bind the crown of this realm, and the descent, limitation, inheritance, and government thereof? such person, so holding, affirming, or maintaining, shall during the life of the queen be guilty of high treason; and after her decease shall be guilty of a misdemeanors, and forfeit his goods and chattels." Stat. 1 Eliz. c. 3.

ON the death of queen Elizabeth, without issue, the line of Henry VIII became extinct. It therefore became necessary to recur to the other issue of Henry VII, by Elizabeth of York his queen: whose eldest daughter Margaret having married James IV king of Scotland, king James the sixth of Scotland, and of England the first, was the lineal descendant from that alliance. So that in his person, as clearly as in Henry VIII, centered all the claims of different competitors from the conquest downwards, he being indisputably the lineal heir of the conqueror. And, what is still more remarkable, in his person also centered the right of the Saxon monarchs, which had been suspended from the conquest till his accession. For, as was formerly observed, Margaret the sister of Edgar Atheling, the daughter of Edward the outlaw, and granddaughter of king Edmund Ironside, was the person in whom the hereditary right of the Saxon kings, supposing it not abolished by the conquest, resided. She married Malcolm king of Scotland; and Henry II, by a descent from Matilda their daughter, is generally called the restorer of the Saxon line. But it must be remembered, that Malcolm by his Saxon queen had sons as well as daughters; and that the royal family of Scotland from that time downwards were the offspring of Malcolm and Margaret. Of this royal family king James the first was the direct lineal heir, and therefore united in his person every possible claim by hereditary right to the English, as well as Scottish throne, being the heir both of Egbert and William the conqueror.

AND it is no wonder that a prince of more learning than wisdom, who could deduce an hereditary title for more than eight hundred years, should
easily be taught by the flatterers of the times to believe there was something divine in this right, and that the finger of providence was visible in its preservation. Whereas, though a wise institution, it was clearly a human institution; and the right inherent in him no natural, but a positive right. And in this and no other light was it taken by the English parliament; who by statute 1 Jac. I. c. 1. did "recognize and acknowledge, that immediately upon the dissolution and decease of Elizabeth late queen of England, the imperial crown thereof did by inherent birthright, and lawful and undoubted succession, descend and come to his most excellent majesty, as being lineally, justly, and lawfully, next and sole heir of the blood royal of this realm." Not a word here of any right immediately derived from heaven: which, if it existed any where, must be sought for among the aborigines of the island, the ancient Britons; among whose princes indeed some have gone to search it for him, /w Elizabeth of York, the mother of queen Margaret of Scotland, was heiress of the house of Mortimer. And Mr Carte observes, that the house of Mortimer, in virtue of its descent from Gladys only sister to Lewellin ap Jorweth the great, had the true right to the principality of Wales. iii. 705. BUT, wild and absurd as the doctrine of divine right most undoubtedly is, it is still more astonishing, that when so many human hereditary rights had centered in this king, his son and heir king Charles the first should be told by those infamous judges, who pronounced his unparalleled sentence, that he was an elective prince; elected by his people, and therefore accountable to them, in his own proper person, for his conduct. The confusion, instability, and madness, which followed the fatal catastrophe of that pious and unfortunate prince, will be a standing argument in favour of hereditary monarchy to all future ages; as they proved at last to the then deluded people: who, in order to recover that peace and happiness which for twenty years together they had lost, in a solemn parliamentary convention of the states restored the right heir of the crown. And in the proclamation for that purpose, which was drawn up and attended by both houses /x, they declared, "that, according to their duty and allegiance, they did heartily, joyfully, and unanimously acknowledge and proclaim, that immediately upon the decease of our late sovereign lord king Charles, the imperial crown of these realms did by inherent birthright and lawful and undoubted succession descend and come to his most excellent majesty Charles the second, as being lineally, justly, and lawfully, next heir of the blood royal of this realm: and thereunto they most humbly and faithfully did submit and oblige themselves, their heirs and posterity for ever."
THUS I think it clearly appears, from the highest authority this nation is acquainted with, that the crown of England hath been ever an hereditary crown; though subject to limitations by parliament. The remainder of this chapter will consist principally of those instances, wherein the parliament has asserted or exercised this right of altering and limiting the succession; a right which, we have seen, was before exercised and asserted in the reigns of Henry IV, Henry VII, Henry VIII, queen Mary, and queen Elizabeth.

THE first instance, in point of time, is the famous bill of exclusion, which raised such a ferment in the latter end of the reign of king Charles the second. It is well known, that the purport of this bill was to have set aside the king’s brother and presumptive heir, the duke of York, from the succession, on the score of his being a papist; that it passed the house of commons, but was rejected by the lords; the king having also declared beforehand, that he never would be brought to consent to it. And from this transaction we may collect two things: 1. That the crown was universally acknowledged to be hereditary; and the inheritance indefeasible unless by parliament: else it had been needless to prefer such a bill. 2. That the parliament had a power to have defeated the inheritance: else such a bill had been ineffectual. The commons acknowledged the hereditary right then subsisting; and the lords did not dispute the power, but merely the propriety, of an exclusion. However, as the bill took no effect, king James the second succeeded to the throne of his ancestors; and might have enjoyed it during the remainder of his life, but for his own infatuated conduct, which (with other concurring circumstances) brought on the revolution in 1688.

THE true ground and principle, upon which that memorable event proceeded, was an entirely new case in politics, which had never before happened in our history; the abdication of the reigning monarch, and the vacancy of the throne thereupon. It was not a defeazance of the right of succession, and a new limitation of the crown, by the king and both houses of parliament: it was the act of the nation alone, upon an apprehension that there was no king in being. For in a full assembly of the lords and commons, met in convention upon this apprehended vacancy, both houses came to this resolution; "that king James the second, having endeavoured to subvert the constitution of the kingdom, by breaking the original contract between king and people; and, by the advice of jesuits and other wicked persons, having violated the fundamental laws; and having withdrawn himself out of this kingdom; has abdicated the
government, and that the throne is thereby vacant." Thus ended at once, by this sudden and unexpected vacancy of the throne, the old line of succession; which from the conquest had lasted above six hundred years, and from the union of the heptarchy in king Egbert almost nine hundred. The facts themselves thus appealed to, the king's endeavours to subvert the constitution by breaking the original contract, his violation of the fundamental laws, and his withdrawing himself out of the kingdom, were evident and notorious: and the consequences drawn from these facts (namely, that they amounted to an abdication of the government; which abdication did not affect only the person of the king himself, but also all his heirs, and rendered the throne absolutely and completely vacant) it belonged to our ancestors to determine. For, whenever a question arises between the society at large and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of the society itself: there is not upon earth any other tribunal to resort to. And that these consequences were fairly deduced from these facts, our ancestors have solemnly determined, in a full parliamentary convention representing the whole society. The reasons upon which they decided may be found at large in the parliamentary proceedings of the times; and may be matter of instructive amusement for us to contemplate, as a speculative point of history. But care must be taken not to carry this enquiry farther, than merely for instruction or amusement. The idea, that the consciences of posterity were concerned in the rectitude of their ancestors' decisions, gave birth to those dangerous political heresies, which so long distracted the state, but at length are all happily extinguished. I therefore rather choose to consider this great political measure, upon the solid footing of authority, than to reason in its favour from its justice, moderation, and expediency: because that might imply a right of dissenting or revolting from it, in case we should think it unjust, oppressive, or inexpedient. Whereas, our ancestors having most indisputably a competent jurisdiction to decide this great and important question, and having in fact decided it, it is now become our duty at this distance of time to acquiesce in their determination; being born under that establishment which was built upon this foundation, and obliged by every tie, religious as well as civil, to maintain it.


BUT, while we rest this fundamental transaction, in point of authority, upon grounds the least liable to cavil, we are bound both in justice and gratitude to add, that it was conducted with a temper and moderation which naturally arose from its equity that, however it might in some
respects go beyond the letter of our ancient laws, (the reason of which will more fully appear hereafter /z) it was agreeable to the spirit of our constitution, and the rights of human nature; and that though in other points (owing to the peculiar circumstances of things and persons) it was not altogether so perfect as might have been wished, yet from thence a new era commenced, in which the bounds of prerogative and liberty have been better defined, the principles of government more thoroughly examined and understood, and the rights of the subject more explicitly guarded by legal provisions, than in any other period of the English history. In particular, it is worthy observation that the convention, in this their judgment, avoided with great wisdom the wild extremes into which the visionary theories of some zealous republicans would have led them. They held that this misconduct of king James amounted to an endeavour to subvert the constitution, and not to an actual subversion, or total dissolution of the government, according to the principles of Mr Locke /a: which would have reduced the society almost to a state of nature; would have levelled all distinctions of honour, rank, offices, and property; would have annihilated the sovereign power, and in consequence have repealed all positive laws; and would have left the people at liberty to have erected a new system of state upon a new foundation of polity. They therefore very prudently voted it to amount to no more than an abdication of the government, and a consequent vacancy of the throne; whereby the government was allowed to subsist, though the executive magistrate was gone, and the kingly office to remain, though king James was no longer king. And thus the constitution was kept entire; which upon every sound principle of government must otherwise have fallen to pieces, had so principal and constituent a part as the royal authority been abolished, or even suspended.
/z See chapter 7.
/a on Gov. p. 2. c. 19.

THIS single postulatum, the vacancy of the throne, being once established, the rest that was then done followed almost of course. For, if the throne be at any time vacant (which may happen by other means besides that of abdication; as if all the bloodroyal should fail, without any successor appointed by parliament;) if, I say, a vacancy by any means whatsoever should happen, the right of disposing of this vacancy seems naturally to result to the lords and commons, the trustees and representatives of the nation. For there are no other hands in which it can so properly be intrusted; and there is a necessity of its being intrusted somewhere, else the whole frame of government must be dissolved and perish. The lords
and commons having therefore determined this main fundamental article, that there was a vacancy of the throne, they proceeded to fill up that vacancy in such manner as they judged the most proper. And this was done by their declaration of 12 February 1688, in the following manner: "that William and Mary, prince and princess of Orange, be, and be declared king and queen, to hold the crown and royal dignity during their lives, and the life of the survivor of them; and that the sole and full exercise of the regal power be only in, and executed by, the said prince of Orange, in the names of the said prince and princess, during their joint lives; and after their deceases the said crown and royal dignity to be to the heirs of the body of the said princess; and for default of such issue to the princess Anne of Denmark and the heirs of her body; and for default of such issue to the heirs of the body of the said prince of Orange."

Perh

Perhaps, upon the principles before established, the convention might (if they pleased) have vested the regal dignity in a family entirely new, and strangers to the royal blood: but they were too well acquainted with the benefits of hereditary succession, and the influence which it has by custom over the minds of the people, to depart any farther from the ancient line than temporary necessity and self-preservation required. They therefore settled the crown, first on king William and queen Mary, king James's eldest daughter, for their joint lives; then on the survivor of them; and then on the issue of queen Mary: upon failure of such issue, it was limited to the princess Anne, king James's second daughter, and her issue; and lastly, on failure of that, to the issue of king William, who was the grandson of Charles the first, and nephew as well as son in law of king James the second, being the son of Mary his only sister. This settlement included all the protestant posterity of king Charles I, except such other issue as king James might at any time have, which was totally omitted through fear of a popish succession. And this order of succession took effect accordingly.

The

These three princes therefore, king William, queen Mary, and queen Anne, did not take the crown by hereditary right or descent, but by way of donation or purchase, as the lawyers call it; by which they mean any method of acquiring an estate otherwise than by descent. The new settlement did not merely consist in excluding king James, and the person pretended to be prince of Wales, and then suffering the crown to descend in the old hereditary channel: for the usual course of descent was in some instances broken through; and yet the convention still kept it in their eye, and paid a great, though not total, regard to it. Let us see how the
succession would have stood, if no abdication had happened, and king James had left no other issue than his two daughters queen Mary and queen Anne. It would have stood thus: queen Mary and her issue; queen Anne and her issue; king William and his issue. But we may remember, that queen Mary was only nominally queen, jointly with her husband king William, who alone had the regal power; and king William was absolutely preferred to queen Anne, though his issue was postponed to hers. Clearly therefore these princes were successively in possession of the crown by a title different from the usual course of descent.

IT was towards the end of king William's reign, when all hopes of any surviving issue from any of these princes died with the duke of Gloucester, that the king and parliament thought it necessary again to exert their power of limiting and appointing the succession, in order to prevent another vacancy of the throne; which must have ensued upon their deaths, as no farther provision was made at the revolution, than for the issue of king William, queen Mary, and queen Anne. The parliament had previously by the statute of 1 W. & M. st. 2. c. 2. enacted, that every person who should be reconciled to, or hold communion with, the see of Rome, should profess the popish religion, or should marry a papist, should be excluded and for ever incapable to inherit, possess, or enjoy, the crown; and that in such case the people should be absolved from their allegiance, and the crown should descend to such persons, being protestants, as would have inherited the same, in case the person so reconciled, holding communion, professing, or marrying, were naturally dead. To act therefore consistently with themselves, and at the same time pay as much regard to the old hereditary line as their former resolutions would admit, they turned their eyes on the princess Sophia, electress and duchess dowager of Hanover, the most accomplished princess of her age. /c For, upon the impending extinction of the protestant posterity of Charles the first, the old law of regal descent directed them to recur to the descendants of James the first; and the princess Sophia, being the daughter of Elizabeth queen of Bohemia, who was the youngest daughter of James the first, was the nearest of the ancient blood royal, who was not incapacitated by professing the popish religion. On her therefore, and the heirs of her body, being protestants, the remainder of the crown, expectant on the death of king William and queen Anne without issue, was settled by statute 12 & 13 W. III. c. 2. And at the same time it was enacted, that whosoever should hereafter come to the possession of the crown, should join in the communion of the church of England as by law established.
SANDFORD, in his genealogical history, published A.D. 1677, speaking (page 535) of the princesses Elizabeth, Louisa, and Sophia, daughters of the queen of Bohemia, says, the first was reputed the most learned, the second the greatest artist, and the last one of the most accomplished ladies in Europe.

THIS is the last limitation of the crown that has been made by parliament: and these several actual limitations, from the time of Henry IV to the present, do clearly prove the power of the king and parliament to new-model or alter the succession. And indeed it is now again made highly penal to dispute it: for by the statute 6 Ann. c. 7. it is enacted, that if any person maliciously, advisedly, and directly, shall maintain by writing or printing, that the kings of this realm with the authority of parliament are not able to make laws to bind the crown and the descent thereof, he shall be guilty of high treason; or if he maintains the same by only preaching, teaching, or advised speaking, he shall incur the penalties of a praemunire.

THE princess Sophia dying before queen Anne, the inheritance thus limited descended on her son and heir king George the first; and, having on the death of the queen taken effect in his person, from him it descended to his late majesty king George the second; and from him to his grandson and heir, our present gracious sovereign, king George the third.

HENCE it is easy to collect, that the title to the crown is at present hereditary, though not quite so absolutely hereditary as formerly; and the common stock or ancestor, from whom the descent must be derived, is also different. Formerly the common stock was king Egbert; then William the conqueror; afterwards in James the first's time the two common stocks united, and so continued till the vacancy of the throne in 1688: now it is the princess Sophia, in whom the inheritance was vested by the new king and parliament. Formerly the descent was absolute, and the crown went to the next heir without any restriction: but now, upon the new settlement, the inheritance is conditional, being limited to such heirs only, of the body of the princess Sophia, as are protestant members of the church of England, and are married to none but protestants.

AND in this due medium consists, I apprehend, the true constitutional notion of the right of succession to the imperial crown of these kingdoms. The extremes, between which it steers, are each of them equally destructive of those ends for which societies were formed and are kept on foot. Where the magistrate, upon every succession, is elected by the people, and may by the express provision of the laws be deposed (if not punished) by his subjects, this may sound like the perfection of liberty, and look well enough when delineated on paper; but in practice will be
ever productive of tumult, contention, and anarchy. And, on the other hand, divine indefeasible hereditary right, when coupled with the doctrine of unlimited passive obedience, is surely of all constitutions the most thoroughly slavish and dreadful. But when such an hereditary right, as our laws have created and vested in the royal stock, is closely interwoven with those liberties, which, we have seen in a former chapter, are equally the inheritance of the subject; this union will form a constitution, in theory the most beautiful of any, in practice the most approved, and, I trust, in duration the most permanent. It was the duty of an expounder of our laws to lay this constitution before the student in its true and genuine light: it is the duty of every good Englishman to understand, to revere, to defend it.

CHAPTER THE FOURTH.

OF THE KINGS ROYAL FAMILY.

THE first and most considerable branch of the king's royal family, regarded by the laws of England, is the queen.

THE queen of England is either queen regent, queen consort, or queen dowager. The queen regent, regnant, or sovereign, is she who holds the crown in her own right; as the first (and perhaps the second) queen Mary, queen Elizabeth, and queen Anne; and such a one has the same powers, prerogatives, rights, dignities, and duties, as if she had been a king. This was observed in the entrance of the last chapter, and is expressly declared by statute 1 Mar. I. st. 3. c. 1. But the queen consort is the wife of the reigning king; and she by virtue of her marriage is participant of divers prerogatives above other women. /a

/Finch. L. 86.

AND, first, she is a public person, exempt and distinct from the king; and not, like other married women, so closely connected as to have lost all legal or separate existence so long as the marriage continues. For the queen is of ability to purchase lands, and to convey them, to make leases, to grant copyholds, and do other acts of ownership, without the concurrence of her lord; which no other married woman can do /b: a privilege as old as the Saxon era. /c She is also capable of taking a grant from the king, which no other wife is from her husband; and in this particular she agrees with the augusta, or piissima regina conjux divi imperatoris of the Roman laws; who, according to Justinian /d, was equally capable of making a grant to, and receiving one from, the emperor. The queen of England hath separate courts and officers distinct from the king's, not only in matters of ceremony, but even of law; and her attorney and solicitor general are intitled to a place within the bar of his majesty's courts, together with the king's counsel. /e She may also sue and be sued alone, without joining her
husband. She may also have a separate property in goods as well as lands, and has a right to dispose of them by will. In short, she is in all legal proceedings looked upon as a feme sole, and not as a feme covert; as a single, not as a married woman. /f For which the reason given by Sir Edward Coke is this: because the wisdom of the common law would not have the king (whose continual care and study is for the public, and circa ardua regni) to be troubled and disquieted on account of his wife’s domestic affairs; and therefore it vests in the queen a power of transacting her own concerns, without the intervention of the king, as if she was an unmarried woman.

/b 4 Rep. 23.
/d Cod. 5. 16. 26.
/e Selden tit. hon. 1. 6. 7.
/f Finch. L. 86. Co. Litt. 133.

THE queen hath also many exemptions, and minute prerogatives. For instance: she pays no toll /g; nor is she liable to any amercement in any court. /h But in general, unless where the law has expressly declared her exempted, she is upon the same footing with other subjects; being to all intents and purposes the king’s subject, and not his equal: in like manner as, in the imperial law, "augusta legibus soluta non est. /i"

/g Co. Litt. 133.
/h Finch. L. 185.
/i Ff. 1. 3. 31.

THE queen hath also some pecuniary advantages, which form her a distinct revenue: as, in the first place, she is intitled to an ancient perquisite called queen-gold or aurum reginae; which is a royal revenue, belonging to every queen consort during her marriage with the king, and due from every person who hath made a voluntary offering or fine to the king, amounting to ten marks or upwards, for and in consideration of any privileges, grants, licences, pardons, or other matter of royal favour conferred upon him by the king: and it is due in the proportion of one tenth part more, over and above the entire offering or fine made to the king; and becomes an actual debt of record to the queen’s majesty by the mere recording the fine. /k As, if an hundred marks of silver be given to the king for liberty to take in mortmain, or to have a fair, market, park, chase, or free warren; there the queen is intitled to ten marks in silver, or (what was formerly an equivalent denomination) to one mark in gold, by the name of queen-gold, or aurum reginae. /l But no such payment is due for any aids or subsidies granted to the king in parliament or convocation;
nor for fines imposed by courts on offenders, against their will; nor for voluntary presents to the king, without any consideration moving from him to the subject; nor for any sale or contract whereby the present revenues or possessions of the crown are granted away or diminished /m. /k Pryn. Aur. Reg. 2.

THE revenue of our ancient queens, before and soon after the conquest, seems to have consisted in certain reservations or rents out of the demesne lands of the crown, which were expressly appropriated to her majesty, distinct from the king. It is frequent in domesday-book, after specifying the rent due to the crown, to add likewise the quantity of gold or other renders reserved to the queen. /n These were frequently appropriated to particular purposes; to buy wool for her majesty's use /o, to purchase oil for her lamps /p, or to furnish her attire from head to foot /q, which was frequently very costly, as one single robe in the fifth year of Henry II stood the city of London in upwards of fourscore pounds. /r A practice somewhat similar to that of the eastern countries, where whole cities and provinces were specifically assigned to purchase particular parts of the queen's apparel. And, for a farther addition to her income, this duty of queen-gold is supposed to have been originally granted; those matters of grace and favour, out of which it arose, being frequently obtained from the crown by the powerful intercession of the queen. There are traces of its payment, though obscure ones, in the book of domesday and in the great pipe-roll of Henry the first. /t In the reign of Henry the second the manner of collecting it appears to have been well understood, and it forms a distinct head in the ancient dialogue of the exchequer /u written in the time of that prince, and usually attributed to Gervase of Tilbury. From that time downwards it was regularly claimed and enjoyed by all the queen consorts of England till the death of Henry VIII; though after the accession of the Tudor family the collecting of it seems to have been much neglected: and, there being no queen consort afterwards till the accession of James I, a period of near sixty years, its very nature and quantity became then a matter of doubt: and, being referred by the king to his then chief justices and chief baron, their report of it was so very unfavorable /w, that queen Anne (though she claimed it) yet never thought proper to exact it. In 1635, 11 Car. I, a time fertile of expedients for raising money upon dormant precedents in our old records (of which ship-money was a fatal instance) the king, at the petition of his queen Henrietta Maria, issued out his writ for levying it; but afterwards purchased it of his consort at the price of ten
thousand pounds; finding it, perhaps, too trifling and troublesome to levy. And when afterwards, at the restoration, by the abolition of the military tenures, and the fines that were consequent upon them, the little that legally remained of this revenue was reduced to almost nothing at all, in vain did Mr Prynne, by a treatise which does honour to his abilities as a painful and judicious antiquarian, endeavour to excite queen Catherine to revive this antiquated claim.


/o causa coadunandi lanam reginae. Domest. ibid.
/q Vicecomes Berkesire, xvi l. pro cappa reginae. (Mag. rot. pip. 19?22 Hen. II. ibid.) Civitas Lund. cordubanario reginae xx s. Mag. Rot. 2 Hen. II. Madox hist. exch. 419.
/r Pro roba ad opus reginae, quater xx l. & vi s. & viii d. Mag. Rot. 5 Hen. II. ibid. 250.
/s Solere aiunt barbaros reges Persarum ac Syrorum uxoribus civitates attribuere, hocmodo; haec civitas mulieri redimiculum praebat, haec in collum, haec in crines, &c. Cic. in Verrem. lib. 3. c. 33.
/u lib. 2. c. 26.
/w Mr Prynne, with some appearance of reason, insinuates, that their researches were very superficial. Aur. Reg. 125.

ANOTHER ancient perquisite belonging to the queen consort, mentioned by all our old writers /x and, therefore only, worthy notice, is this: that on the taking of a whale on the coasts, which is a royal fish, it shall be divided between the king and queen; the head only being the king's property, and the tail of it the queen's. "De sturgione observetur, quod rex illum habebit integrum: de balena vero sufficit, si rex habeat caput, et regina caudam." The reason of this whimsical division, as assigned by our ancient records /y, was, to furnish the queen's wardrobe with whalebone.

/x Bracton, l. 3. c. 3. Britton, c. 17. Fleta, l. 1. c. 45 & 46.

BUT farther: though the queen is in all respects a subject, yet, in point of the security of her life and person, she is put on the same footing with the king. It is equally treason (by the statute 25 Edw. III.) to compass or
imagine the death of our lady the king's companion, as of the king himself: and to violate, or defile, the queen consort, amounts to the same high crime; as well in the person committing the fact, as in the queen herself, if consenting. A law of Henry the eighth made it treason also for any woman, who was not a virgin, to marry the king without informing him thereof. But this law was soon after repealed; it trespassing too strongly, as well on natural justice, as female modesty. If however the queen be accused of any species of treason, she shall (whether consort or dowager) be tried by the house of peers, as queen Ann Boleyn was in 28 Hen. VIII. Stat. 33 Hen. VIII. c. 21.

THE husband of a queen regnant, as prince George of Denmark was to queen Anne, is her subject; and may be guilty of high treason against her: but, in the instance of conjugal sideling, he is not subjected to the same penal restrictions. For which the reason seems to be, that, if a queen consort is unfaithful to the royal bed, this may debase or bastardize the heirs to the crown; but no such danger can be consequent on the infidelity of the husband to a queen regnant.

A QUEEN dowager is the widow of the king, and as such enjoys most of the privileges belonging to her as queen consort. But it is not high treason to conspire her death; or to violate her chastity, for the same reason as was before alleged, because the succession to the crown is not thereby endangered. Yet still, pro dignitate regali, no man can marry a queen dowager without special licence from the king, on pain of forfeiting his lands and goods. This sir Edward Coke tells us was enacted in parliament in 6 Hen. IV, though the statute be not in print. But she, though an alien born, shall still be intitled to dower after the king's demise, which no other alien is. A queen dowager, when married again to a subject, doth not lose her regal dignity, as peeresses dowager do their peerage when they marry commoners. For Katherine, queen dowager of Henry V, though she married a private gentleman, Owen ap Meredith ap Theodore, commonly called Owen Tudor; yet, by the name of Katherine queen of England, maintained an action against the bishop of Carlisle. And so the queen of Navarre marrying with Edmond, brother to king Edward the first, maintained an action of dower by the name of queen of Navarre.

THE prince of Wales, or heir apparent to the crown, and also his royal consort, and the princess royal, or eldest daughter of the king, are likewise
peculiarly regarded by the laws. For, by statute 25 Edw. III, to compass or conspire the death of the former, or to violate the chastity of either of the latter, are as much high treason, as to conspire the death of the king, or violate the chastity of the queen. And this upon the same reason, as was before given; because the prince of Wales is next in succession to the crown, and to violate his wife might taint the blood royal with bastardy: and the eldest daughter of the king is also alone inheritable to the crown, in failure of issue male, and therefore more respected by the laws than any of her younger sisters; insomuch that upon this, united with other (feodal) principles, while our military tenures were in force, the king might levy an aid for marrying his eldest daughter, and her only. The heir apparent to the crown is usually made prince of Wales and earl of Chester, by special creation, and investiture; but, being the king's eldest son, he is by inheritance duke of Cornwall, without any new creation. /d /d 8 Rep. 1. Seld. titl. of hon. 2. 5.

THE younger sons and daughters of the king, who are not in the immediate line of succession, are little farther regarded by the laws, than to give them precedence before all peers and public officers as well ecclesiastical as temporal. This is done by the statute 31 Hen. VIII. c. 10. which enacts that no person, except the king's children, shall presume to sit or have place at the side of the cloth of estate in the parliament chamber; and that certain great officers therein named shall have precedence above all dukes, except only such as shall happen to be the king's son, brother, uncle, nephew (which sir Edward Coke /e explains to signify grandson or nepos) or brother's or sister's son. And in 1718, upon a question referred to all the judges by king George I, it was resolved by the opinion of ten against the other two, that the education and care of all the king's grandchildren while minors, and the care and approbation of their marriages, when grown up, did belong of right to his majesty as king of this realm, during their father's life. /f And this may suffice for the notice, taken by law, of his majesty's royal family.

/e 4 Inst. 362.

/f Fortesc. Al. 401-440.

CHAPTER THE FIFTH.

OF THE COUNCILS BELONGING TO THE KING.

THE third point of view, in which we are to consider the king, is with regard to his councils. For, in order to assist him in the discharge of his duties, the maintenance of his dignity, and the exertion of his prerogative, the law hath assigned him a diversity of councils to advise with.
1. THE first of these is the high court of parliament, whereof we have already treated at large.

2. SECONDLY, 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. /a Accordingly Bracton /b, speaking of the nobility of his time, says they might properly be called "consules, a consulendo; reges enim tales sibi associant ad consulendum." And in our law books /c it is laid down, that peers are created for two reasons; 1. Ad consulendum, 2. Ad defendendum regem: for which reasons the law gives them certain great and high privileges; such as freedom from arrests, &c., even when no parliament is sitting: because the law intends, that they are always assisting the king with their counsel for the commonwealth; or keeping the realm in safety by their prowess and valour.

/a Co. Litt. 110.
/b l. 1. c. 8.
/c 7 Rep. 34. 9 Rep. 49. 12 Rep. 96.

INSTANCES of conventions of the peers, to advise the king, have been in former times very frequent; though now fallen into disuse, by reason of the more regular meetings of parliament. Sir Edward Coke /d gives us an extract of a record, 5 Hen. IV, concerning an exchange of lands between the king and the earl of Northumberland, wherein the value of each was agreed to be settled by advice of parliament (if any should be called before the feast of St Lucia) or otherwise by advice of the grand council (of peers) which the king promises to assemble before the said feast, in case no parliament shall be called. Many other instances of this kind of meeting are to be found under our ancient kings: though the formal method of convoking them had been so long left off, that when king Charles I in 1640 issued out writs under the great seal to call a great council of all the peers of England to meet and attend his majesty at York, previous to the meeting of the long parliament, the earl of Clarendon /e mentions it as a new invention, not before heard of; that is, as he explains himself, so old, that it had not been practiced in some hundreds of years. But, though there had not so long before been an instance, nor has there been any since, of assembling them in so solemn a manner, yet, in cases of emergency, our princes have at several times thought proper to call for and consult as many of the nobility as could easily be got together: as was particularly the case with king James the second, after the landing of the prince of Orange;
and with the prince of Orange himself, before he called that convention parliament, which afterwards called him to the throne.
/d 1 Inst. 110.
/e Hist. b. 2.

BESIDES this general meeting, it is usually looked upon to be the right of each particular peer of the realm, to demand an audience of the king, and to lay before him, with decency and respect, such matters as he shall judge of importance to the public weal. And therefore, in the reign of Edward II, it was made an article of impeachment in parliament against the two Hugh Spencers, father and son, for which they were banished the kingdom, "that they by their evil covin would not suffer the great men of the realm, the king's good counsellors, to speak with the king, or to come near him; but only in the presence and hearing of the said Hugh the father and Hugh the son, or one of them, and at their will, and according to such things as pleased them. /f"
/f 4 Inst. 53.

3. A THIRD council belonging the king, are, according to sir Edward Coke /g, his judges of the courts of law, for law matters. And this appears frequently in our statutes, particularly 14 Ed. III. c. 5. and in other books of law. So that when the king's council is mentioned generally, it must be defined, particularized, and understood, secundum subjectam materiam; and, if the subject be of a legal nature, then by the king's council is understood his council for matters of law; namely, his judges. Therefore when by statute 16 Ric. II. c. 5. it was made a high offence to import into this kingdom any papal bulles, or other processes from Rome; and it was enacted, that the offenders should be attached by their bodies, and brought before the king and his council to answer for such offence; here, by the expression of king's council, were understood the king's judges of his courts of justice, the subject matter being legal: this being the general way of interpreting the word, council. /h
/g 1 Inst. 110.
/h 3 Inst. 125.

4. BUT the principal council belonging to the king is his privy council, which is generally called, by way of eminence, the council. And this, according to sir Edward Coke's description of it /i, is a noble, honorable, and reverend assembly, of the king and such as he wills to be of his privy council, in the king's court or palace. The king's will is the sole constituent of a privy counsellor; and this also regulates their number, which of ancient time was 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 in 1679 limited it to thirty: whereof fifteen were to be the principal officers of state, and those to be counsellors, virtute officii; and the other fifteen were composed of ten lords and five commoners of the king's choosing. /k But since that time the number has been much augmented, and now continues indefinite. At the same time also, the ancient office of lord president of the council was revived in the person of Anthony earl of Shaftsbury; an officer, that by the statute of 31 Hen. VIII. c. 10. has precedence next after the lord chancellor and lord treasurer.

/i 4 Inst. 53.
/k Temple's Mem. part 3.

PRIVY counsellors 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 chooses them, but subject to removal at his discretion.

THE duty of a privy counsellor appears from the oath of office /l, which consists of seven articles: 1. To advise the king according to the best of his cunning and discretion. 2. To advise for the king's honour and good of the public, without partiality through affection, love, meed, doubt, or dread. 3. To keep the king's counsel secret. 4. To avoid corruption. 5. To help and strengthen the execution of what shall be there resolved. 6. To withstand all persons who would attempt the contrary. And, lastly, in general, 7. To observe, keep, and do all that a good and true counsellor ought to do to his sovereign lord.

/l 4 Inst. 54.

THE power of the privy council is to enquire into all offences against the government, and to commit the offenders into custody, in order to take their trial in some of the courts of law. But their jurisdiction is only to enquire, and not to punish: and the persons committed by them are entitled to their habeas corpus by statute 16 Car. I. c. 10. as much as if committed by an ordinary justice of the peace. And, by the same statute, the court of starchamber, and the court of requests, both of which consisted of privy counsellors, were dissolved; and it was declared illegal for them to take cognizance of any matter of property, belonging to the subjects of this kingdom. But, in plantation or admiralty causes, which arise out of the jurisdiction of this kingdom, and in matters of lunacy and ideocy (being a special flower of the prerogative) with regard to these, although they may eventually involve questions of extensive property, the privy council continues to have cognizance, being the court of appeal in
such causes: or, rather, the appeal lies to the king's majesty himself, assisted by his privy council.

AS to the qualifications of members to sit this board: any natural born subject of England is capable of being a member of the privy council; taking the proper oaths for security of the government, and the test for security of the church. But, in order to prevent any persons under foreign attachments from insinuating themselves into this important trust, as happened in the reign of king William in many instances, it is enacted by the act of settlement, /m that 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 privileges of privy counsellors, as such, consist principally in the security which the law has given them against attempts and conspiracies to destroy their lives. For, by statute 3 Hen. VII. c. 14. if any of the king's servants of his household, conspire or imagine to take away the life of a privy counsellor, it is felony, though nothing be done upon it. And the reason of making this statute, sir Edward Coke /n tells us, was because such servants have greater and readier means, either by night or by day, to destroy such as be of great authority, and near about the king: and such a conspiracy was, just before this parliament, made by some of king Henry the seventh's household servants, and great mischief was like to have ensued thereupon. This extends only to the king's menial servants. But the statute 9 Ann. c. 16. goes farther, and enacts, that any persons that shall unlawfully attempt to kill, or shall unlawfully assault, and strike, or wound, any privy counsellor in the execution of his office, shall be felons, and suffer death as such. This statute was made upon the daring attempt of the sieur Guiscard, who stabbed Mr Harley, afterwards earl of Oxford, with a penknife, when under examination for high crimes in a committee of the privy council.

Inst. 38.

THE dissolution of the privy council depends upon the king's pleasure; and he may, whenever he thinks proper, discharge any particular member, or the whole of it, and appoint another. By the common law also it was dissolved ipso facto by the king's demise; as deriving all its authority from him. But now, to prevent the inconveniences of having no council in being at the accession of a new prince, it is enacted by statute 6 Ann. c. 7. that the privy council shall continue for six months after the demise of the crown, unless sooner determined by the successor.

CHAPTER THE SIXTH.
OF THE KINGS DUTIES.
I PROCEED next to the duties, incumbent on the king by our constitution; in consideration of which duties his dignity and prerogative are established by the laws of the land: it being a maxim in the law, that protection and subjection are reciprocal. And these reciprocal duties are what, I apprehend, were meant by the convention in 1688, when they declared that king James had broken the original contract between king and people. But however, as the terms of that original contract were in some measure disputed, being alleged to exist principally in theory, and to be only deducible by reason and the rules of natural law; in which deduction different understandings might very considerably differ; it was, after the revolution, judged proper to declare these duties expressly; and to reduce that contract to a plain certainty. So that, whatever doubts might be formerly raised by weak and scrupulous minds about the existence of such an original contract, they must now entirely cease; especially with regard to every prince, who has reigned since the year 1688.

THE principal duty of the king is, to govern his people according to law. Nec regibus infinita aut libera potestas, was the constitution of our German ancestors on the continent. And this is not only consonant to the principles of nature, of liberty, of reason, and of society, but has always been esteemed an express part of the common law of England, even when prerogative was at the highest. "The king," saith Bracton, who wrote under Henry III, "ought not to be subject to man, but to God, and to the law; for the law maketh the king. Let the king therefore render to the law, what the law has invested in him with regard to others; dominion, and power: for he is not truly king, where will and pleasure rules, and not the law." And again; "the king also hath a superior, namely God, and also the law, by which he was made a king." Thus Bracton: and Fortescue also, having first well distinguished between a monarchy absolutely and despotically regal, which is introduced by conquest and violence, and a political or civil monarchy, which arises from mutual consent; (of which last species he asserts the government of England to be) immediately lays it down as a principle, that "the king of England must rule his people according to the decrees of the laws thereof: insomuch that he is bound by an oath at his coronation to the observance and keeping of his own laws."

But, to obviate all doubts and difficulties concerning this matter, it is expressly declared by statute 12 & 13 W. III. c. 2. that "the laws of England are the birthright of the people thereof; and all the kings and queens who shall ascend the throne of this realm ought to administer the government
of the same according to the said laws; and all their officers and ministers ought to serve them respectively according to the same: and therefore all the laws and statutes of this realm, for securing the established religion, and the rights and liberties of the people thereof, and all other laws and statutes of the same now in force, are by his majesty, by and with the advice and consent of the lords spiritual and temporal and commons, and by authority of the same, ratified and confirmed accordingly."

"Tac. de M.G. c. 7.
/c l. 1. c. 8.
/d l. 2. c. 16. 3.
/e c. 9. & 34.

AND, as to the terms of the original contract between king and people, these I apprehend to be now couched in the coronation oath, which by the statute 1 W. & M. st. 1. c. 6. is to be administered to every king and queen, who shall succeed to the imperial crown of these realms, by one of the archbishops or bishops of the realm, in the presence of all the people; who on their parts do reciprocally take the oath of allegiance to the crown. This coronation oath is conceived in the following terms:

"The archbishop or bishop shall say, Will you solemnly promise and swear to govern the people of this kingdom of England, and the dominions thereto belonging, according to the statutes in parliament agreed on, and the laws and customs of the same The king or queen shall say, I solemnly promise so to do.

"Archbishop or bishop. Will you to your power cause law and justice, in mercy, to be executed in all your judgments King or queen. I will.

"Archbishop or bishop. Will you to the utmost of your power maintain the laws of God, the true profession of the gospel, and the protestant reformed religion established by the law? And will you preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them, or any of them King or queen. All this I promise to do.

"After this the king or queen, laying his or her hand upon the holy gospels, shall say, The things which I have here before promised I will perform and keep: so help me God. And then shall kiss the book."

THIS is the form of the coronation oath, as it is now prescribed by our laws: the principal articles of which appear to be at least as ancient as the mirror of justices /f, and even as the time of Bracton /g: but the wording of it was changed at the revolution, because (as the statute alleges) the oath itself had been framed in doubtful words and expressions, with relation to ancient laws and constitutions at this time unknown. /h However, in what
form soever it be conceived, this is most indisputably a fundamental and original express contract; though doubtless the duty of protection is impliedly as much incumbent on the sovereign before coronation as after: in the same manner as allegiance to the king becomes the duty of the subject immediately on the descent of the crown, before he has taken the oath of allegiance, or whether he ever takes it at all. This reciprocal duty of the subject will be considered in its proper place. At present we are only to observe, that in the king’s part of this original contract are expressed all the duties that a monarch can owe to his people; viz. to govern according to law: to execute judgment in mercy: and to maintain the established religion.

/f cap. 1. 2.
/g l. 3. tr. 1. c. 9.
/h In the old folio abridgment of the statutes, printed by Lettou and Machlinia in the reign of Edward IV, (penes me) there is preserved a copy of the old coronation oath; which, as the book is extremely scarce, I will here transcribe. Ceo est le serement que le roy jurre a soun coronement: que il gardera et meintenera lez droitez et lez franchisez de seynt esglise grauntez auncientembroz dez droitez roys christiens d'Englorere, et quil gardera toutez sez terrez honoures et dignitees droiturexlx et franks del coron du roialme d'Englorere en tout maner dentiere sanz null maner damenusement, et lez droitez dispergez dilapidez ou perduz de la corone a soun poiair reappeller en launcien estate, et quil gardera le peas de seynt esglise et al clergie et al people de bon accorde, et quil face faire en toutez sez jugementez owel et droit justice oue discretion et misericorde, et quil grauntera a tenure lez leyes et custumez du roialme, et a soun poiair lez face garder et affermer que lez gentez du people avont faitez et esliez, et les malveys leyz et custumes de tout oustera, et ferme peas et establrieb al people de soun roialme en ceo garde esgardera a soun poiair: come Dieu luy aide. Tit. sacramentum regis. fol. m. ij.

CHAPTER THE SEVENTH.
OF THE KINGS PREROGATIVE.
IT was observed in a former chapter /a, that one of the principal bulwarks of civil liberty, or (in other words) of the British constitution, was the limitation of the king’s prerogative by bounds so certain and notorious, that it is impossible he should ever exceed them, without the consent of the people, on the one hand; or without, on the other, a violation of that original contract, which in all states impliedly, and in ours most expressly, subsists between the prince and the subject. It will now be our business to consider this prerogative minutely; to demonstrate its necessity in general;
and to mark out in the most important instances its particular extent and restrictions: from which considerations this conclusion will evidently follow, that the powers which are vested in the crown by the laws of England, are necessary for the support of society; and do not intrench any farther on our natural liberties, than is expedient for the maintenance of our civil.

/a chap. 1. page 137.

THERE cannot be a stronger proof of that genuine freedom, which is the boast of this age and country, than the power of discussing and examining, with decency and respect, the limits of the king's prerogative. A topic, that in some former ages was thought too delicate and sacred to be profaned by the pen of a subject. It was ranked among the arcana imperii; and, like the mysteries of the bona dea, was not suffered to be pried into by any but such as were initiated in its service: because perhaps the exertion of the one, like the solemnities of the other, would not bear the inspexion of a rational and sober enquiry. The glorious queen Elizabeth herself made no scruple to direct her parliaments to abstain from discoursing of matters of state; /b and it was the constant language of this favorite princess and her ministers, that even that august assembly "ought not to deal, to judge, or to meddle, with her majesty's prerogative royal. /c" And her successor, king James the first, who had imbibed high notions of the divinity of regal sway, more than once laid it down in his speeches, that "as it is atheism and blasphemy in a creature to dispute what the deity may do, so it is presumption and sedition in a subject to dispute what a king may do in the height of his power: good christians, he adds, will be content with God's will, revealed in his word; and good subjects will rest in the king's will, revealed in his law. /d"

/b Dewes. 479.
/c Ibid. 645.
/d King James's works. 557, 531.

BUT, whatever might be the sentiments of some of our princes, this was never the language of our ancient constitution and laws. The limitation of the regal authority was a first and essential principle in all the Gothic systems of government established in Europe; though gradually driven out and overborne, by violence and chicane, in most of the kingdoms on the continent. We have seen, in the preceding chapter, the sentiments of Bracton and Fortescue, at the distance of two centuries from each other. And sir Henry Finch, under Charles the first, after the lapse of two centuries more, though he lays down the law of prerogative in very strong and emphatical terms, yet qualifies it with a general restriction, in regard
to the liberties of the people. "The king hath a prerogative in all things, that are not injurious to the subject; for in them all it must be remembered, that the king's prerogative stretcheth not to the doing of any wrong. /e" Nihilenim aliud potest rex, nisi id solum quod de jure potest. /f
And here it may be some satisfaction to remark, how widely the civil law differs from our own, with regard to the authority of the laws over the prince, or (as a civilian would rather have expressed it) the authority of the prince over the laws. It is a maxim of the English law, as we have seen from Bracton, that "rex debet esse sub lege, quia lex facit regem:" the imperial law will tell us, that "in omnibus, imperatoris excipitur fortuna; cui ipsas leges Deus subject." We shall not long hesitate to which of them to give the preference, as most conducive to those ends for which societies were framed, and are kept together; especially as the Roman lawyers themselves seem to be sensible of the unreasonableness of their own constitution. "Decet tamen principem," says Paulus, "servare leges, quibus ipse solutus est." This is at once laying down the principle of despotic power, and at the same time acknowledging its absurdity.
/e Finch. L. 84, 85.
/f Bract. l. 3. tr. 1. c. 9.
/g Nov. 105. 2.
/h Ff. 32. 1. 23.

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. It signifies, in its etymology, (from prae and rogo) something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects: for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer. And therefore Finch /i lays it down as a maxim, that the prerogative is that law in case of the king, which is law in no case of the subject.
/i Finch. L. 85.

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 by itself, without reference to any other extrinsic circumstance; as, the right of sending ambassadors, of creating peers, and of making war or peace.
But such prerogatives as are incidental bear always 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. These, and an infinite number of other instances, will better be understood, when we come regularly to consider the rules themselves, to which these incidental prerogatives are exceptions. And therefore we will at present only dwell upon the king's substantive or direct prerogatives. THESE substantive or direct prerogatives may again be divided into three kinds: being such as regard, first, the king's royal character; secondly, his royal authority; and, lastly, his royal income. These are necessary, to secure reverence to his person, obedience to his commands, and an affluent supply for the ordinary expenses of government; without all of which it is impossible to maintain the executive power in due independence and vigor. Yet, in every branch of this large and extensive dominion, our free constitution has interposed such seasonable checks and restrictions, as may curb it from trampling on those liberties, which it was meant to secure and establish. The enormous weight of prerogative (if left to itself, as in arbitrary government it is) spreads havoc and destruction among all the inferior movements: but, when balanced and bridled (as with us) by its proper counterpoise, timely and judiciously applied, its operations are then equable and regular, it invigorates the whole machine, and enables every part to answer the end of its construction.

IN the present chapter we shall only consider the two first of these divisions, which relate to the king's political character and authority; or, in other words, his dignity and regal power; to which last the name of prerogative is frequently narrowed and confined. The other division, which forms the royal revenue, will require a distinct examination; according to the known distribution of the feodal writers, who distinguish the royal prerogatives into the majora and minora regalia, in the latter of which classes the rights of the revenue are ranked. For, to use their own words, "majora regalia imperii praeeminentiam spectant; minora vero ad commodum pecuniarium immediate attinent; et haec proprie fiscalia sunt, et ad jus fisci pertinent. /k"

/k Peregrin. de jure fisc. l. 1. c. i. num. 9.

FIRST, then, of the royal dignity. Under every monarchical establishment, it is necessary to distinguish the prince from his subjects, not only by the
outward pomp and decorations of majesty, but also by ascribing to him certain qualities, as inherent in his royal capacity, distinct from and superior to those of any other individual in the nation. For, though a philosophical mind will consider the royal person merely as one man appointed by mutual consent to preside over many others, and will pay him that reverence and duty which the principles of society demand, yet the mass of mankind will be apt to grow insolent and refractory, if taught to consider their prince as a man of no greater perfection than themselves. The law therefore ascribes to the king, in his high political character, not only large powers and emoluments which form his prerogative and revenue, but likewise certain attributes of a great and transcendent nature; by which the people are led to consider him in the light of a superior being, and to pay him that awful respect, which may enable him with greater ease to carry on the business of government. This is what I understand by the royal dignity, the several branches of which we will now proceed to examine.

I. AND, first, the law ascribes to the king the attribute of sovereignty, or pre-eminence. "Rex est vicarius," says Bracton /l, "et minister Dei in terra: omnis quidem sub eo est, et ipse sub nullo nisi tantum sub Deo." He is said to have imperial dignity, and in charters before the conquest is frequently styled basileus and imperator, the titles respectively assumed by the emperors of the east and west /m. His realm is declared to be an empire, and his crown imperial, by many acts of parliament, particularly the statutes 24 Hen. VIII. c. 12. and 25 Hen. VIII. c. 28; which at the same time declare the king to be the supreme head of the realm in matters both civil and ecclesiastical, and of consequence inferior to no man upon earth, dependent on no man, accountable to no man. Formerly there prevailed a ridiculous notion, propagated by the German and Italian civilians, that an emperor could do many things which a king could not, (as the creation of notaries and the like) and that all kings were in some degree subordinate and subject to the emperor of Germany or Rome. The meaning therefore of the legislature, when it uses these terms of empire and imperial, and applies them to the realm of England, is only to assert that our king is equally sovereign and independent within these his dominions, as any emperor is in his empire; and owes no kind of subjection to any other potentate upon earth. Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had
power to command the execution of it: but who, says Finch, shall command the king? Hence it is likewise, that by law the person of the king is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary: for no jurisdiction upon earth has power to try him in a criminal way; much less to condemn him to punishment. If any foreign jurisdiction had this power, as was formerly claimed by the pope, the independence of the kingdom would be no more: and, if such a power were vested in any domestic tribunal, there would soon be an end of the constitution, by destroying the free agency of one of the constituent parts of the sovereign legislative power.

/l  l. 1. c. 8.
/m Seld. tit. of hon. 1. 2.
/n Finch. L. 83.

ARE then, it may be asked, the subjects of England totally destitute of remedy, in case the crown should invade their rights, either by private injuries, or public oppressions? To this we may answer, that the law has provided a remedy in both cases.

AND, first, as to private injuries; if any person has, in point of property, a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion. /o And this is entirely consonant to what is laid down by the writers on natural law. "A subject, says Puffendorf, so long as he continues a subject, hath no way to oblige his prince to give him his due, when he refuses it; though no wise prince will ever refuse to stand to a lawful contract. And, if the prince gives the subject leave to enter an action against him, upon such contract, in his own courts, the action itself proceeds rather upon natural equity, than upon the municipal laws." For the end of such action is not to compel the prince to observe the contract, but to persuade him. And, as to personal wrongs; it is well observed by Mr Locke, "the harm which the sovereign can do in his own person not being likely to happen often, nor to extend itself far; nor being able by his single strength to subvert the laws, nor oppress the body of the people, (should any prince have so much weakness and ill nature as to endeavour to do it) the inconveniency therefore of some particular mischiefs, that may happen sometimes, when a heady prince comes to the throne, are well recompensed by the peace of the public and security of the government, in the person of the chief magistrate being thus set out of the reach of danger."

/o Finch. L. 255.
/p Law of N. and N. l. 8. c. 10.
/q on Gov. p. 2. 205.
NEXT, as to cases of ordinary public oppression, where the vitals of the constitution are not attacked, the law hath also assigned a remedy. For, as a king cannot misuse his power, without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished. The constitution has therefore provided, by means of indictments, and parliamentary impeachments, that no man shall dare to assist the crown in contradiction to the laws of the land. But it is at the same time a maxim in those laws, that the king himself can do no wrong; since it would be a great weakness and absurdity in any system of positive law, to define any possible wrong, without any possible redress.
FOR, as to such public oppressions as tend to dissolve the constitution, and subvert the fundamentals of government, they are cases which the law will not, out of decency, suppose; being incapable of distrusting those, whom it has invested with any part of the supreme power; since such distrust would render the exercise of that power precarious and impracticable. For, whereever the law expresses its distrust of abuse of power, it always vests a superior coercive authority in some other hand to correct it; the very notion of which destroys the idea of sovereignty. If therefore (for example) the two houses of parliament, or either of them, had avowedly a right to animadvert on the king, or each other, or if the king had a right to animadvert on either of the houses, that branch of the legislature, so subject to animadversion, would instantly cease to be part of the supreme power; the balance of the constitution would be overturned; and that branch or branches, in which this jurisdiction resided, would be completely sovereign. The supposition of law therefore is, that neither the king nor either house of parliament (collectively taken) is capable of doing any wrong; since in such cases the law feels itself incapable of furnishing any adequate remedy. For which reason all oppressions, which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any stated rule, or express legal provision: but, if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies.
INDEED, it is found by experience, that whenever the unconstitutional oppressions, even of the sovereign power, advance with gigantic strides and threaten desolation to a state, mankind will not be reasoned out of the feelings of humanity; nor will sacrifice their liberty by a scrupulous adherence to those political maxims, which were originally established to preserve it. And therefore, though the positive laws are silent, experience will furnish us with a very remarkable case, wherein nature and reason
prevailed. When king James the second invaded the fundamental constitution of the realm, the convention declared an abdication, whereby the throne was rendered vacant, which induced a new settlement of the crown. And so far as this precedent leads, and no farther, we may now be allowed to lay down the law of redress against public oppression. If therefore any future prince should endeavour to subvert the constitution by breaking the original contract between king and people, should violate the fundamental laws, and should withdraw himself out of the kingdom; we are now authorized to declare that this conjunction of circumstances would amount to an abdication, and the throne would be thereby vacant. But it is not for us to say, that any one, or two, of these ingredients would amount to such a situation; for there our precedent would fail us. In these therefore, or other circumstances, which a fertile imagination may furnish, since both law and history are silent, it becomes us to be silent too; leaving to future generations, whenever necessity and the safety of the whole shall require it, the exertion of those inherent (though latent) powers of society, which no climate, no time, no constitution, no contract, can ever destroy or diminish.

II. BESIDES the attribute of sovereignty, the law also ascribes to the king, in his political capacity, absolute perfection. The king can do no wrong. Which ancient and fundamental maxim is not to be understood, as if every thing transacted by the government was of course just and lawful, but 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. And, 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. /r
/r Plowd. 487.

THE king, moreover, is not only incapable of doing wrong, but even of thinking wrong: he can never mean to do an improper thing: in him is no folly or weakness. And therefore, if the crown should be induced to grant any franchise or privilege to a subject contrary to reason, or in any wise prejudicial to the commonwealth, or a private person, the law will not suppose the king to have meant either an unwise or an injurious action, but declares that the king was deceived in his grant; and thereupon such grant is rendered void, merely upon the foundation of fraud and deception, either by or upon those agents, whom the crown has thought
proper to employ. For the law will not cast an imputation on that magistrate whom it entrusts with the executive power, as if he was capable of intentionally disregarding his trust: but attributes to mere imposition (to which the most perfect of sublunary beings must still continue liable) those little inadvertencies, which, if charged on the will of the prince, might lessen him in the eyes of his subjects.

YET still, notwithstanding this personal perfection, which the law attributes to the sovereign, the constitution has allowed a latitude of supposing the contrary, in respect to both houses of parliament; each of which, in its turn, hath exerted the right of remonstrating and complaining to the king even of those acts of royalty, which are most properly and personally his own; such as messages signed by himself, and speeches delivered from the throne. And yet, such is the reverence which is paid to the royal person, that though the two houses have an undoubted right to consider these acts of state in any light whatever, and accordingly treat them in their addresses as personally proceeding from the prince, yet, among themselves, (to preserve the more perfect decency, and for the greater freedom of debate) they usually suppose them to flow from the advice of the administration. But the privilege of canvassing thus freely the personal acts of the sovereign (either directly, or even through the medium of his reputed advisers) belongs to no individual, but is confined to those august assemblies: and there too the objections must be proposed with the utmost respect and deference. One member was sent to the tower /s, for suggesting that his majesty's answer to the address of the commons contained "high words, to fright the members out of their duty;" and another /t, for saying that a part of the king's speech "seemed rather to be calculated for the meridian of Germany than Great Britain."

/s Com. Journ. 18 Nov. 1685.

IN farther pursuance of this principle, the law also determines that in the king can be no negligence, or laches, and therefore no delay will bar his right. Nullum tempus occurrit regi 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. /u In the king also can be no stain or corruption of blood: for if the heir to the crown were attainted of treason or felony, and afterwards the crown should descend to him, this would purge the attainder ipso facto, /w And therefore when Henry VII, who as earl of Richmond stood attainted, came to the crown, it was not thought necessary to pass an act of parliament to reverse this attainder; because, as
lord Bacon in his history of that prince informs us, it was agreed that the
assumption of the crown had at once purged all attainders. Neither can the
king in judgment of law, as king, 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. /x By a statute indeed, 28 Hen. VIII. c. 17. power was given to future
kings to rescind and revoke all acts of parliament that should be made
while they were under the age of twenty four: but this was repealed by the
statute 1 Edw. VI. c. 11. so far as related to that prince; and both statutes
are declared to be determined by 24 Geo. II. c. 24. It hath also been usually
thought prudent, when the heir apparent has been very young, to appoint
a protector, guardian, or regent, for a limited time: but the very necessity
of such extraordinary provision is sufficient to demonstrate the truth of
that maxim of the common law, that in the king is no minority; and
therefore he hath no legal guardian. /y
/u Finch. L. 82. Co. Litt. 90 b.
w Finch. L. 82.
x Co. Litt. 43.
y The methods of appointing this guardian or regent have been so
various, and the duration of his power so uncertain, that from thence
alone it may be collected that his office is unknown to the common law;
and therefore (as sir Edward Coke says, 4 Inst. 58.) the surest way is to
have him made by authority of the great council in parliament. The earl of
Pembroke by his own authority assumed, in very troublesome times, the
regency of Henry III, who was then only nine years old; but was declared
of full age by the pope at seventeen, confirmed the great charter at
eighteen, and took upon him the administration of the government at
twenty. A guardian and council of regency were named for Edward III, by
the parliament which deposed his father; the young king being then
fifteen, and not assuming the government till three years after. When
Richard II succeeded at the age of eleven, the duke of Lancaster took upon
him the management of the kingdom, till the parliament met, which
appointed a nominal council to assist him. Henry V on his death-bed
named a regent and a guardian for his infant son Henry VI, then nine
months old: but the parliament altered his disposition, and appointed a
protector and council, with a special limited authority. Both these princes
remained in a state of pupillage till the age of twenty three. Edward V, at
the age of thirteen, was recommended by his father to the care of the duke
of Glocester; who was declared protector by the privy council. The statutes
25 Hen. VIII. c. 12. and 28 Hen. VIII. c. 7. provided, that the successor, if a
male and under eighteen, or if a female and under sixteen, should be till such age in the governance of his or her natural mother, (if approved by the king) and such other counsellors as his majesty should by will or otherwise appoint: and he accordingly appointed his sixteen executors to have the government of his son, Edward VI, and the kingdom; which executors elected the earl of Hertford protector. The statute 24 Geo. II. c. 24. in case the crown should descend to any of the children of Frederick late prince of Wales under the age of eighteen, appoints the princess dowager; and that of 5 Geo. III. c. 27. in case of a like descent to any of his present majesty's children, empowers the king to name either the queen, the princess dowager, or any descendant of king George II residing in this kingdom; to be guardian and regent, till the successor attains such age, assisted by a council of regency: the powers of them all being expressly defined and set down in the several acts.

III. A THIRD attribute of the king's majesty is his perpetuity. The law ascribes to him, in his political capacity, an absolute immortality. The king never dies. Henry, Edward, or George may die; but 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. 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 coronae: an expression which signifies merely a transfer of property; for, as is observed in Plowden /z, 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. Thus too, when Edward the fourth, in the tenth year of his reign, was driven from his throne for a few months by the house of Lancaster, this temporary transfer of his dignity was denominated his demise; and all process was held to be discontinued, as upon a natural death of the king. /a

/z Plowd. 177. 234.
/a M. 49 Hen. VI. pl. 1-8.

WE are next to consider those branches of the royal prerogative, which invest this our sovereign lord, thus all-perfect and immortal in his kingly capacity, with a number of authorities and powers; in the exertion whereof consists the executive part of government. This is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength and dispatch. Were it placed in many hands, it would be subject to many wills:
many wills, if disunited and drawing different ways, create weakness in a
government: and to unite those several wills, and reduce them to one, is a
work of more time and delay than the exigencies of state will afford. The
king of England is therefore not only the chief, but properly the sole,
magistrate of the nation; all others acting by commission from, and in due
subordination to him: in like manner as, upon the great revolution in the
Roman state, all the powers of the ancient magistracy of the
commonwealth were concentred in the new emperor; so that, as Gravina
expresses it, "in ejus unius persona veteris reipublicae vis atque
majestas per cumulatas magistratum potestates exprimebatur."
Orig. 1. 105.
AFTER what has been premised in this chapter, I shall not (I trust) be
considered as an advocate for arbitrary power, when I lay it down as a
principle, that in the exertion of lawful prerogative, the king is and ought
to be absolute; that is, so far absolute, that there is no legal authority that
can either delay or resist him. He may reject what bills, may make what
treaties, may coin what money, may create what peers, may pardon what
offences he pleases: unless where the constitution hath expressly, or by
evident consequence, laid down some exception or boundary; declaring,
that thus far the prerogative shall go and no farther. For otherwise the
power of the crown would indeed be but a name and a shadow, insufficient
for the ends of government, if, where its jurisdiction is clearly established
and allowed, any man or body of men were permitted to disobey it, in the
ordinary course of law: I say, in the ordinary course of law; for I do not
now speak of those extraordinary recourses to first principles, which are
necessary when the contracts of society are in danger of dissolution, and
the law proves too weak a defence against the violence of fraud or
oppression. And yet the want of attending to this obvious distinction has
occasioned these doctrines, of absolute power in the prince and of national
resistance by the people, to be much misunderstood and perverted by the
advocates for slavery on the one hand, and the demagogues of faction on
the other. The former, observing the absolute sovereignty and
transcendent dominion of the crown laid down (as it certainly is) most
strongly and emphatically in our lawbooks, as well as our homilies, have
denied that any case can be excepted from so general and positive a rule;
forgetting how impossible it is, in any practical system of laws, to point out
beforehand those eccentrical remedies, which the sudden emergence of
national distress may dictate, and which that alone can justify. On the
other hand, over-zealous republicans, feeling the absurdity of unlimited
passive obedience, have fancifully (or sometimes factiously) gone over to
the other extreme: and, because resistance is justifiable to the person of
the prince when the being of the state is endangered, and the public voice
proclaims such resistance necessary, they have therefore allowed to every
individual the right of determining this expedience, and of employing
private force to resist even private oppression. A doctrine productive of
anarchy, and (in consequence) equally fatal to civil liberty as tyranny itself.
For civil liberty, rightly understood, consists in protecting the rights of
individuals by the united force of society: society cannot be maintained,
and of course can exert no protection, without obedience to some
sovereign power: and obedience is an empty name, if every individual has
a right to decide how far he himself shall obey.
IN the exertion therefore of those prerogatives, which the law has given
him, the king is irresistible and absolute, according to the forms of the
constitution. And yet, if the consequence of that exertion be manifestly to
the grievance or dishonour of the kingdom, the parliament will call his
advisers to a just and severe account. For prerogative consisting (as Mr
Locke /c has well defined it) in the discretionary power of acting for the
public good, where the positive laws are silent, if that discretionary power
be abused to the public detriment, such prerogative is exerted in an
unconstitutional manner. Thus the king may make a treaty with a foreign
state, which shall irrevocably bind the nation; and yet, when such treaties
have been judged pernicious, impeachments have pursued those
ministers, by whose agency or advice they were concluded.
/c on Gov. 2. 166.
THE prerogatives of the crown (in the sense under which we are now
considering them) respect either this nation's intercourse with foreign
nations, or its own domestic government and civil polity.
WITH regard to foreign concerns, the king is the delegate or
representative of his people. It is impossible that the individuals of a state,
in their collective capacity, can transact the affairs of that state with
another community equally numerous as themselves. Unanimity must be
wanting to their measures, and strength to the execution of their counsels.
In the king therefore, as in a center, all the rays of his people are united,
and form by that union a consistency, splendor, and power, that make him
feared and respected by foreign potentates; who would scruple to enter
into any engagements, that must afterwards be revised and ratified by a
popular assembly. What is done by the royal authority, with regard to
foreign powers, is the act of the whole nation: what is done without the
king's concurrence is the act only of private men. And so far is this point
carried by our law, that it hath been held /d, that should all the subjects of
England make war with a king in league with the king of England, without the royal assent, such war is no breach of the league. And, by the statute 2 Hen. V. c. 6. any subject committing acts of hostility upon any nation in league with the king, was declared to be guilty of high treason: and, though that act was repealed by the statute 20 Hen. VI. c. 11. so far as relates to the making this offence high treason, yet still it remains a very great offence against the law of nations, and punishable by our laws, either capitally or otherwise, according to the circumstances of the case.

I. THE king therefore, considered as the representative of his people, has the sole power of sending ambassadors to foreign states, and receiving ambassadors at home. This may lead us into a short enquiry, how far the municipal laws of England intermeddle with or protect the rights of these messengers from one potentate to another, whom we call ambassadors. THE rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitutions. For, as they represent the persons of their respective masters, who owe no subjection to any laws but those of their own country, their actions are not subject to the control of the private law of that state, wherein they are appointed to reside. He that is subject to the coercion of laws is necessarily dependent on that power by whom those laws were made; but an ambassador ought to be independent of every power, except that by which he is sent; and of consequence ought not to be subject to the mere municipal laws of that nation, wherein he is to exercise his functions. If he grossly offends, or makes an ill use of his character, he may be sent home and accused before his master; /e who is bound either to do justice upon him, or avow himself the accomplice of his crimes. /f But there is great dispute among the writers on the laws of nations, whether this exemption of ambassadors extends to all crimes, as well natural as positive; or whether it only extends to such as are mala prohibitae, as coining, and not to those that are mala in se, as murder. /g Our law seems to have formerly taken in the restriction, as well as the general exemption. For it has been held, both by our common lawyers and civilians /h, that an ambassador is privileged by the law of nature and nations; and yet, if he commits any offence against the law of reason and nature, he shall lose his privilege /i: and that therefore, if an ambassador conspires the death of the king in whose land he is, he may be condemned and executed for treason; but if he commits any other species of treason, it is otherwise, and he must be sent to his own kingdom. /k And these positions seem to be built upon good appearance of reason. For since, as
we have formerly shewn, all municipal laws act in subordination to the primary law of nature, and, where they annex a punishment to natural crimes, are only declaratory of and auxiliary to that law; therefore to this natural, universal rule of justice ambassadors, as well as other men, are subject in all countries; and of consequence it is reasonable that wherever they transgress it, there they shall be liable to make atonement. /l But, however these principles might formerly obtain, the general practice of Europe seems now to have adopted the sentiments of the learned Grotius, that the security of ambassadors is of more importance than the punishment of a particular crime /m. And therefore few, if any, examples have happened within a century past, where an ambassador has been punished for any offence, however atrocious in its nature. /e As was done with count Gyllenberg the Swedish minister to Great Britain, A.D. 1716. /f Sp. L. 26. 21. /g Van Leeuwen in Ff. 50. 7. 17. Barbeyrac's Puff. l. 8. c. 9. 9. & 17. Van Bynkershoek de foro legator. c. 17, 18, 19. /h 1 Roll. Rep. 175. 3 Bulstr. 27. /i 4 Inst. 153. /k 1 Roll. Rep. 185. /l Foster's reports. 188. /m Securitas legatorum utilitati quae ex poena est praeponderat. de jur. b. & p. 2. 18. 4. 4. IN respect to civil suits, all the foreign jurists agree, that neither an ambassador, nor any of his train or comites, can be prosecuted for any debt or contract in the courts of that kingdom wherein he is sent to reside. Yet sir Edward Coke maintains, that, if an ambassador make a contract which is good jure gentium, he shall answer for it here. /n And the truth is, we find no traces in our lawbooks of allowing any privilege to ambassadors or their domestics, even in civil suits, previous to the reign of queen Anne; when an ambassador from Peter the great, czar of Muscovy, was actually arrested and taken out of his coach in London, in 1708, for debts which he had there contracted. This the czar resented very highly, and demanded (we are told) that the officers who made the arrest should be punished with death. But the queen (to the amazement of that despotic court) directed her minister to inform him, "that the law of England had not yet protected ambassadors from the payment of their lawful debts; that therefore the arrest was no offence by the laws; and that she could inflict no punishment upon any, the meanest, of her subjects, unless warranted by the law of the land. /o" To satisfy however the clamours of the foreign
ministers (who made it a common cause) as well as to appease the wrath of Peter, a new statute was enacted by parliament, reciting the arrest which had been made, "in contempt of the protection granted by her majesty, contrary to the law of nations, and in prejudice of the rights and privileges, which ambassadors and other public ministers have at all times been thereby possessed of, and ought to be kept sacred and inviolable:"

wherefore it enacts, that for the future all process whereby the person of any ambassador, or of his domestic or domestic servant, may be arrested, or his goods distreined or seised, shall be utterly null and void; and the persons prosecuting, soliciting, or executing such process shall be deemed violaters of the law of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment as the lord chancellor and the two chief justices, or any two of them, shall think fit. But it is expressly provided, that no trader, within the description of the bankrupt laws, who shall be in the service of any ambassador, shall be privileged or protected by this act; nor shall any one be punished for arresting an ambassador's servant, unless his name be registred with the secretary of state, and by him transmitted to the sheriffs of London and Middlesex.

Exceptions, that are strictly conformable to the rights of ambassadors, as observed in the most civilized countries. And, in consequence of this statute, thus enforcing the law of nations, these privileges are now usually allowed in the courts of common law.

/o Mod. Un. Hist. xxxv. 454.
/p A copy of the act made upon this occasion, very elegantly engrossed and illuminated, was sent him to Moscow as a present.
/q 7 Ann. c. 12.
/r Saepe quaesitum est an comitum numero et jure habendi sunt, qui legatum comitantur, non ut instructor fiat legatio, sed unice ut lucro suo consulant, institores forte et mercatores. Et, quamvis hos saepe defenderint et comitum loco habere voluerint legati, apparet tamen satis eo non pertinere, qui in legati legationisve officio non sunt. Quum autem ea res nonnunquam turbas dederit, optimo exemplo in quibusdam aulis olim receptum suit, ut legatus teneretur exhibere nomenclaturam comitum suorum. Van Bynkersh. c. 15. prope finem.
/s Fitzg. 200. Stra. 797.

II. IT is also the king's prerogative to make treaties, leagues, and alliances with foreign states and princes. For it is by the law of nations essential to the goodness of a league, that it be made by the sovereign power; and then it is binding upon the whole community: and in England the
sovereign power, quoad hoc, is vested in the person of the king. Whatever contracts therefore he engages in, no other power in the kingdom can legally delay, resist, or annul. And yet, lest this plenitude of authority should be abused to the detriment of the public, the constitution (as was hinted before) hath here interposed a check, by the means of parliamentary impeachment, for the punishment of such ministers as advise or conclude any treaty, which shall afterwards be judged to derogate from the honour and interest of the nation.

III. UPON the same principle the king has also the sole prerogative of making war and peace. For it is held by all the writers on the law of nature and nations, that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power: and this right is given up not only by individuals, but even by the entire body of people, that are under the dominion of a sovereign. It would indeed be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him against his will in a state of war. Whatever hostilities therefore may be committed by private citizens, the state ought not to be affected thereby; unless that should justify their proceedings, and thereby become partner in the guilt. Such unauthorized voluntiers in violence are not ranked among open enemies, but are treated like pirates and robbers: according to that rule of the civil law; hostes hi sunt qui nobis, aut quibus nos, publice bellum decrevimus: caeteri latrones aut praedones sunt. And the reason which is given by Grotius, why according to the law of nations a denunciation of war ought always to precede the actual commencement of hostilities, is not so much that the enemy may be put upon his guard, (which is matter rather of magnanimity than right) but that it may be certainly clear that the war is not undertaken by private persons, but by the will of the whole community; whose right of willing is in this case transferred to the supreme magistrate by the fundamental laws of society. So that, in order to make a war completely effectual, it is necessary with us in England that it be publicly declared and duly proclaimed by the king's authority; and, then, all parts of both the contending nations, from the highest to the lowest, are bound by it. And, wherever the right resides of beginning a national war, there also must reside the right of ending it, or the power of making peace. And the same check of parliamentary impeachment, for improper or inglorious conduct, in beginning, conducting, or concluding a national war, is in general
sufficient to restrain the ministers of the crown from a wanton or injurious exertion of this great prerogative.

/Puff. l. 8. c. 6. 8. and Barbeyr. in loc.

/Ff. 50. 16. 118.

/x de jur. b. & p. l. 3. c. 3. 11.

IV. BUT, as the delay of making war may sometimes be detrimental to individuals who have suffered by depredations from foreign potentates, our laws have in some respect armed the subject with powers to impel the prerogative; by directing the ministers of the crown to issue letters of marque and reprisal upon due demand: the prerogative of granting which is nearly related to, and plainly derived from, that other of making war; this being indeed only an incomplete state of hostilities, and generally ending in a formal denunciation of war. These letters are grantable by the law of nations /y, whenever the subjects of one state are oppressed and injured by those of another; and justice is denied by that state to which the oppressor belongs. In this case letters of marque and reprisal (words in themselves synonimous and signifying a taking in return) may be obtained, in order to seise the bodies or goods of the subjects of the offending state, until satisfaction be made, wherever they happen to be found. Indeed this custom of reprisals seems dictated by nature herself; and accordingly we find in the most ancient times very notable instances of it. /z But here the necessity is obvious of calling in the sovereign power, to determine when reprisals may be made; else every private sufferer would be a judge in his own cause. And, in pursuance of this principle, it is with us declared by the statute 4 Hen. V. c. 7. that, if any subjects of the realm are oppressed in time of truce by any foreigners, the king will grant marque in due form, to all that feel themselves grieved. Which form is thus directed to be observed: the sufferer must first apply to the lord privy-seal, and he shall make out letters of request under the privy seal; and, if, after such request of satisfaction made, the party required do not within convenient time make due satisfaction or restitution to the party grieved, the lord chancellor shall make him out letters of marque under the great seal; and by virtue of these he may attack and seise the property of the aggressor nation, without hazard of being condemned as a robber or pirate.

/y Grot. de jur. b. & p. l. 3. c. 2. 4 & 5.

/z See the account given by Nestor, in the eleventh book of the Iliad, of the reprisals made by himself on the Epeian nation; from whom he took a multitude of cattle, as a satisfaction for a prize won at the Elian games by his father Neleus, and for debts due to many private subjects of the Pylian
kingdom: out of which booty the king took three hundred head of cattle for his own demand, and the rest were equitably divided among the other creditors.

V. UPON exactly the same reason stands the prerogative of granting safe-conducts, without which by the law of nations no member of one society has a right to intrude into another. And therefore Puffendorf very justly resolves /a, that it is left in the power of all states, to take such measures about the admission of strangers, as they think convenient; those being ever excepted who are driven on the coasts by necessity, or by any cause that deserves pity or compassion. Great tenderness is shewn by our laws, not only to foreigners in distress (as will appear when we come to speak of shipwrecks) 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 himself upon the high seas, or send his goods and merchandise 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 /b must be granted under the king's great seal and inrolled in chancery, or else are of no effect: the king being supposed the best judge of such emergencies, as may deserve exception from the general law of arms.

/a Law of N. and N. b. 3. c. 3. 9.
/b 15 Hen. VI. c. 3. 18 Hen. VI. c. 8. 20 Hen. VI. c. 1.

indeed the law of England, as a commercial country, pays a very particular regard to foreign merchants in innumerable instances. One I cannot omit to mention: that by magna carta /c it is provided, that all merchants (unless publicly prohibited beforehand) shall have safe conduct to depart from, to come into, to tarry in, and to go through England, for the exercise of merchandize, without any unreasonable imposts, except in time of war: and, if a war breaks out between us and their country, they shall be attached (if in England) without harm of body or goods, till the king or his chief justiciary be informed how our merchants are treated in the land with which we are at war; and, if ours be secure in that land, they shall be secure in ours. This seems to have been a common rule of equity among all the northern nations; for we learn from Stiernhook /d, that it was a maxim among the Goths and Swedes, "quam legem exteri nobis posuere, eandem illis ponemus." But it is somewhat extraordinary, that it should have found a place in magna carta, a mere interior treaty between
the king and his natural-born subjects; which occasions the learned Montesquieu to remark with a degree of admiration, "that the English have made the protection of foreign merchants one of the articles of their national liberty." But indeed it well justifies another observation which he has made, "that the English know better than any other people upon earth, how to value at the same time these three great advantages, religion, liberty, and commerce." Very different from the genius of the Roman people; who in their manners, their constitution, and even in their laws, treated commerce as a dishonorable employment, and prohibited the exercise thereof to persons of birth, or rank, or fortune: and equally different from the bigotry of the canonists, who looked on trade as inconsistent with christianity, and determined at the council of Melfi, under pope Urban II, A.D. 1090, that it was impossible with a safe conscience to exercise any traffic, or follow the profession of the law.

THESE are the principal prerogatives of the king, respecting this nation's intercourse with foreign nations; in all of which he is considered as the delegate or representative of his people. But in domestic affairs he is considered in a great variety of characters, and from thence there arises an abundant number of other prerogatives.

I. FIRST, he is a constituent part of the supreme legislative power; and, as such, has the prerogative of rejecting such provisions in parliament, as he judges improper to be passed. The expediency of which constitution has before been evinced at large. I shall only farther remark, that the king is not bound by any act of parliament, unless he be named therein by special and particular words. The most general words that can be devised ("any person or persons, bodies politic, or corporate, &c.") affect not him in the least, if they may tend to restrain or diminish any of his rights or interests.
For it would be of most mischievous consequence to the public, if the strength of the executive power were liable to be curtailed without its own express consent, by constructions and implications of the subject. Yet where an act of parliament is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights of the crown, it is said to be binding as well upon the king as upon the subject: and, likewise, the king may take the benefit of any particular act, though he be not especially named.

II. THE king is considered, in the next place, as the generalissimo, or the first in military command, within the kingdom. The great end of society is to protect the weakness of individuals by the united strength of the community: and the principal use of government is to direct that united strength in the best and most effectual manner, to answer the end proposed. Monarchical government is allowed to be the fittest of any for this purpose: it follows therefore, from the very end of its institution, that in a monarchy the military power must be trusted in the hands of the prince.

IN this capacity therefore, of general of the kingdom, the king has the sole power of raising and regulating fleets and armies. Of the manner in which they are raised and regulated I shall speak more, when I come to consider the military state. We are now only to consider the prerogative of enlisting and of governing them: which indeed was disputed and claimed, contrary to all reason and precedent, by the long parliament of king Charles I; but, upon the restoration of his son, was solemnly declared by the statute 13 Car. II. c. 6. to be in the king alone: for that the sole supreme government and command of the militia within all his majesty's realms and dominions, and of all forces by sea and land, and of all sorts and places of strength, ever was and is the undoubted right of his majesty, and his royal predecessors, kings and queens of England; and that both or either house of parliament cannot, nor ought to, pretend to the same.

THIS statute, it is obvious to observe, extends not only to fleets and armies, but also to sorts, and other places of strength, within the realm; the sole prerogative as well of erecting, as manning and governing of which, belongs to the king in his capacity of general of the kingdom: and all lands were formerly subject to a tax, for building of castles wherever the king thought proper. This was one of the three things, from
contributing to the performance of which no lands were exempted; and therefore called by our Saxon ancestors the trinoda necessitas: sc. pontis reparatio, arcis constructio, et expeditio contra hostem. /p And this they were called upon to do so often, that, as sir Edward Coke from M. Paris assures us /q, there were in the time of Henry II 1115 castles subsisting in England. The inconvenience of which, when granted out to private subjects, the lordly barons of those times, was severely felt by the whole kingdom; for, as William of Newbury remarks in the reign of king Stephen, "erant in Anglia quodammodo tot reges vel potius tyranni, quot domini castellorum:" but it was felt by none more sensibly than by two succeeding princes, king John and king Henry III. And therefore, the greatest part of them being demolished in the barons' wars, the kings of after times have been very cautious of suffering them to be rebuilt in a fortified manner: and sir Edward Coke lays it down /r, that no subject can build a castle, or house of strength imbatteled, or other fortress defensible, without the licence of the king; for the danger which might ensue, if every man at his pleasure did it.

/o 2 Inst. 30.
/q 2 Inst. 31.
/r 1 Inst. 5.

TO this branch of the prerogative may be referred the power vested in his majesty, by statutes 12 Car. II. c. 4. and 29 Geo. II. c. 16. of prohibiting the exportation of arms or ammunition out of this kingdom, under severe penalties: and likewise the right which the king has, whenever he sees proper, of confining his subjects to stay within the realm, or of recalling them when beyond the seas. By the common law /s, every man may go out of the realm for whatever cause he pleaseth, without obtaining the king's leave; provided he is under no injunction of staying at home: (which liberty was expressly declared in king John's great charter, though left out in that of Henry III) but, because that every man ought of right to defend the king and his realm, therefore the king at his pleasure may command him by his writ that he go not beyond the seas, or out of the realm without licence; and if he do the contrary, he shall be punished for disobeying the king's command. Some persons there anciently were, that, by reason of their stations, were under a perpetual prohibition of going abroad without licence obtained; among which were reckoned all peers, on account of their being counsellors of the crown; all knights, who were bound to defend the kingdom from invasions; all ecclesiastics, who were expressly confined by cap. 4. of the constitutions of Clarendon, on account of their
attachment in the times of popery to the see of Rome; all archers and other
artificers, lest they should instruct foreigners to rival us in their several
trades and manufactures. This was law in the times of Britton /t, who
wrote in the reign of Edward I: and sir Edward Coke /u gives us many
instances to this effect in the time of Edward III. In the succeeding reign
the affair of travelling wore a very different aspect: an act of parliament
being made /w, forbidding all persons whatever to go abroad without
licence; except only the lords and other great men of the realm; and true
and notable merchants; and the king's soldiers. But this act was repealed
by the statute 4 Jac. I. c. 1. And at present every body has, or at least
assumes, the liberty of going abroad when he pleases. Yet undoubtedly if
the king, by writ of ne exeat regnum, under his great seal or privy seal,
thinks proper to prohibit him from so doing; or if the king sends a writ to
any man, when abroad, commanding his return; and in either case the
subject disobeys; it is a high contempt of the king's prerogative, for which
the offender's lands shall be seised till he return; and then he is liable to
fine and imprisonment. /x
/s F.N.B. 85.
/t c. 123.
/u 3 Inst. 175.
/w 5 Ric. II. c. 2.
/x 1 Hawk. P.C. 22.

III. ANOTHER capacity, in which the king is considered in domestic
affairs, is as the fountain of justice and general conservator of the peace of
the kingdom. By the fountain of justice the law does not mean the author
or original, but only the distributor. Justice is not derived from the king, as
from his free gift; but he is the steward of the public, to dispense it to
whom it is due. /y He is not the spring, but the reservoir; from whence
right and equity are conducted, by a thousand channels, to every
individual. The original power of judicature, by the fundamental principles
of society, is lodged in the society at large: but as it would be impracticable
to render complete justice to every individual, by the people in their
collective capacity, therefore every nation has committed that power to
certain select magistrates, who with more ease and expedition can hear
and determine complaints; and in England this authority has
immemorially been exercised by the king or his substitutes. He therefore
has alone the right of erecting courts of judicature: for, though the
constitution of the kingdom hath entrusted him with the whole executive
power of the laws, it is impossible, as well as improper, that he should
personally carry into execution this great and extensive trust: it is
consequently necessary, that courts should be erected, to assist him in executing this power; and equally necessary, that, if erected, they should be erected by his authority. And hence it is, that all jurisdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers.

/y Ad hoc autem creatus est et electus, ut justitiam faciat universis. Bract. l. 3. tr. 1.c. 9.

IT is probable, and almost certain, that in very early times, before our constitution arrived at its full perfection, our kings in person often heard and determined causes between party and party. But at present, by the long and uniform usage of many ages, our kings have delegated their whole judicial power to the judges of their several courts; which are the grand depositary of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the crown itself cannot now alter but by act of parliament. /z And, in order to maintain both the dignity and independence of the judges in the superior courts, it is enacted by the statute 13 W. III. c. 2. that their commissions shall be made (not, as formerly, durante bene placito, but) quamdiu bene se gesserint, and their salaries ascertained and established; but that it may be lawful to remove them on the address of both houses of parliament. And now, by the noble improvements of that law in the statute of 1 Geo. III. c. 23. enacted at the earnest recommendation of the king himself from the throne, the judges are continued in their offices during their good behaviour, notwithstanding any demise of the crown (which was formerly held /a immediately to vacate their seats) and their full salaries are absolutely secured to them during the continuance of their commissions: his majesty having been pleased to declare, that "he looked upon the independence and uprightness of the judges, as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the crown. /b"

/z 2 Hawk. P.C. 2.
/a Ld Raym. 747.

IN criminal proceedings, or prosecutions for offences, it would still be a higher absurdity, if the king personally sate in judgment; because in regard to these he appears in another capacity, that of prosecutor. All offences are either against the king's peace, or his crown and dignity; and are so laid in every indictment. For, though in their consequences they
generally seem (except in the case of treason and a very few others) to be rather offences against the kingdom than the king; yet, as the public, which is an invisible body, has delegated all its power and rights, with regard to the execution of the laws, to one visible magistrate, all affronts to that power, and breaches of those rights, are immediately offences against him, to whom they are so delegated by the public. He is therefore the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law. And this notion was carried so far in the old Gothic constitution, (wherein the king was bound by his coronation oath to conserve the peace) that in case of any forcible injury offered to the person of a fellow subject, the offender was accused of a kind of perjury, in having violated the king's coronation oath; dicerat fregisse juramentum regis juratum. And hence also arises another branch of the prerogative, that of pardoning offences; for it is reasonable that he only who is injured should have the power of forgiving. And therefore, in parliamentary impeachments, the king has no prerogative of pardoning: because there the commons of Great Britain are in their own names the prosecutors, and not the crown; the offence being for the most part avowedly taken to be done against the public. Of prosecutions and pardons I shall treat more at large hereafter; and only mention them here, in this cursory manner, to shew the constitutional grounds of this power of the crown, and how regularly connected all the links are in this vast chain of prerogative.

Stiernh. de jure Goth. l. 3. c. 3. A notion somewhat similar to this may be found in the mirror. c. 1. 5.

IN this distinct and separate existence of the judicial power, in a peculiar body of men, nominated indeed, but not removeable at pleasure, by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an over-balance for the legislative. For which reason, by the statute of 16 Car. I. c. 10. which abolished the court of star chamber, effectual care is taken to remove all judicial power out of the hands of the king's privy council; who, as then was evident from recent instances, might soon be inclined to pronounce that for law, which was
most agreeable to the prince or his officers. Nothing therefore is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state. And indeed, that the absolute power, claimed and exercised in a neighbouring nation, is more tolerable than that of the eastern empires, is in great measure owing to their having vested the judicial power in their parliaments, a body separate and distinct from both the legislative and executive: and, if ever that nation recovers its former liberty, it will owe it to the efforts of those assemblies. In Turkey, where every thing is centered in the sultan or his ministers, despotic power is in its meridian, and wears a more dreadful aspect.

A CONSEQUENCE of this prerogative is the legal ubiquity of the king. His majesty, in the eye of the law, is always present in all his courts, though he cannot personally distribute justice. /d His judges are the mirror by which the king's image is reflected. It is the regal office, and not the royal person, that is always present in court, always ready to undertake prosecutions, or pronounce judgment, for the benefit and protection of the subject. And from this ubiquity it follows, that the king can never be nonsuit; /e for a nonsuit is the desertion of the suit or action by the non-appearance of the plaintiff in court. For the same reason also, in the forms of legal proceedings, the king is not said to appear by his attorney, as other men do; for he always appears in contemplation of law in his own proper person. /f

/d Fortesc. c. 8. 2 Inst. 186.
/e Co. Litt. 139.
/f Finch. L. 81.

FROM the same original, of the king's being the fountain of justice, we may also deduce the prerogative of issuing proclamations, which is vested in the king alone. These proclamations have then a binding force, when (as Sir Edward Coke observes /g) they are grounded upon and enforce the laws of the realm. For, though the making of laws is entirely the work of a distinct part, the legislative branch, of the sovereign power, yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate. And therefore his constitutions or edicts, concerning these points, which we call proclamations, are binding upon the subject, where they do not either contradict the old laws, or tend to establish new ones; but only enforce the execution of such laws as are already in being, in such manner as the king shall judge necessary. Thus the established law is, that the king may prohibit any of his subjects from leaving the realm: a proclamation therefore forbidding this in general for three weeks, by laying an embargo.
upon all shipping in time of war /h, will be equally binding as an act of parliament, because founded upon a prior law. A proclamation for disarming papists is also binding, being only in execution of what the legislature has first ordained: but a proclamation for allowing arms to papists, or for disarming any protestant subjects, will not bind; because the first would be to assume a dispensing power, the latter a legislative one; to the vesting of either of which in any single person the laws of England are absolutely strangers. Indeed by the statute 31 Hen. VIII. c. 8. it was enacted, that the king’s proclamations should have the force of acts of parliament: a statute, which was calculated to introduce the most despotic tyranny; and which must have proved fatal to the liberties of this kingdom, had it not been luckily repealed in the minority of his successor, about five years after. /i
/g 3 Inst. 162.
/h 4 Mod. 177, 179.
/i Stat. 1 Edw. VI. c. 12.

IV. THE king is likewise the fountain of honour, of office, and of privilege: and this in a different sense from that wherein he is styled the fountain of justice; for here he is really the parent of them. It is impossible that government can be maintained without a due subordination of rank; that the people may know and distinguish such as are set over them, in order to yield them their due respect and obedience; and also that the officers themselves, being encouraged by emulation and the hopes of superiority, may the better discharge their functions: and the law supposes, that no one can be so good a judge of their several merits and services, as the king himself who employs them. It has therefore intrusted with him the sole power of conferring dignities and honours, in confidence that he will bestow them upon none, but such as deserve 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 creations 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. All offices under the crown carry in the eye of the law an honour along with them; because they imply a superiority of parts and abilities, being supposed to be always filled with those that are most able to execute them. And, on the other hand, all honours in their original had duties or offices annexed to them: an earl, comes, was the conservator or governor of a county; and a knight, miles, was bound to attend the king in
his wars. For the same reason therefore that honours are in the disposal of
the king, offices ought to be so likewise; and as the king may create new
titles, so may he create new offices: but with this restriction, that he cannot
create new offices with new fees annexed to them, nor annex new fees to
old offices; for this would be a tax upon the subject, which cannot be
imposed but by act of parliament /k Wherefore, in 13 Hen. IV, a new office
being created by the king's letters patent for measuring cloths, with a new
fee for the same, the letters patent were, on account of the new fee,
revoked and declared void in parliament.
/k 2 Inst. 533.
UPON the same, or a like reason, the king has also the prerogative of
conferring privileges upon private persons. Such as granting place or
precedence to any of his subjects, as shall seem good to his royal wisdom
/l: or such as converting aliens, or persons born out of the king's
dominions, into denizens; whereby some very considerable privileges of
natural-born subjects are conferred upon them. 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. Of aliens, denizens, natural-born, and naturalized subjects, I
shall speak more largely in a subsequent chapter; as also of corporations at
the close of this book of our commentaries. I now only mention them
incidentally, in order to remark the king's prerogative of making them;
which is grounded upon this foundation, that the king, having the sole
administration of the government in his hands, is the best and the only
judge, in what capacities, with what privileges, and under what
distinctions, his people are the best qualified to serve, and to act under
him. A principle, which was carried so far by the imperial law, that it was
determined to be the crime of sacrilege, even to doubt whether the prince
had appointed proper officers in the state /m.
/l 4 Inst. 361.
/m Disputare de principali judicio non oportet: sacrilegii enim instar est,
dubitare an is dignus sit; quem elegerit imperator. C. 9. 29. 3.
V. ANOTHER light in which the laws of England consider the king with
regard to domestic concerns, is as the arbiter of commerce. By commerce,
I at present mean domestic commerce only. It would lead me into too large
a field, if I were to attempt, to enter upon the nature of foreign trade, its
privileges, regulations, and restrictions; and would be also quite beside the
purpose of these commentaries, which are confined to the laws of England.
Whereas no municipal laws can be sufficient to order and determine the
very extensive and complicated affairs of traffic and merchandize; neither can they have a proper authority for this purpose. For as these are transactions carried on between the subjects of independent states, the municipal laws of one will not be regarded by the other. For which reason the affairs of commerce are regulated by a law of their own, called the law merchant orlex mercatoria, which all nations agree in and take notice of. And in particular the law of England does in many cases refer itself to it, and leaves the causes of merchants to be tried by their own peculiar customs; and that often even in matters relating to inland trade, as for instance with regard to the drawing, the acceptance, and the transfer, of bills of exchange. /n

WITH us in England, the king’s prerogative, so far as it relates to mere domestic commerce, will fall principally under the following articles: FIRST, the establishment of public marts, or places of buying and selling, such as markets and fairs, with the tolls thereunto belonging. These can only be set up by virtue of the king’s grant, or by long and immemorial usage and prescription, which presupposes such a grant. /o The limitation of these public resorts, to such time and such place as may be most convenient for the neighbourhood, forms a part of economics, or domestic polity; which, considering the kingdom as a large family, and the king as the master of it, he clearly has a right to dispose and order as he pleases. /o 2 Inst. 220.

SECONDLY, the regulation of weights and measures. These, for the advantage of the public, ought to be universally the same throughout the kingdom; being the general criterions which reduce all things to the same or an equivalent value. But, as weight and measure are things in their nature arbitrary and uncertain, it is therefore expedient that they be reduced to some fixed rule or standard: which standard it is impossible to fix by any written law or oral proclamation; for no man can, by words only, give another an adequate idea of a foot-rule, or a pound-weight. It is therefore necessary to have recourse to some visible, palpable, material standard; by forming a comparison with which, all weights and measures may be reduced to one uniform size: and the prerogative of fixing this standard, our ancient law vested in the crown; as in Normandy it belonged to the duke. /p This standard was originally kept at Winchester: and we find in the laws of king Edgar /q, near a century before the conquest, an injunction that the one measure, which was kept at Winchester, should be observed throughout the realm. Most nations have regulated the standard of measures of length by comparison with the parts of the human body; as
the palm, the hand, the span, the foot, the cubit, the ell, (ulna, or arm) the
pace, and the fathom. But, as these are of different dimensions in men of
different proportions, our ancient historians /rinform us, that a new
standard of longitudinal measure was ascertained by king Henry the first;
who commanded that the ulna or ancient ell, which answers to the modern
yard, should be made of the exact length of his own arm. And, one
standard of measures of length being gained, all others are easily derived
from thence; those of greater length by multiplying, those of less by
subdividing, that original standard. Thus, by the statute calledcompositio
ulnarum et perticarum, five yards and an half make a perch; and the yard
is subdivided into three feet, and each foot into twelve inches; which
inches will be each of the length of three grains of barley. Superficial
measures are derived by squaring those of length; and measures of
capacity by cubing them. The standard of weights was originally taken
from corns of wheat, whence the lowest denomination of weights we have
is still called a grain; thirty two of which are directed, by the statute called
compositio mensurarum, to compose a penny weight, whereof twenty
make an ounce, twelve ounces a pound, and so upwards. And upon these
principles the first standards were made; which, being originally so fixed
by the crown, their subsequent regulations have been generally made by
the king in parliament. Thus, under king Richard I, in his parliament
holden at Westminster, A.D. 1197, it was ordained that there shall be only
one weight and one measure throughout the kingdom, and that the
custody of the assise or standard of weights and measures shall be
committed to certain persons in every city and borough; /s from whence
the ancient office of the king's aulnager seems to have been derived, whose
duty it was, for a certain fee, to measure all cloths made for sale, till the
office was abolished by the statute 11 & 12 W. III. c. 20. In king John's time
this ordinance of king Richard was frequently dispensed with for money;
/t which occasioned a provision to be made for enforcing it, in the great
charters of king John and his son. /u These original standards were called
pondus regis /w, and mensura domini regis; /x and are directed by a
variety of subsequent statutes to be kept in the exchequer, and all weights
and measures to be made conformable thereto. /y But, as sir Edward Coke
observes /z, though this hath so often by authority of p
arliament been
enacted, yet it could never be effected; so forcible is custom with the
multitude, when it hath gotten an head.
/p Gr. Coustum. c. 16.
/q cap. 8.
THIRDLY, as money is the medium of commerce, it is the king's prerogative, as the arbiter of domestic commerce, to give it authority or make it current. Money is an universal medium, or common standard, by comparison with which the value of all merchandize may be ascertained: or it is a sign, which represents the respective values of all commodities. Metals are well calculated for this sign, because they are durable and are capable of many subdivisions: and a precious metal is still better calculated for this purpose, because it is the most portable. A metal is also the most proper for a common measure, because it can easily be reduced to the same standard in all nations: and every particular nation fixes on it its own impression, that the weight and standard (wherein consists the intrinsic value) may both be known by inspection only.

AS the quantity of precious metals increases, that is, the more of them there is extracted from the mine, this universal medium or common sign will sink in value, and grow less precious. Above a thousand millions of bullion are calculated to have been imported into Europe from America within less than three centuries; and the quantity is daily increasing. The consequence is, that more money must be given now for the same commodity than was given an hundred years ago. And, if any accident was to diminish the quantity of gold and silver, their value would proportionably rise. A horse, that was formerly worth ten pounds, is now perhaps worth twenty; and, by any failure of current specie, the price may be reduced to what it was. Yet is the horse in reality neither dearer nor cheaper at one time than another: for, if the metal which constitutes the coin was formerly twice as scarce as at present, the commodity was then as dear at half the price, as now it is at the whole.

THE coining of money is in all states the act of the sovereign power; for the reason just mentioned, that its value may be known on inspection. And with respect to coinage in general, there are three things to be considered therein; the materials, the impression, and the denomination.

WITH regard to the materials, sir Edward Coke lays it down /a, that the money of England must either be of gold or silver; and none other was
ever issued by the royal authority till 1672, when copper farthings and half-pence were coined by king Charles the second, and ordered by proclamation to be current in all payments, under the value of six-pence, and not otherwise. But this copper coin is not upon the same footing with the other in many respects, particularly with regard to the offence of counterfeiting it.

/a 2 Inst. 577.

AS to the impression, the stamping thereof is the unquestionable prerogative of the crown: for, though divers bishops and monasteries had formerly the privilege of coining money, yet, as sir Matthew Hale observes /b, this was usually done by special grant from the king, or by prescription which supposes one; and therefore was derived from, and not in derogation of, the royal prerogative. Besides that they had only the profit of the coinage, and not the power of instituting either the impression or denomination; but had usually the stamp sent them from the exchequer.

/b 1 Hist. P.C. 191.

THE denomination, or the value for which the coin is to pass current, is likewise in the breast of the king; and, if any unusual pieces are coined, that value must be ascertained by proclamation. In order to fix the value, the weight, and the fineness of the metal are to be taken into consideration together. When a given weight of gold or silver is of a given fineness, it is then of the true standard, and called sterling metal; a name for which there are various reasons given /c, but none of them entirely satisfactory. And of this sterling metal all the coin of the kingdom must be made by the statute 25 Edw. III. c. 13. So that the king's prerogative seemeth not to extend to the debasing or inhancing the value of the coin, below or above the sterling value /d: though sir Matthew Hale /e appears to be of another opinion. The king may also, by his proclamation, legitimate foreign coin, and make it current here; declaring at what value it shall be taken in payments. /f But this, I apprehend, ought to be by comparison with the standard of our own coin; otherwise the consent of parliament will be necessary. There is at present no such legitimated money; Portugal coin being only current by private consent, so that any one who pleases may refuse to take it in payment. The king may also at any time decry, or cry down, any coin of the kingdom, and make it no longer current. /g

/c Spelm. Gloss. 203.

/d 2 Inst. 577.

/e 1 H.P.C. 194.

/f Ibid. 197.

/g Ibid.
VI. THE king is, lastly, considered by the laws of England as the head and supreme governor of the national church. TO enter into the reasons upon which this prerogative is founded is matter rather of divinity than of law. I shall therefore only observe that by statute 26 Hen. VIII. c. 1. (reciting that the king's majesty justly and rightfully is and ought to be the supreme head of the church of England; and so had been recognized by the clergy of this kingdom in their convocation) it is enacted, that the king shall be reputed the only supreme head in earth of the church of England, and shall have, annexed to the imperial crown of this realm, as well the titles and style thereof, as all jurisdictions, authorities, and commodities, to the said dignity of supreme head of the church appertaining. And another statute to the same purport was made, 1 Eliz. c. 1.

IN virtue of this authority the king convenes, prorogues, restrains, regulates, and dissolves all ecclesiastical synods or convocations. This was an inherent prerogative of the crown, long before the time of Henry VIII, as appears by the statute 8 Hen. VI. c. 1. and the many authors, both lawyers and historians, vouched by sir Edward Coke. So that the statute 25 Hen. VIII. c. 19. which restrains the convocation from making or putting in execution any canons repugnant to the king's prerogative, or the laws, customs, and statutes of the realm, was merely declaratory of the old common law: that part of it only being new, which makes the king's royal assent actually necessary to the validity of every canon. The convocation or ecclesiastical synod, in England, differs considerably in its constitution from the synods of other christian kingdoms: those consisting wholly of bishops; whereas with us the convocation is the miniature of a parliament, wherein the archbishop presides with regal state; the upper house of bishops represents the house of lords; and the lower house, composed of representatives of the several dioceses at large, and of each particular chapter therein, resembles the house of commons with its knights of the shire and burgesses. This constitution is said to be owing to the policy of Edward I; who thereby at one and the same time let in the inferior clergy to the privilege of forming ecclesiastical canons, (which before they had not) and also introduced a method of taxing ecclesiastical benefices, by consent of convocation.

/h 4 Inst. 322, 323.
/i In the diet of Sweden, where the ecclesiastics form one of the branches of the legislature, the chamber of the clergy resembles the convocation of England. It is composed of the bishops and superintendants; and also of
deputies, one of which is chosen by every ten parishes or rural deanry. Mod. Un. Hist. xxxiii. 18. /k Gilb. hist. of exch. c. 4.

FROM this prerogative also of being the head of the church arises the king's right of nomination to vacant bishopricks, and certain other ecclesiastical preferments; which will better be considered when we come to treat of the clergy. I shall only here observe, that this is now done in consequence of the statute 25 Hen. VIII. c. 20.

AS head of the church, the king is likewise the dernier resort in all ecclesiastical causes; an appeal lying ultimately to him in chancery from the sentence of every ecclesiastical judge: which right was restored to the crown by statute 25 Hen. VIII. c. 19. as will more fully be shewn hereafter.

CHAPTER THE EIGHTH.
OF THE KINGS REVENUE.
HAVING, in the preceding chapter, considered at large those branches of the king's prerogative, which contribute to his royal dignity, and constitute the executive power of the government, we proceed now to examine the king's fiscal prerogatives, or such as regard his revenue; which the British constitution hath vested in the royal person, in order to support his dignity and maintain his power: being a portion which each subject contributes of his property, in order to secure the remainder.

THIS revenue is either ordinary, or extraordinary. The king's ordinary revenue is such, as has either subsisted time out of mind in the crown; or else has been granted by parliament, by way of purchase or exchange for such of the king's inherent hereditary revenues, as were found inconvenient to the subject.

WHEN I say that it has subsisted time out of mind in the crown, I do not mean that the king is at present in the actual possession of the whole of this revenue. Much (nay, the greatest part) of it is at this day in the hands of subjects; to whom it has been granted out from time to time by the kings of England: which has rendered the crown in some measure dependent on the people for its ordinary support and subsistence. So that I must be obliged to recount, as part of the royal revenue, what lords of manors and other subjects frequently look upon to be their own absolute rights, because they are and have been vested in them and their ancestors for ages, though in reality originally derived from the grants of our ancient princes.

I. THE first of the king's ordinary revenues, which I shall take notice of, is of an ecclesiastical kind; (as are also the three succeeding ones) viz. 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 see. And these upon the vacancy of the bishoprick are immediately the right of the king, as a consequence of his prerogative in church matters; whereby he is considered as the founder of all archbishopricks and bishopricks, to whom during the vacancy they revert. And for the same reason, before the dissolution of abbeys, the king had the custody of the temporalties of all such abbeys and priories as were of royal foundation (but not of those founded by subjects) on the death of the abbot or prior. /a Another reason may also be given, why the policy of the law hath vested this custody in the king; because, as the successor is not known, the lands and possessions of the see would be liable to spoil and devastation, if no one had a property therein. Therefore the law has given the king, not the temporalties themselves, but the custody of the temporalties, till such time as a successor is appointed; with power of taking to himself all the intermediate profits, without any account to the successor; and with the right of presenting (which the crown very frequently exercises) to such benefices and other preferments as fall within the time of vacation. /b This revenue is of so high a nature, that it could not be granted out to a subject, before, or even after, it accrued: but now by the statute 14 Edw. III. st. 4. c. 4 & 5. the king may, after the vacancy, lease the temporalties to the dean and chapter; saving to himself all advowsons, escheats, and the like. Our ancient kings, and particularly William Rufus, were not only remarkable for keeping the bishopricks a long time vacant, for the sake of enjoying the temporalties, but also committed horrible waste on the woods and other parts of the estate; and, to crown all, would never, when the see was filled up, restore to the bishop his temporalties again, unless he purchased them at an exorbitant price. To remedy which, king Henry the first /c granted a charter at the beginning of his reign, promising neither to sell, nor let to farm, nor take any thing from, the domains of the church, till the successor was installed. And it was made one of the articles of the great charter /d, that no waste should be committed in the temporalties of bishopricks, neither should the custody of them be sold. The same is ordained by the statute of Westminster the first; /e and the statute 14 Edw. III. st. 4. c. 4. (which permits, as we have seen, a lease to the dean and chapter) is still more explicit in prohibiting the other exactions. It was also a frequent abuse, that the king would for trifling, or no causes, seise the temporalties of bishops, even during their lives, into his own hands: but this is guarded against by statute 1 Edw. III. st. 2. c. 2. /a 2 Inst. 15.
THIS revenue of the king, which was formerly very considerable, is now by a customary indulgence almost reduced to nothing: for, at present, as soon as the new bishop is consecrated and confirmed, he usually receives the restitution of his temporalties quite entire, and untouched, from the king; and then, and not sooner, he has a fee simple in his bishoprick, and may maintain an action for the same. /f

II. THE king is entitled to a corody, as the law calls it, out of every bishoprick: that is, to send one of his chaplains to be maintained by the bishop, or to have a pension allowed him till the bishop promotes him to a benefice. /g This is also in the nature of an acknowledgement to the king, as founder of the see; since he had formerly the same corody or pension from every abbey or priory of royal foundation. It is, I apprehend, now fallen into total disuse; though sir Matthew Hale says /h, that it is due of common right, and that no prescription will discharge it.

III. THE king also (as was formerly observed /i) is entitled to all the tithes arising in extraparochial places /k: though perhaps it may be doubted how far this article, as well as the last, can be properly reckoned a part of the king's own royal revenue; since a corody supports only his chaplains, and these extraparochial tithes are held under an implied trust, that the king will distribute them for the good of the clergy in general.

IV. THE next branch consists in the first-fruits, and tenths, of all spiritual preferments in the kingdom; both of which I shall consider together. THESE were originally a part of the papal usurpations over the clergy of this kingdom; first introduced by Pandulph the pope's legate, during the reigns of king John and Henry the third, in the see of Norwich; and afterwards attempted to be made universal by the popes Clement V and John XXII, about the beginning of the fourteenth century. The first-fruits, primitiae, or annates, were the first year's whole profits of the spiritual preferment, according to a rate or valor made under the direction of pope Innocent IV by Walter bishop of Norwich in 38 Hen. III, and afterwards advanced in value by commission from pope Nicholas the third, A.D.1292,
20 Edw. I; /l which valuation of pope Nicholas is still preserved in the
exchequer /m. The tenths, ordecimae, were the tenth part of the annual
profit of each living by the same valuation; which was also claimed by the
holy see, under no better pretence than a strange misapplication of that
precept of the Levitical law, which directs /n, "that the Levites should offer
the tenth part of their tithe as a heave-offering to the Lord, and give it to
Aaron the high priest." But this claim of the pope met with vigorous
resistance from the English parliament; and a variety of acts were passed
to prevent and restrain it, particularly the statute 6 Hen. IV. c. 1. which
calls it a horrible mischief and damnable custom. But the popish clergy,
blindly devoted to the will of a foreign master, still kept it on foot;
sometimes more secretly, sometimes more openly and avowedly: so that,
in the reign of Henry VIII, it was computed, that in the compass of fifty
years 800000 ducats had been sent to Rome for first-fruits only. And, as
the clergy expressed this willingness to contribute so much of their income
to the head of the church, it was thought proper (when in the same reign
the papal power was abolished, and the king was declared the head of the
church of England) to annex this revenue to the crown; which was done by
statute 26 Hen. VIII. c. 3. (confirmed by statute 1 Eliz. c. 4.) and a new
valor beneficiorum was then made, by which the clergy are at present
rated.
/l F.N.B. 176.
/m 3 Inst. 154.
/n Numb. 18. 26.

BY these lastmentioned statutes all vicarages under ten pounds a year, and
all rectories under ten marks, are discharged from the payment of first-
fruits: and if, in such livings as continue chargeable with this payment, the
incumbent lives but half a year, he shall pay only one quarter of his first-
fruits; if but one whole year, then half of them; if a year and half, three
quarters; and if two years, then the whole; and not otherwise. Likewise by
the statute 27 Hen. VIII. c. 8. no tenths are to be paid for the first year, for
then the first-fruits are due: and by other statutes of queen Anne, in the
fifth and sixth years of her reign, if a benefice be under fifty pounds per
annum clear yearly value, it shall be discharged of the payment of first-
fruits and tenths.

THUS the richer clergy, being, by the criminal bigotry of their popish
predecessors, subjected at first to a foreign exaction, were afterwards,
when that yoke was shaken off, liable to a like misapplication of their
revenues, through the rapacious disposition of the then reigning monarch:
till at length the piety of queen Anne restored to the church what had been
thus indirectly taken from it. This she did, not by remitting the tenths and first-fruits entirely; but, in a spirit of the truest equity, by applying these superfluities of the larger benefices to make up the deficiencies of the smaller. And to this end she granted her royal charter, which was confirmed by the statute 2 Ann. c. 11. whereby all the revenue of first-fruits and tenths is vested in trustees for ever, to form a perpetual fund for the augmentation of poor livings. This is usually called queen Anne's bounty; which has been still farther regulated by subsequent statutes, too numerous here to recite.

V. THE next branch of the king's ordinary revenue (which, as well as the subsequent branches, is of a lay or temporal nature) consists in the rents and profits of the demesne lands of the crown. These demesne lands, terrae dominicales regis, being either the share reserved to the crown at the original distribution of landed property, or such as came to it afterwards by forfeitures or other means, were anciently very large and extensive; comprizing divers manors, honors, and lordships; the tenants of which had very peculiar privileges, as will be shewn in the second book of these commentaries, when we speak of the tenure in ancient demesne. At present they are contracted within a very narrow compass, having been almost entirely granted away to private subjects. This has occasioned the parliament frequently to interpose; and, particularly, after king William III had greatly impoverished the crown, an act passed /o, whereby all future grants or leases from the crown for any longer term than thirty one years or three lives are declared to be void; except with regard to houses, which may be granted for fifty years. And no reversionary lease can be made, so as to exceed, together with the estate in being, the same term of three lives or thirty one years: that is, where there is a subsisting lease, of which there are twenty years still to come, the king cannot grant a future interest, to commence after the expiration of the former, for any longer term than eleven years. The tenant must also be made liable to be punished for committing waste; and the usual rent must be reserved, or, where there has usually been no rent, one third of the clear yearly value. /p The misfortune is, that this act was made too late, after almost every valuable possession of the crown had been granted away for ever, or else upon very long leases; but may be of benefit to posterity, when those leases come to expire.

/o 1 Ann. st. 1. c. 7.

/p In like manner, by the civil law, the inheritances or fundi patrimoniales of the imperial crown could not be alienated, but only let to farm. Cod. l. 11. t. 61.
VI. HITHER might have been referred the advantages which were used to arise to the king from the profits of his military tenures, to which most lands in the kingdom were subject, till the statute 12 Car. II. c. 24. which in great measure abolished them all: the explication of the nature of which tenures, must be referred to the second book of these commentaries. Hither also might have been referred the profitable prerogative of purveyance and pre-emption: which was a right enjoyed by the crown of buying up provisions and other necessaries, by the intervention of the king’s purveyors, for the use of his royal household, at an appraised valuation, in preference to all others, and even without consent of the owner; and also of forcibly impressing the carriages and horses of the subject, to do the king's business on the public roads, in the conveyance of timber, baggage, and the like, however inconvenient to the proprietor, upon paying him a settled price. A prerogative, which prevailed pretty generally throughout Europe, during the scarcity of gold and silver, and the high valuation of money consequential thereupon. In those early times the king’s household (as well as those of inferior lords) were supported by specific renders of corn, and other victuals, from the tenants of the respective demesnes; and there was also a continual market kept at the palace gate to furnish viands for the royal use. And this answered all purposes, in those ages of simplicity, so long as the king's court continued in any certain place. But when it removed from one part of the kingdom to another (as was formerly very frequently done) it was found necessary to send purveyors beforehand, to get together a sufficient quantity of provisions and other necessaries for the household: and, lest the unusual demand should raise them to an exorbitant price, the powers beforementioned were vested in these purveyors; who in process of time very greatly abused their authority, and became a great oppression to the subject though of little advantage to the crown; ready money in open market (when the royal residence was more permanent, and specie began to be plenty) being found upon experience to be the best proveditor of any. Wherefore by degrees the powers of purveyance have declined, in foreign countries as well as our own; and particularly were abolished in Sweden by Gustavus Adolphus, toward the beginning of the last century. And, with us in England, having fallen into disuse during the suspension of monarchy, king Charles at his restoration consented, by the same statute, to resign entirely these branches of his revenue and power, for the ease and convenience of his subjects: and the parliament, in part of recompense, settled on him, his heirs, and successors, for ever, the hereditary excise of fifteen pence per barrel on all beer and ale sold in the
kingdom, and a proportionable sum for certain other liquors. So that this hereditary excise, the nature of which shall be farther explained in the subsequent part of this chapter, now forms the sixth branch of his majesty's ordinary revenue.
/q 4 Inst. 273.

VII. A SEVENTH branch might also be computed to have arisen from wine licences; or the rents payable to the crown by such persons as are licensed to sell wine by retail throughout England, except in a few privileged places. These were first settled on the crown by the statute 12 Car. II. c. 25. and, together with the hereditary excise, made up the equivalent in value for the loss sustained by the prerogative in the abolition of the military tenures, and the right of pre-emption and purveyance: but this revenue was abolished by the statute 30 Geo. II. c. 19. and an annual sum of upwards of £7000 per annum, issuing out of the new stamp duties imposed on wine licences, was settled on the crown in its stead.

VIII. AN eighth branch of the king's ordinary revenue is usually reckoned to consist in the profits arising from his forests. Forests are waste grounds belonging to the king, replenished with all manner of beasts of chase or venary; which are under the king's protection, for the sake of his royal recreation and delight: and, to that end, and for preservation of the king's game, there are particular laws, privileges, courts and officers belonging to the king's forests; all which will be, in their turns, explained in the subsequent books of these commentaries. What we are now to consider are only the profits arising to the king from hence; which consist principally in amercements or fines levied for offences against the forest-laws. But as few, if any courts of this kind for levying amercements have been held since 1632, 8 Car. I. and as, from the accounts given of the proceedings in that court by our histories and law books /s, nobody would now wish to see them again revived, it is needless (at least in this place) to pursue this enquiry any farther.
/s 1 Jones. 267-298.

IX. THE profits arising from the king's ordinary courts of justice make a ninth branch of his revenue. And these consist not only in fines imposed upon offenders, forfeitures of recognizances, and amercements 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, and other legal proceedings, and for permitting fines to be levied of lands in order to bar entails, or otherwise to insure their title. As none of these can be done without the immediate intervention of the king, by himself or his
officers, the law allows him certain perquisites and profits, as a
recompense for the trouble he undertakes for the public. These, in process
of time, have been almost all granted out to private persons, or else
appropriated to certain particular uses: so that, though our law-proceedings are still loaded with their payment, very little of them is now
returned into the king’s exchequer; for a part of whose royal maintenance they were originally intended. All future grants of them however, by the
statute 1 Ann. st. 2. c. 7. are to endure for no longer time than the prince’s
life who grants them.

X. A TENTH branch of the king’s ordinary revenue, said to be grounded on
the consideration of his guarding and protecting the seas from pirates and
robbers, is the right to royal fish, which are whale and sturgeon: and these,
when either thrown ashore, or caught near the coasts, are the property of
the king, on account of their superior excellence. Indeed our ancestors seem to have entertained a very high notion of the importance of this
right; it being the prerogative of the kings of Denmark and the dukes of
Normandy; and from one of these it was probably derived to our princes. It is expressly claimed and allowed in the statute de praerogativa regis:
and the most ancient treatises of law now extant make mention of it; though they seem to have made a distinction between whale and sturgeon, as was incidentally observed in a former chapter.

XI. ANOTHER maritime revenue, and founded partly upon the same
reason, is that of shipwrecks; which are also declared to be the king’s
property by the same prerogative statute and were so, long before, at the common law. It is worthy observation, how greatly the
law of wrecks has been altered, and the rigor of it gradually softened, in
favour of the distressed proprietors. Wreck, by the ancient common law,
was where any ship was lost at sea, and the goods or cargo were thrown
upon the land; in which case these goods, so wrecked, were adjudged to
belong to the king: for it was held, that, by the loss of the ship, all property
was gone out of the original owner. But this was undoubtedly adding
sorrow to sorrow, and was consonant neither to reason nor humanity.
Wherefore it was first ordained by king Henry I, that if any person escaped alive out of the ship it should be no wreck; and afterwards king Henry II, by his charter, declared, that if on the coasts of either England,
Poictou, Oleron, or Gascony, any ship should be distressed, and either man or beast should escape or be found therein alive, the goods should remain to the owners, if they claimed them within three months; but otherwise should be esteemed a wreck, and should belong to the king, or other lord of the franchise. This was again confirmed with improvements by king Richard the first, who, in the second year of his reign /c, not only established these concessions, by ordaining that the owner, if he was shipwrecked and escaped, "omnes res suas liberas et quietas haberet," but also, that, if he perished, his children, or in default of them his brethren and sisters, should retain the property; and, in default of brother or sister, then the goods should remain to the king. /d And the law, so long after as the reign of Henry III, seems still to have been guided by the same equitable provisions. For then if a dog (for instance) escaped, by which the owner might be discovered, or if any certain mark were set on the goods, by which they might be known again, it was held to be no wreck. /e And this is certainly most agreeable to reason; the rational claim of the king being only founded upon this, that the true owner cannot be ascertained. But afterwards, in the statute of Westminster the first /f, the law is laid down more agreeable to the charter of king Henry the second: and upon that statute hath stood the legal doctrine of wrecks to the present time. It enacts, that if any live thing escape (a man, a cat, or a dog; which, as in Bracton, are only put for examples /g,) in this case, and, as it seems, in this case only, it is clearly not a legal wreck: but the sheriff of the county is bound to keep the goods a year and a day (as in France for one year, agreeably to the maritime laws of Oleron /h, and in Holland for a year and an half) that if any man can prove a property in them, either in his own right or by right of representation /i, they shall be restored to him without delay; but, if no such property be proved within that time, they then shall be the king's. If the goods are of a perishable nature, the sheriff may sell them, and the money shall be liable in their stead. /k This revenue of wrecks is frequently granted out to lords of manors, as a royal franchise; and if any one be thus entitled to wrecks in his own land, and the king's goods are wrecked thereon, the king may claim them at any time, even after the year and day. /l
/z Dr & St. d. 2. c. 51.
/a Spelm. Cod. apud Wilkins. 305.
/b 26 May, A.D. 1174. 1 Rym. Foed. 36.
/c Rog. Hoved. in Ric. I.
/d In like manner Constantine the great, finding that by the imperial law the revenue of wrecks was given to the prince's treasury or fiscus,
restrained it by an edict (Cod. 11. 5. 1.) and ordered them to remain to the
owners; adding this humane expostulation, "Quod enim jus habet fiscus in
aliena calamitate, ut de re tam luctuosa compendium sectetur?"
/e Bract. l. 3. c. 3.
/f 3 Edw. I. c. 4.
/g Flet. 1. c. 44. 2 Inst. 167.
/h 28.
/i 2 Inst. 168.
/k Plowd. 166.
IT is to be observed, that in order to constitute a legal wreck, the goods
must come to land. If they continue at sea, the law distinguishes them by
the barbarous and uncouth appellations of jetsam, flotsam, and ligan.
Jetsam is where goods are cast into the sea, and there sink and remain
under water: flotsam is where they continue swimming on the surface of
the waves: ligan is where they are sunk in the sea, but tied to a cork or
buoy, in order to be found again /m. These are also the king's, if no owner
appears to claim them; but, if any owner appears, he is entitled to recover
the possession. For even if they be cast overboard, without any mark or
buoy, in order to lighten the ship, the owner is not by this act of necessity
construed to have renounced his property /n: much less can things ligan
be supposed to be abandoned, since the owner has done all in his power,
to assert and retain his property. These three are therefore accounted so
far a distinct thing from the former, that by the king's grant to a man of
wrecks, things jetsam, flotsam, and ligan will not pass. /o
/m 5 Rep. 106.
/n Quae enim res in tempestate, levandae navis causa, ejiciuntur, hac
dominatorum permanent. Quia palam est, eas non eo animo ejici, quod quis
habere nolit. Inst. 2. 1. 48.
/o 5 Rep. 108.
WRECKS, in their legal acceptation, are at present not very frequent: it
rarely happening that every living creature on board perishes; and if any
should survive, it is a very great chance, since the improvement of
commerce, navigation, and correspondence, but the owner will be able to
assert his property within the year and day limited by law. And in order to
preserve this property entire for him, and if possible to prevent wrecks at
all, our laws have made many very humane regulations; in a spirit quite
opposite to those savage laws, which formerly prevailed in all the northern
regions of Europe, and a few years ago were still laid to subsist on the
coasts of the Baltic sea, permitting the inhabitants to seize on whatever
they could get as lawful prize; or, as an author of their own expresses it, "in naufragorum miseria et calamitate tanquam vultures ad praedam currere."

For by the statute 2 Edw. III. c. 13. if any ship be lost on the shore, and the goods come to land (so as it be not legal wreck) they shall be presently delivered to the merchants, they paying only a reasonable reward to those that saved and preserved them, which is intitled salvage. Also by the common law, if any persons (other than the sheriff) take any goods so cast on shore, which are not legal wreck, the owners might have a commission to enquire and find them out, and compel them to make restitution. And by statute 12 Ann. st. 2. c. 18. confirmed by 4 Geo. I. c. 12. in order to assist the distressed, and prevent the scandalous illegal practices on some of our sea coasts, (too similar to those on the Baltic) it is enacted, that all head-officers and others of towns near the sea shall, upon application made to them, summon as many hands as are necessary, and send them to the relief of any ship in distress, on forfeiture of 100l. and, in case of assistance given, salvage shall be paid by the owners, to be assessed by three neighbouring justices. All persons that secrete any goods shall forfeit their treble value: and if they wilfully do any act whereby the ship is lost or destroyed, by making holes in her, stealing her pumps, or otherwise, they are guilty of felony, without benefit of clergy. Lastly, by the statute 26 Geo. II. c. 19. plundering any vessel either in distress, or wrecked, and whether any living creature be on board or not, (for, whether wreck or otherwise, it is clearly not the property of the populace) such plundering, I say, or preventing the escape of any person that endeavors to save his life, or wounding him with intent to destroy him, or putting out false lights in order to bring any vessel into danger, are all declared to be capital felonies; in like manner as the destroying trees, steeples, or other stated seamarks, is punished by the statute 8 Eliz. c. 13. with a forfeiture of 200l. Moreover, by the statute of George II, pilfering any goods cast ashore is declared to be petty larceny; and many other salutary regulations are made, for the more effectually preserving ships of any nation in distress.

By the civil law, to destroy persons shipwrecked, or prevent their saving the ship, is capital. And to steal even a plank from a vessel in distress, or wrecked, makes the party liable to answer for the whole ship and cargo. (Ff. 47. 9. 3.) The laws also of the Wisigoths, and the most early Neapolitan constitutions, punished with the utmost severity all those who neglected to assist any ship in distress, or plundered any goods cast on shore. (Lindenbrog. Cod. LL. antiqu. 146. 715.)
XII. A TWELFTH branch of the royal revenue, the right to mines, has its original from the king's prerogative of coinage, in order to supply him with materials: and therefore those mines, which are properly royal, and to which the king is entitled when found, are only those of silver and gold. /s By the old common law, if gold or silver be found in mines of base metal, according to the opinion of some the whole was a royal mine, and belonged to the king; though others held that it only did so, if the quantity of gold or silver was of greater value than the quantity of base metal. /t But now by the statutes 1 W. & M. st. 1. c. 30. and 5 W. & M. c. 6. this difference is made immaterial; it being enacted, that 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 that 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 price stated in the act. This was an extremely reasonable law: for now private owners are not discouraged from working mines, through a fear that they may be claimed as royal ones; neither does the king depart from the just rights of his revenue, since he may have all the precious metal contained in the ore, paying no more for it than the value of the base metal which it is supposed to be; to which base metal the land-owner is by reason and law entitled.

/s 2 Inst. 577.
/t Plowd. 566.

XIII. TO the same original may in part be referred the revenue of treasure-trove (derived from the French word, trovero, to find) called in Latin thesaurus inventus, which is where any money or coin, gold, silver, plate, or bullion, is found hidden in the earth, or other private place, the owner thereof being unknown; in which case the treasure belongs to the king: but if he that hid it be known, or afterwards found out, the owner and not the king is entitled to it. /u Also if it be found in the sea, or upon the earth, it doth not belong to the king, but the finder, if no owner appears, /w So that it seems it is the hiding, not the abandoning of it, that gives the king a property: Bracton /x defining it, in the words of the civilians, to be "vetus depositio pecuniae." This difference clearly arises from the different intentions, which the law implies in the owner. A man, that hides his treasure in a secret place, evidently does not mean to relinquish his property; but reserves a right of claiming it again, when he sees occasion; and, if he dies and the secret also dies with him, the law gives it the king, in part of his royal revenue. But a man that scatters his treasure into the sea, or upon the public surface of the earth, is construed to have absolutely
abandoned his property, and returned it into the common stock, without any intention of reclaiming it; and therefore it belongs, as in a state of nature, to the first occupant, or finder; unless the owner appear and assert his right, which then proves that the loss was by accident, and not with an intent to renounce his property.

3 Inst. 132. Dalt. Sheriffs. c. 16.

Britt. c. 17. Finch. L. 177.

FORMERLY all treasure-trove belonged to the finder; as was also the rule of the civil law. Afterwards it was judged expedient for the purposes of the state, and particularly for the coinage, to allow part of what was so found to the king; which part was assigned to be all hidden treasure; such as is casually lost and unclaimed, and also such as is designedly abandoned, still remaining the right of the fortunate finder. And that the prince shall be entitled to this hidden treasure is now grown to be, according to Grotius, "jus commune, et quasi gentium:" for it is not only observed, he adds, in England, but in Germany, France, Spain, and Denmark. The finding of deposited treasure was much more frequent, and the treasures themselves more considerable, in the infancy of our constitution than at present. When the Romans, and other inhabitants of the respective countries which composed their empire, were driven out by the northern nations, they concealed their money under-ground; with a view of resorting to it again when the heat of the eruption should be over, and the invaders driven back to their desarts. But as this never happened, the treasures were never claimed; and on the death of the owners the secret also died along with them. The conquering generals, being aware of the value of these hidden mines, made it highly penal to secrete them from the public service. In England therefore, as among the feudists, the punishment of such as concealed from the king the finding of hidden treasure was formerly no less than death; but now it is only fine and imprisonment.

Bracton. l. 3. c. 3. 3 Inst. 133.

Ff. 41. 1. 31.

de jur. b. & p. l. 2. c. 8. 7.

Glanv. l. 1. c. 2. Crag. 1. 16. 40.

3 Inst. 133.

XIV. WAIFS, bona waviata, are goods stolen, and waived or thrown away by the thief in his slight, for fear of being apprehended. These are given to the king by the law, as a punishment upon the owner, for not himself pursuing the felon, and taking away his goods from him. And therefore
if the party robbed do his diligence immediately to follow and apprehend the thief (which is called making fresh suit) or do convict him afterwards, or procure evidence to convict him, he shall have his goods again. /e Waived goods do also not belong to the king, till seised by somebody for his use; for if the party robbed can seise them first, though at the distance of twenty years, the king shall never have them. /f If the goods are hid by the thief, or left any where by him, so that he had them not about him when he fled, and therefore did not throw them away in his slight; these also are not bona waviata, but the owner may have them again when he pleases. /g The goods of a foreign merchant, though stolen and thrown away in slight, shall never be waifs /h: the reason whereof may be, not only for the encouragement of trade, but also because there is no wilful default in the foreign merchant's not pursuing the thief, he being generally a stranger to our laws, our usages, and our language.

/d Cro. Eliz. 694.
/e Finch. L. 212.
/f Ibid.
/g 5 Rep. 109.

XV. ESTRAYS are such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them; in which case the law gives them to the king as the general owner and lord paramount of the soil, in recompense for the damage which they may have done therein; and they now most commonly belong to the lord of the manor, by special grant from the crown. But in order to vest an absolute property in the king or his grantees, they must be proclaimed in the church and two market towns next adjoining to the place where they are found; and then, if no man claims them, after proclamation and a year and a day passed, they belong to the king or his substitute without redemption; /i even though the owner were a minor, or under any other legal incapacity. /k A provision similar to which obtained in the old Gothic constitution, with regard to all things that were found, which were to be thrice proclaimed, primum coram comitibus et viatoribus obviis, deinde in proxima villa vel pagopostremo coram ecclesia vel judicio: and the space of a year was allowed for the owner to reclaim his property. /l If the owner claims them within the year and day, he must pay the charges of finding, keeping, and proclaiming them /m. The king or lord has no property till the year and day passed: for if a lord keepeth an estray three quarters of a year, and within the year it strayeth again, and another lord getteth it, the first lord cannot take it again. /n 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, which we in general call cattle; and so Fleta defines it, pecus vagans, quod nullus petit, sequitur, vel advocat. For animals upon which the law sets no value, as a dog or cat, and animals ferae naturae, as a bear or wolf, cannot be considered as estrays. So swans may be estrays, but not any other fowl; whence they are said to be royal fowl. The reason of which distinction seems to be, that, cattle and swans being of a reclaimed nature, the owner's property in them is not lost merely by their temporary escape; and they also, from their intrinsic value, are a sufficient pledge for the expense of the lord of the franchise in keeping them the year and day. For he that takes an estray is bound, so long as he keeps it, to find it in provisions and keep it from damage; and may not use it by way of labour, but is liable to an action for so doing. Yet he may milk a cow, or the like, for that tends to the preservation, and is for the benefit of the animal.

Mirr. c. 3. 19.
Stiernh. de jur. Gothor. l. 3. c. 5.
Dalt. Sh. 79.
Finch. L. 177.
l. 1. c. 43.
7 Rep. 17.
1 Roll. Abr. 889.
Cro. Jac. 147.

Besides the particular reasons before given why the king should have the several revenues of royal fish, shipwrecks, treasure-trove, waifs, and estrays, there is also one general reason which holds for them all; and that is, because they are bona vacantia, or goods in which no one else can claim a property. And therefore by the law of nature they belonged to the first occupant or finder; and so continued under the imperial law. But, in settling the modern constitutions of most of the governments in Europe, it was thought proper (to prevent that strife and contention, which the mere title of occupancy is apt to create and continue, and to provide for the support of public authority in a manner the least burdensome to individuals) that these rights should be annexed to the supreme power by the positive laws of the state. And so it came to pass that, as Bracton expresses it, haec, quae nullius in bonis sunt, et olim suerunt inventoris de jure naturali, jam efficiuntur principis de jure gentium.

l. 1. c. 12.
XVI. THE next branch of the king's ordinary revenue consists in forfeitures of lands and goods for offences; bona confiscata, as they are called by the civilians, because they belonged to the fiscus or imperial treasury; or, as our lawyers term them, forisfacta, that is, such whereof the property is gone away or departed from the owner. The true reason and only substantial ground of any forfeiture for crimes consist in this; that all property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom, which every man must sacrifice when he enters into social communities. If therefore a member of any national community violates the fundamental contract of his association, by transgressing the municipal law, he forfeits his right to such privileges as he claims by that contract; and the state may very justly resume that portion of property, or any part of it, which the laws have before assigned him. Hence, in every offence of an atrocious kind, the laws of England have exacted a total confiscation of the moveables or personal estate; and in many cases a perpetual, in others only a temporary, loss of the offender's immoveables or landed property; and have vested them both in the king, who is the person supposed to be offended, being the one visible magistrate in whom the majesty of the public resides. The particulars of these forfeitures will be more properly recited when we treat of crimes and misdemeanors. I therefore only mention them here, for the sake of regularity, as a part of the census regalis; and shall postpone for the present the farther consideration of all forfeitures, excepting one species only, which arises from the misfortune rather than the crime of the owner, and is called a deodand.

BY this is meant whatever personal chattel is the immediate occasion of the death of any reasonable creature; which is forfeited to the king, to be applied to pious uses, and distributed in alms by his high almoner; though formerly destined to a more superstitious purpose. It seems to have been originally designed, in the blind days of popery, as an expiation for the souls of such as were snatched away by sudden death; and for that purpose ought properly to have been given to holy church; in the same manner, as the apparel of a stranger who was found dead was applied to purchase masses for the good of his soul. And this may account for that rule of law, that no deodand is due where an infant under the years of discretion is killed by a fall from a cart, or horse, or the like, not being in motion; whereas, if an adult person falls from thence and is killed, the thing is certainly forfeited. For the reason given by sir Matthew Hale seems to be very inadequate, viz. because an infant is not able to take care
of himself: for why should the owner save his forfeiture, on account of the imbecility of the child, which ought rather to have made him more cautious to prevent any accident of mischief? The true ground of this rule seems rather to be, that the child, by reason of its want of discretion, is presumed incapable of actual sin, and therefore needed no deodand to purchase propitiatory masses: but every adult, who dies in actual sin, stood in need of such atonement, according to the humane superstition of the founders of the English law.

/u 1 Hal. P.C. 419. Fleta. l. 1. c. 25.
/x 3 Inst. 57. 1 Hal. P.C. 422.

THUS stands the law, if a person be killed by a fall from a thing standing still. But if a horse, or ox, or other animal, of his own motion, kill as well an infant as an adult, or if a cart run over him, they shall in either case be forfeited as deodands; /y which is grounded upon this additional reason, that such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture. A like punishment is in like cases inflicted by the mosaical law /z: "if an ox gore a man that he die, the ox shall be stoned, and his flesh shall not be eaten." And among the Athenians /a, whatever was the cause of a man's death, by falling upon him, was exterminated or cast out of the dominions of the republic. Where a thing, not in motion, is the occasion of a man's death, that part only which is the immediate cause is forfeited; as if a man be climbing up a wheel, and is killed by falling from it, the wheel alone is a deodand /b: but, wherever the thing is in motion, not only that part which immediately gives the wound, (as the wheel, which runs over his body) but all things which move with it and help to make the wound more dangerous (as the cart and loading, which increase the pressure of the wheel) are forfeited. /c It matters not whether the owner were concerned in the killing or not; for if a man kills another with my sword, the sword is forfeited /d as an accursed thing. /e And therefore, in all indictments for homicide, the instrument of death and the value are presented and found by the grand jury (as, that the stroke was given with a certain penknife, value sixpence) that the king or his grantee may claim the deodand: for it is no deodand, unless it be presented as such by a jury of twelve men. /f

No deodands are due for accidents happening upon the high sea, that being out of the jurisdiction of the common law: but if a man falls from a boat or ship in fresh water, and is drowned, the vessel and cargo are in strictness a deodand. /g

/y Omnia, quae movent ad mortem, sunt Deo danda. Bracton. l. 3. c. 5.
A similar rule obtained among the ancient Goths. Si quis, me nesciente, quocunque meo telo vel instrumento in perniciem suam abutatur; vel ex aedibus meis cadat, vel incidat in puteum meum, quantumvis tectum et munitum, vel in cataractam, et sub molendino meo confringatur, ipse aliqua multa plectar; ut in parte infelicitatis meae numeretur, habuisse vel aedificasse aliquod quo homo periret. Stiernhook de jure Goth. l. 3. c. 4.

DEODANDS, and forfeitures in general, as well as wrecks, treasure trove, royal fish, mines, waifs, and estrays, may be granted by the king to particular subjects, as a royal franchise: and indeed they are for the most part granted out to the lords of manors, or other liberties; to the perversion of their original design.

XVII. ANOTHER branch of the king's ordinary revenue arises from escheats of lands, which happen upon the defect of heirs to succeed to the inheritance; whereupon they in general revert to and vest in the king, who is esteemed, in the eye of the law, the original proprietor of all the lands in the kingdom. But the discussion of this topic more properly belongs to the second book of these commentaries, wherein we shall particularly consider the manner in which lands may be acquired or lost by escheat.

XVIII. I PROCEED therefore to the eighteenth and last branch of the king's ordinary revenue; which consists in the custody of idiots, from whence we shall be naturally led to consider also the custody of lunatics. An idiot, or natural fool, is one that hath had no understanding from his nativity; and therefore is by law presumed never likely to attain any. For which reason the custody of him and of his lands was formerly vested in the lord of the fee; (and therefore still, by special custom, in some manors the lord shall have the ordering of idiot and lunatic copyholders) but, by reason of the manisold abuses of this power by subjects, it was at last provided by common consent, that it should be given to the king, 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: This fiscal prerogative of the king is declared in parliament by statute 17 Edw. II. c. 9. which directs (in affirmance of the common law)
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; in
order to prevent such idiots from aliening their lands, and their heirs from
being disherited.

/h Flet. l. 1. c. 11. 10.
/k F.N.B. 232.
/l 4 Rep. 126.

BY the old common law there is a writ de idiota inquirendo, to enquire
whether a man be an idiot or not /m: which must be tried by a jury of
twelve men; and if they find him purus idiota, the profits of his lands, and
the custody of his person may be granted by the king to some subject, who
has interest enough to obtain them. /n This branch of the revenue hath
been long considered as a hardship upon private families; and so long ago
as in the 8 Jac. I. it was under the consideration of parliament, to vest this
custody in the relations of the party, and to settle an equivalent on the
crown in lieu of it; it being then proposed to share the same sate with the
slavery of the feodal tenures, which has been since abolished. /o Yet few
instances can be given of the oppressive exertion of it, since it seldom
happens that a jury finds a man an idiot a nativitate, but only non compos
mentis from some particular time; which has an operation very different in
point of law.

/m F.N.B. 232.
/n This power, though of late very rarely exerted, is still alluded to in
common speech, by that usual expression of begging a man for a fool.

A MAN is not an idiot /p, 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; /q he being supposed incapable of understanding, as
wanting those senses which furnish the human mind with ideas.

/p F.N.B. 233.
/q Co. Litt. 42. Fleta. l. 6. c. 40.

A LUNATIC, or non compos mentis, is one who hath had understanding,
but by disease, grief, or other accident hath lost the use of his reason. A
lunatic is indeed properly one that hath lucid intervals; sometimes
enjoying his senses, and sometimes not, and that frequently depending
upon the change of the moon. But under the general name of non compos
mentis (which sir Edward Coke says is the most legal name /r) are
comprized not only lunatics, but 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 by any means rendered incapable of
conducting their own affairs. To these also, as well as idiots, the king is
 guardian, but to a very different purpose. For the law always imagines,
that these accidental misfortunes may be removed; and therefore only
constitutes the crown a trustee for the unfortunate persons, to protect
their property, and to account to them for all profits received, if they
recover, or after their decease to their representatives. And therefore it is
declared by the statute 17 Edw. II. c. 10. that the king shall provide for the
custody and sustentation of lunatics, and preserve their lands and the
profits of them, for their use, when they come to their right mind: and the
king shall take nothing to his own use; and if the parties die in such estate,
the residue shall be distributed for their souls by the advice of the
ordinary, and of course (by the subsequent amendments of the law of
administrations) shall now go to their executors or administrators.

THE method of proving a person non compos is very similar to that of
proving him an idiot. The lord chancellor, to whom, by special authority
from the king, the custody of idiots and lunatics is intrusted, upon
petition or information, grants a commission in nature of the writ de idiota
inquirendo, to enquire into the party's state of mind; and if he be found
non compos, he usually commits the care of his person, with a suitable
allowance for his maintenance, to some friend, who is then called his
committee. However, to prevent sinister practices, the next heir is never
permitted to be this committee of the person; because it is his interest that
the party should die. But, it hath been said, there lies not the same
objection against his next of kin, provided he be not his heir; for it is his
interest to preserve the lunatic's life, in order to increase the personal
estate by savings, which he or his family may hereafter be entitled to enjoy.

The heir is generally made the manager or committee of the estate, it
being clearly his interest by good management to keep it in condition;
accountable however to the court of chancery, and to the non compos
himself, if he recovers; or otherwise, to his administrators.

IN this care of idiots and lunatics the civil law agrees with ours; by
assigning them tutors to protect their persons, and curators to manage
their estates. But in another instance the Roman law goes much beyond
the English. For, if a man by notorious prodigality was in danger of
wasting his estate, he was looked upon as non compos and committed to the care of curators or tutors by the praetor. And by the laws of Solon such prodigals were branded with perpetual infamy. But with us, when a man on an inquest of idiocy hath been returned anunthrift and not an idiot, no farther proceedings have been had. And the propriety of the practice itself seems to be very questionable. It was doubtless an excellent method of benefiting the individual and of preserving estates in families; but it hardly seems calculated for the genius of a free nation, who claim and exercise the liberty of using their own property as they please. "Sic utere tuo, ut alienum non laedas," is the only restriction our laws have given with regard to economical prudence. And the frequent circulation and transfer of lands and other property, which cannot be effected without extravagance somewhere, are perhaps not a little conducive towards keeping our mixed constitution in its due health and vigor.

Solent praetores, si talem hominem invenerint, qui neque tempus neque finem expensarum habet, sed bona sua dilacerando et dissipando profundit, curatorem ei dare, exemplo furiosi: et tamdiu erunt ambo in curatione, quamdiu vel furiosus sanitatem, vel ille bonos mores, receperit. Ff. 27. 10. 1.

THIS may suffice for a short view of the king’s ordinary revenue, or the proper patrimony of the crown; which was very large formerly, and capable of being increased to a magnitude truly formidable: for there are very few estates in the kingdom, that have not, at some period or other since the Norman conquest, been vested in the hands of the king by forfeiture, escheat, or otherwise. But, fortunately for the liberty of the subject, this hereditary landed revenue, by a series of improvident management, is sunk almost to nothing; and the casual profits, arising from the other branches of the census regalis, are likewise almost all of them alienated from the crown. In order to supply the deficiencies of which, we are now obliged to have recourse to new methods of raising money, unknown to our early ancestors; which methods constitute the king’s extraordinary revenue. For, the public patrimony being got into the hands of private subjects, it is but reasonable that private contributions should supply the public service. Which, though it may perhaps fall harder upon some individuals, whose ancestors have had no share in the general plunder, than upon others, yet, taking the nation throughout, it amounts to nearly the same; provided the gain by the extraordinary, should appear to be no greater than the loss by the ordinary, revenue. And perhaps, if
every gentleman in the kingdom was to be stripped of such of his lands as were formerly the property of the crown; was to be again subject to the inconveniences of purveyance and pre-emption, the oppression of forest laws, and the slavery of feodal tenures; and was to resign into the king's hands all his royal franchises of waifs, wrecks, estrays, treasure-trove, mines, deodands, forfeitures, and the like; he would find himself a greater loser, than by paying his quota to such taxes, as are necessary to the support of government. The thing therefore to be wished and aimed at in a land of liberty, is by no means the total abolition of taxes, which would draw after it very pernicious consequences, and the very supposition of which is the height of political absurdity. For as the true idea of government and magistracy will be found to consist in this, that some few men are deputed by many others to preside over public affairs, so that individuals may the better be enabled to attend to their private concerns; it is necessary that those individuals should be bound to contribute a portion of their private gains, in order to support that government, and reward that magistracy, which protects them in the enjoyment of their respective properties. But the things to be aimed at are wisdom and moderation, not only in granting, but also in the method of raising, the necessary supplies; by contriving to do both in such a manner as may be most conducive to the national welfare and at the same time most consistent with economy and the liberty of the subject; who, when properly taxed, contributes only, as was before observed, some part of his property, in order to enjoy the rest.

/y pag. 271.

THESE extraordinary grants are usually called by the synonymous names of aids, subsidies, and supplies; and are granted, we have formerly seen, by the commons of Great Britain, in parliament assembled: who, when they have voted a supply to his majesty, and settled the quantum of that supply, usually resolve themselves into what is called a committee of ways and means, to consider of the ways and means of raising the supply so voted. And in this committee every member (though it is looked upon as the peculiar province of the chancellor of the exchequer) may propose such scheme of taxation as he thinks will be least detrimental to the public. The resolutions of this committee (when approved by a vote of the house) are in general esteemed to be (as it were) final and conclusive. For, through the supply cannot be actually raised upon the subject till directed by an act of the whole parliament, yet no monied man will scruple to advance to the government any quantity of ready cash, on the credit of a
bare vote of the house of commons, though no law be yet passed to establish it.
/z pag. 163.

THE taxes, which are raised upon the subject, are either annual or perpetual. The usual annual taxes are those upon land and malt.

I. THE land tax, in its modern shape, has superseded all the former methods of rating either property, or persons in respect of their property, whether by tenths or fifteenths, subsidies on land, hydages, scutages, or talliages; a short explication of which will greatly assist us in understanding our ancient laws and history.

TENTHS, and fifteenths /a/, were temporary aids issuing out of personal property, and granted to the king by parliament. They were formerly the real tenth or fifteenth part of all the moveables belonging to the subject; when such moveables, or personal estates, were a very different and a much less considerable thing than what they usually are at this day. Tenths are said to have been first granted under Henry the second, who took advantage of the fashionable zeal for croisades to introduce this new taxation, in order to defray the expense of a pious expedition to Palestine, which he really or seemingly had projected against Saladine emperor of the Saracens; whence it was originally denominated the Saladine tenth. /b But afterwards fifteenths were more usually granted than tenths.

Originally the amount of these taxes was uncertain, being levied by assessments new made at every fresh grant of the commons, a commission for which is preserved by Matthew Paris /c: but it was at length reduced to a certainty in the eighth of Edw. III. when, by virtue of the king's commission, new taxations were made of every township, borough, and city in the kingdom, and recorded in the exchequer; which rate was, at the time, the fifteenth part of the value of every township, the whole amounting to about 29000l. and therefore it still kept up the name of a fifteenth, when, by the alteration of the value of money and the increase of personal property, things came to be in a very different situation. So that when, of later years, the commons granted the king a fifteenth, every parish in England immediately knew their proportion of it; that is, the same identical sum that was assessed by the same aid in the eighth of Edw. III; and then raised it by a rate among themselves, and returned it into the royal exchequer.

/a 2 Inst. 77. 4 Inst. 34.
/c A.D. 1232.
THE other ancient levies were in the nature of a modern land tax; for we may trace up the original of that charge as high as to the introduction of our military tenures; when every tenant of a knight's see was bound, if called upon, to attend the king in his army for forty days in every year. But this personal attendance growing troublesome in many respects, the tenants found means of compounding for it, by first sending others in their stead, and in process of time by making a pecuniary satisfaction to the crown in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee, under the name of scutages; which appear to have been levied for the first time in the fifth year of Henry the second, on account of his expedition to Toulouse, and were then (I apprehend) mere arbitrary compositions, as the king and the subject could agree. But this precedent being afterwards abused into a means of oppression, (by levying scutages on the landholders by the royal authority only, whenever our kings went to war, in order to hire mercenary troops and pay their contingent expences) it became thereupon a matter of national complaint; and king John was obliged to promise in his magna carta, that no scutage should be imposed without the consent of the common council of the realm. This clause was indeed omitted in the charters of Henry III, where we only find it stipulated, that scutages should be taken as they were used in the time of king Henry the second. Yet afterwards, by a variety of statutes under Edward I and his grandson, it was provided, that the king shall not take any aids or tasks, any talliage or tax, but by the common assent of the great men and commons in parliament.

See the second book of these commentaries.

cap. 14.
 cap. 14.
 9 Hen. III. c. 37.
 25 Edw. I. c. 5 & 6. 34 Edw. I. st. 4. c. 1. 14 Edw. III. st. 2. c. 1.

OF the same nature with scutages upon knights-fees were the assessments of hydage upon all other lands, and of talliage upon cities and burghs. But they all gradually fell into disuse, upon the introduction of subsidies, about the time of king Richard II and king Henry IV. These were a tax, not immediately imposed upon property, but upon persons in respect of their reputed estates, after the nominal rate of 4s. in the pound for lands, and 2s. 6d. for goods; and for those of aliens in a double proportion. But this assessment was also made according to an ancient valuation; wherein the computation was so very moderate, and the rental of the kingdom was supposed to be so exceeding low, that one subsidy of this sort did not, according to sir Edward Coke, amount to more than 70000l. whereas a
modern land tax at the same rate produces two millions. It was ancien
tly the rule never to grant more than one subsidy, and two fifteenths at a
time; but this rule was broke through for the first time on a very pressing
occasion, the Spanish invasion in 1588; when the parliament gave queen
Elizabeth two subsidies and four fifteenths. Afterwards, as money sunk in
value, more subsidies were given; and we have an instance in the first
parliament of 1640, of the king's desiring twelve subsidies of the
commons, to be levied in three years; which was looked upon as a startling
proposal: though lord Clarendon tells us /k, that the speaker, serjeant
Glanvile, made it manifest to the house, how very inconsiderable a sum
twelve subsidies amounted to, by telling them he had computed what he
was to pay for them; and, when he named the sum, he being known to be
possessed of a great estate, it seemed not worth any farther deliberation.
And indeed, upon calculation, we shall find, that the total amount of these
twelve subsidies, to be raised in three years, is less than what is now raised
in one year, by a land tax of two shillings in the pound.
/\ Madox. hist. exch. 480.
/\ 4 Inst. 33.
/\ Hist. b. 2.
The grant of scutages, talliages, or subsidies by the commons did not
extend to spiritual preferments; those being usually taxed at the same time
by the clergy themselves in convocation; which grants of the clergy were
confirmed in parliament, otherwise they were illegal, and not binding; as
the same noble writer observes of the subsidies granted by the
convocation, who continued sitting after the dissolution of the first
parliament in 1640. A subsidy granted by the clergy was after the rate of
4s. in the pound according to the valuation of their livings in the king's
books; and amounted, sir Edward Coke tells us /l, to about 20000l. While
this custom continued, convocations were wont to sit as frequently as
parliaments: but the last subsidies, thus given by the clergy, were those
confirmed by statute 15 Car. II. cap. 10. since which another method of
taxation has generally prevailed, which takes in the clergy as well as the
laity; in recompense for which the beneficed clergy have from that period
been allowed to vote at the elections of knights of the shire; /m and
thenceforward also the practice of giving ecclesiastical subsidies hath
fallen into total disuse.
/\ 4 Inst 33.
/m Dalt. of sheriffs, 418. Gilb. hist. of exch. c. 4.
The lay subsidy was usually raised by commissioners appointed by the
crown, or the great officers of state: and therefore in the beginning of the
civil wars between Charles I and his parliament, the latter, having no other sufficient revenue to support themselves and their measures, introduced the practice of laying weekly and monthly assessments /n of a specific sum upon the several counties of the kingdom; to be levied by a pound rate on lands and personal estates: which were occasionally continued during the whole usurpation, sometimes at the rate of 120000l. a month; sometimes at inferior rates. /o After the restoration the ancient method of granting subsidies, instead of such monthly assessments, was twice, and twice only, renewed; viz. in 1663, when four subsidies were granted by the temporalty, and four by the clergy; and in 1670, when 800000l. was raised by way of subsidy, which was the last time of raising supplies in that manner. For, the monthly assessments being now established by custom, being raised by commissioners named by parliament, and producing a more certain revenue; from that time forwards we hear no more of subsidies; but occasional assessments were granted as the national emergencies required. These periodical assessments, the subsidies which preceded them, and the more ancient scutage, hydage, and talliage, were to all intents and purposes a land tax; and the assessments were sometimes expressly called so. /p Yet a popular opinion has prevailed, that the land tax was first introduced in the reign of king William III; because in the year 1692 a new assessment or valuation of estates was made throughout the kingdom; which, though by no means a perfect one, had this effect, that a supply of 500000l. was equal to 1s. in the pound of the value of the estates given in. And, according to this enhanced valuation, from the year 1693 to the present, a period of above seventy years, the land tax has continued an annual charge upon the subject; above half the time at 4s. in the pound, sometimes at 3s, sometimes at 2s, twice /q at 1s, but without any total intermission. The medium has been 3s. 3d. in the pound, being equivalent to twenty three ancient subsidies, and amounting annually to more than a million and an half of money. The method of raising it is by charging a particular sum upon each county, according to the valuation given in, A.D. 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 of the county, and their officers.
/n 29 Nov. 4 Mar. 1642.
/o One of these bills of assessment, in 1656, is preserved in Scobell's collection, 400.
/q in the years 1732 and 1733.
II. THE other annual tax is the malt tax; which is a sum of 750000l, raised every year by parliament, ever since 1697, by a duty of 6d. 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 the excise; and is indeed itself no other than an annual excise, the nature of which species of taxation I shall presently explain: only premising at present, that in the year 1760 an additional perpetual excise of 3d. per bushel was laid upon malt; and in 1763 a proportionable excise was laid upon cyder and perry.

THE perpetual taxes are,

I. THE customs; or the duties, toll, tribute, or tariff, payable upon merchandise exported and imported. The considerations upon which this revenue (or the more ancient part of it, which arose only from exports) was invested in the king, were said to be two; /r 1. Because he gave the subject leave to depart the kingdom, and to carry his goods along with him. 2. Because the king was bound of common right to maintain and keep up the ports and havens, and to protect the merchant from pirates. Some have imagined they are called with us customs, because they were the inheritance of the king by immemorial usage and the common law, and not granted him by any statute /s: but sir Edward Coke hath clearly shewn /t, that the king's first claim to them was by grant of parliament 3 Edw. I. though the record thereof is not now extant. And indeed this is in express words confessed by statute 25 Edw. I. c. 7. wherein the king promises to take no customs from merchants, without the common assent of the realm, "saving to us and our heirs, the customs on wools, skins, and leather, formerly granted to us by the commonalty aforesaid." These were formerly called the hereditary customs of the crown; and were due on the exportation only of the said three commodities, and of none other: which were styled the staple commodities of the kingdom, because they were obliged to be brought to those ports where the king's staple was established, in order to be there first rated, and then exported. /u They were denominated in the barbarous Latin of our ancient records, custuma; /w not consuetudines, which is the language of our law whenever it means merely usages. The duties on wool, sheep-skins, or woolfells, and leather, exported, were called custuma antiqua sive magna; and were payable by every merchant, as well native as stranger; with this difference, that merchant-strangers paid an additional toll, viz. half as much again as was paid by natives. The custuma parva et novawere an impost of 3d. in the pound, due from merchant-strangers only, for all commodities as well imported as exported; which was usually called the alien's duty, and was
first granted in 31 Edw. I. But these ancient hereditary customs, especially those on wool and woolfells, came to be of little account when the nation became sensible of the advantages of a home manufacture, and prohibited the exportation of wool by statute 11 Edw. III. c. 1.

Dyer. 165.
Dyer. 43. pl. 24.
t 2 Inst. 58, 59.
u Dav. 9.
w This appellation seems to be derived from the French word coustum, or coûtum, which signifies toll or tribute, and owes its own etymology to the word coust, which signifies price, charge, or, as we have adopted it in English, cost.
x 4 Inst. 29.
THERE is also another ancient hereditary duty belonging to the crown, called the prisage or butlerage of wines. Prisage was a right of taking two tons of wine from every ship importing into England twenty tons or more; which by Edward I was exchanged into a duty of 2s. for every ton imported by merchant-strangers; which is called butlerage, because paid to the king's butler.

y Dav. 8. b. 2 Bulstr. 254.
OTHER customs payable upon exports and imports are distinguished into subsidies, tonnage, poundage, and other imposts. Subsidies are such as were imposed by parliament upon any of the staple commodities before mentioned, over and above the custuma antiqua et magna: tonnage was a duty upon all wines imported, over and above the prisage and butlerage aforesaid: poundage was a duty imposed ad valorem, at the rate of 12d. in the pound, on all other merchandize whatsoever: and the other imports were such as were occasionally laid on by parliament, as circumstances and times required. z These distinctions are now in a manner forgotten, except by the officers immediately concerned in this department; their produce being in effect all blended together, under the one denomination of the customs.

z Dav. 11, 12.
BY these we understand, at present, a duty or subsidy paid by the merchant, at the quay, upon all imported as well as exported commodities, by authority of parliament; unless where, for particular national reasons, certain rewards, bounties, or drawbacks, are allowed for particular exports or imports. Those of tonnage and poundage, in particular, were at first granted, as the old statutes, and particularly 1 Eliz. c. 19. express it, for the defence of the realm, and the keeping and safeguard of the seas, and for
the intercourse of merchandize safely to come into and pass out of the
same. They were at first usually granted only for a stated term of years, as,
for two years in 5 Ric. II; /a but in Henry the fifth's time, they were
granted him for life by a statute in the third year of his reign; and again to
Edward IV for the term of his life also: since which time they were
regularly granted to all his successors, for life, sometimes at their first,
sometimes at other subsequent parliaments, till the reign of Charles the
first; when, as had before happened in the reign of Henry VIII /b and
other princes, they were neglected to be asked. And yet they were
imprudently and unconstitutionally levied and taken without consent of
parliament, (though more than one had been assembled) for fifteen years
together; which was one of the causes of those unhappy discontents,
justifiable at first in too many instances, but which degenerated at last into
causeless rebellion and murder. For, as in every other, so in this particular
case, the king (previous to the commencement of hostilities) gave the
nation ample satisfaction for the errors of his former conduct, by passing
an act /c, whereby he renounced all power in the crown of levying the duty
of tonnage and poundage, without the express consent of parliament; and
also all power of imposition upon any merchandizes whatever. Upon the
restoration this duty was granted to king Charles the second for life, and so
it was to his two immediate successors; but now by three several statutes,
9 Ann. c. 6. 1 Geo. I. c. 12. and 3 Geo. I. c. 7. it is made perpetual and
mortgaged for the debt of the public. The customs, thus imposed by
parliament, are chiefly contained in two books of rates, set forth by
parliamentary authority; /d one signed by sir Harbottle Grimston, speaker
of the house of commons in Charles the second's time; and the other an
additional one signed by sir Spenser Compton, speaker in the reign of
George the first; to which also subsequent additions have been made.
Aliens pay a larger proportion than natural subjects, which is what is now
generally understood by the aliens' duty; to be exempted from which is one
principal cause of the frequent applications to parliament for acts of
naturalization.
/a Dav. 12.
/c 16 Car. I. c. 8.
/d Stat. 12 Car. II. c. 4. 11 Geo. I. c. 7.

THESE customs are then, we see, a tax immediately paid by the merchant,
although ultimately by the consumer. And yet these are the duties felt least
by the people; and, if prudently managed, the people hardly consider that
they pay them at all. For the merchant is easy, being sensible he does not
pay them for himself; and the consumer, who really pays them, confounds
them with the price of the commodity: in the same manner as Tacitus
observes, that the emperor Nero gained the reputation of abolishing the
tax on the sale of slaves, though he only transferred it from the buyer to
the seller; so that it was, as he expresses it, "remissum magis specie, quam
vi: quia cum venditor pendere juberetur, in partem pretii emportibus
accrescebat." But this inconvenience attends it on the other hand, that
these imposts, if too heavy, are a check and cramp upon trade; and
especially when the value of the commodity bears little or no proportion to
the quantity of the duty imposed. This in consequence gives rise also to
smuggling, which then becomes a very lucrative employment: and its
natural and most reasonable punishment, viz. confiscation of the
commodity, is in such cases quite ineffectual; the intrinsic value of the
goods, which is all that the smuggler has paid, and therefore all that he can
lose, being very inconsiderable when compared with his prospect of
advantage in evading the duty. Recourse must therefore be had to
extraordinary punishments to prevent it; perhaps even to capital ones:
which destroys all proportion of punishment /f, and puts murderers upon
an equal footing with such as are really guilty of no natural, but merely a
positive offence.
/e Hist. l. 13.
THERE is also another ill consequence attending high imports on
merchandize, not frequently considered, but indisputably certain; that the
erlier any tax is laid on a commodity, the heavier it falls upon the
consumer in the end: for every trader, through whose hands it passes,
must have a profit, not only upon the raw material and his own labour and
time in preparing it, but also upon the very tax itself, which he advances to
the government; otherwise he loses the use and interest of the money
which he so advances. To instance in the article of foreign paper. The
merchant pays a duty upon importation, which he does not receive again
till he sells the commodity, perhaps at the end of three months. He is
therefore equally entitled to a profit upon that duty which he pays at the
customhouse, as to a profit upon the original price which he pays to the
manufacturer abroad; and considers it accordingly in the price he
demands of the stationer. When the stationer sells it again, he requires a
profit of the printer or bookseller upon the whole sum advanced by him to
the merchant: and the bookseller does not forget to charge the full
proportion to the student or ultimate consumer; who therefore does not
only pay the original duty, but the profits of these three intermediate
traders, who have successively advanced it for him. This might be carried much farther in any mechanical, or more complicated, branch of trade.

II. DIRECTLY opposite in its nature to this is the excise duty; which is an inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption. This is doubtless, impartially speaking, the most economical way of taxing the subject: the charges of levying, collecting, and managing the excise duties being considerably less in proportion, than in any other branch of the revenue. It also renders the commodity cheaper to the consumer, than charging it with customs to the same amount would do; for the reason just now given, because generally paid in a much later stage of it. But, at the same time, the rigor and arbitrary proceedings of excise-laws seem hardly compatible with the temper of a free nation. For the frauds that might be committed in this branch of the revenue, unless a strict watch is kept, make it necessary, wherever it is established, to give the officers a power of entering and searching the houses of such as deal in excisable commodities, at any hour of the day, and, in many cases, of the night likewise. And the proceedings in case of transgressions are so summary and sudden, that a man may be convicted in two days time in the penalty of many thousand pounds by two commissioners or justices of the peace; to the total exclusion of the trial by jury, and disregard of the common law. For which reason, though lord Clarendon tells us /g, that to his knowledge the earl of Bedford (who was made lord treasurer by king Charles the first, to oblige his parliament) intended to have set up the excise in England, yet it never made a part of that unfortunate prince’s revenue; being first introduced, on the model of the Dutch prototype, by the parliament itself after its rupture with the crown. Yet such was the opinion of its general unpopularity, that when in 1642 "aspersions were cast by malignant persons upon the house of commons, that they intended to introduce excises, the house for its vindication therein did declare, that these rumours were false and scandalous; and that their authors should be apprehended and brought to condign punishment. /h" Its original establishment was in 1643, and its progress was gradual; /i being at first laid upon those persons and commodities, where it was supposed the hardship would be least perceivable, viz. the makers and venders of beer, ale, cyder, and perry; /k and the royalists at Oxford soon followed the example of their brethren at Westminster by imposing a similar duty; both sides protesting that it should be continued no longer than to the end of the war, and then be utterly abolished. /l But the parliament at Westminster soon after imposed it on flesh, wine, tobacco, sugar, and such
a multitude of other commodities that it might fairly be denominated
general; in pursuance of the plan laid down by Mr Pymme (who seems to
have been the father of the excise) in his letter to sir John Hotham, /m
signifying, "that they had proceeded in the excise to many particulars, and
intended to go on farther; but that it would be necessary to use the people
to it by little and little." And afterwards, when the people had been
accustomed to it for a series of years, the succeeding champions of liberty
boldly and openly declared, "the impost of excise to be the most easy and
indifferent levy that could be laid upon the people /n:" and accordingly
continued it during the whole usurpation. Upon king Charles's return, it
having then been long established and its produce well known, some part
of it was given to the crown, in the 12 Car. II, by way of purchase (as was
before observed) for the feodal tenures and other oppressive parts of the
hereditary revenue. But, from its first original to the present time, its very
name has been odious to the people of England. It has nevertheless been
imposed on abundance of other commodities in the reigns of king William
III, and every succeeding prince, to support the enormous expenses
occasioned by our wars on the continent. Thus brandies and other spirits
are now excised at the distillery; printed silks and linens, at the printers;
starch and hair powder, at the maker's; gold and silver wire, at the
wiredrawer's; all plate whatsoever, first in the hands of the vendor, who
pays yearly for a licence to sell it, and afterwards in the hands of the
occupier, who also pays an annual duty for having it in his custody; and
coaches and other wheel carriages, for which the occupier is excised;
though not with the same circumstances of arbitrary strictness with regard
to plate and coaches, as in the other instances. To these we may add coffee
and tea, chocolate, and cocoa paste, for which the duty is paid by the
retailer; all artificial wines, commonly called sweets; paper and
pasteboard, first when made, and again if stained or printed; malt as
before-mentioned; vinegars; and the manufacture of glass; for all which
the duty is paid by the manufacturer; hops, for which the person that
gathers them is answerable; candles and soap, which are paid for at the
maker's; malt liquors brewed for sale, which are excised at the brewery;
cyder and perry, at the mill; and leather and skins, at the tanner's. A list,
which no friend to his country would wish to see farther encreased.

/g Hist. b. 3.
/i The translator and continuator of Petavius's chronological history
(Lond. 1659.) informs us, that it was first moved for, 28 Mar. 1643, by Mr
Prynne. And it appears from the journals of the commons that on that day
the house resolved itself into a committee to consider of raising money, in consequence of which the excise was afterwards voted. But Mr Prynne was not a member of parliament till 7 Nov. 1648; and published in 1654 "A protestation against the illegal, detestable, and oft-condemned tax and extortion of excise in general." It is probably therefore a mistake of the printer for Mr Pymme, who was intended for chancellor of the exchequer under the earl of Bedford. (Lord Clar. b. 7.)


Lord Clar. b. 7.

30 May 1643. Dugdale of the troubles, 120.


I PROCEED therefore to a third duty, namely that upon salt; which is another distinct branch of his majesty's extraordinary revenue, and consists in an excise of 3s. 4d. per bushel imposed upon all salt, by several statutes of king William and other subsequent reigns. This is not generally called an excise, because under the management of different commissioners: but the commissioners of the salt duties have by statute 1 Ann. c. 21. the same powers, and must observe the same regulations, as those of other excises. This tax had usually been only temporary; but by statute 26 Geo. II. c. 3. was made perpetual.

IV. ANOTHER very considerable branch of the revenue is levied with greater cheerfulness, as, instead of being a burden, it is a manifest advantage to the public. I mean the post-office, or duty for the carriage of letters. As we have traced the original of the excise to the parliament of 1643, so it is but justice to observe that this useful invention owes its birth to the same assembly. It is true, there existed postmasters in much earlier times: but I apprehend their business was confined to the furnishing of posthorses to persons who were desirous to travel expeditiously, and to the dispatching extraordinary packets upon special occasions. The outline of the present plan seems to have been originally conceived by Mr Edmond Prideaux, who was appointed attorney general to the commonwealth after the murder of king Charles. He was a chairman of a committee in 1642 for considering what rates should be set upon inland letters; and afterwards appointed postmaster by an ordinance of both the houses, in the execution of which office he first established a weekly conveyance of letters into all parts of the nation: thereby saving to the public the charge of maintaining postmasters, to the amount of 7000l. per annum. And, his own emoluments being probably considerable, the common council of London endeavoured to erect another post-office in opposition to his, till checked by a resolution of the commons, declaring, that the
office of postmaster is and ought to be in the sole power and disposal of
the parliament. This office was afterwards farmed by one Manley in 1654.
But, in 1657, a regular post-office was erected by the authority of the
protector and his parliament, upon nearly the same model as has been
ever since adopted, with the same rates of postage as were continued till
the reign of queen Anne. After the restoration a similar office, with some
improvements, was established by statute 12 Car. II. c. 35. but the rates of
letters were altered, and some farther regulations added, by the statutes 9
Ann. c. 10. 6 Geo. I. c. 21. 26 Geo. II. c. 12. and 5 Geo. III. c. 25. and
penalties were enacted, in order to confine the carriage of letters to the
public office only, except in some few cases: a provision, which is
absolutely necessary; for nothing but an exclusive right can support an
office of this sort: many rival independent offices would only serve to ruin
one another. The privilege of letters coming free of postage, to and from
members of parliament, was claimed by the house of commons in 1660,
when the first legal settlement of the present post-office was made; but
afterwards dropped upon a private assurance from the crown, that this
privilege should be allowed the members. And accordingly a warrant
was constantly issued to the postmaster-general, directing the
allowance thereof, to the extent of two ounces in weight: till at length it
was expressly confirmed by statute 4 Geo. III. c. 24; which adds many new
regulations, rendered necessary by the great abuses crept into the practice
of franking; whereby the annual amount of franked letters had gradually
increased, from 23600l. in the year 1715, to 170700l. in the year 1763.
There cannot be devised a more eligible method, than this, of raising
money upon the subject: for therein both the government and the people
find a mutual benefit. The government acquires a large revenue; and the
people do their business with greater ease, expedition, and cheapness,
than they would be able to do if no such tax (and of course no such office)
existed.

Ibid. 7 Sept. 1644.
Ibid. 21 Mar. 1649.
Ibid.
Scobell. 358.
Ibid. 22 Dec. 1660.
Ibid. 16 Apr. 1735.
Ibid. 26 Feb. 1734.
V. A FIFTH branch of the perpetual revenue consists in the stamp duties, which are a tax imposed upon all parchment and paper whereon any legal proceedings, or private instruments of almost any nature whatsoever, are written; and also upon licences for retailing wines, of all denominations; upon all almanacks, newspapers, advertisements, cards, dice, and pamphlets containing less than six sheets of paper. These imposts are very various, according to the nature of the thing stamped, rising gradually from a penny to ten pounds. This is also a tax, which though in some instances it may be heavily felt, by greatly increasing the expence of all mercantile as well as legal proceedings, yet (if moderately imposed) is of service to the public in general, by authenticating instruments, and rendering it much more difficult than formerly to forge deeds of any standing; since, as the officers of this branch of the revenue vary their stamps frequently, by marks perceptible to none but themselves, a man that would forge a deed of king William's time, must know and be able to counterfeit the stamp of that date also. In France and some other countries the duty is laid on the contract itself, not on the instrument in which it is contained: but this draws the subject into a thousand nice disquisitions and disputes concerning the nature of his contract, and whether taxable or not; in which the farmers of the revenue are sure to have the advantage. Our method answers the purposes of the state as well, and consults the ease of the subject much better. The first institution of the stamp duties was by statute 5 & 6 W. & M. c. 21. and they have since in many instances been encreased to five times their original amount.

VI. A SIXTH branch is the duty upon houses and windows. As early as the conquest mention is made in domesday book of sumage or fuage, vulgarly called smoke farthings; which were paid by custom to the king for every chimney in the house. And we read that Edward the black prince (soon after his successes in France) in imitation of the English custom, imposed a tax of a florin upon every hearth in his French dominions. But the first parliamentary establishment of it in England was by statute 13 & 14 Car. II. c. 10. whereby an hereditary revenue of 2s. for every hearth, in all houses paying to church and poor, was granted to the king for ever. And, by subsequent statutes, for the more regular assessment of this tax, the constable and two other substantial inhabitants of the parish, to be appointed yearly, were, once in every year, empowered to view the inside of every house in the parish. But, upon the revolution, by statute 1 W. & M. st. 1. c. 10. hearth-money was declared to be "not only a great oppression to the poorer sort, but a badge of slavery upon the whole people, exposing
every man’s house to be entered into, and searched at pleasure, by persons
unknown to him; and therefore, to erect a lasting monument of their
majesties’ goodness in every house in the kingdom, the duty of hearth-
money was taken away and abolished.” This monument of goodness
remains among us to this day: but the prospect of it was somewhat
darkened when, in six years afterwards, by statute 7 W. III. c. 18. a tax was
laid upon all houses (except cottages) of 2s. now advanced to 3s. per
house, and a tax also upon all windows, if they exceed nine, in such house.
Which rates have been from time to time varied, (particularly by statutes
20 Geo. II. c. 3. and 31 Geo. II. c. 22.) 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.

VII. THE seventh branch of the extraordinary perpetual revenue is the
duty arising from licences to hackney coaches and chairs in London, and
the parts adjacent. In 1654 two hundred hackney coaches were allowed
within London, Westminster, and six miles round, under the direction of
the court of aldermen. /b By statute 13 & 14 Car. II. c. 2. four hundred
were licensed; and the money arising thereby was applied to repairing the
streets. /c This number was increased to seven hundred by statute 5 W. &
M. c. 22. and the duties vested in the crown: and by the statute 9 Ann. c.
23. and other subsequent statutes /d, there are now eight hundred
licensed coaches and four hundred chairs. This revenue is governed by
commissioners of its own, and is, in truth, a benefit to the subject; as the
expense of it is felt by no individual, and its necessary regulations have
established a competent jurisdiction, whereby a very refractory race of
men may be kept in some tolerable order.

/b Scobell. 313.
/d 10 Ann. c. 19. 158. 12 Geo. I. c. 15. 33 Geo. II. c. 25.
VIII. THE eighth and last branch of the king’s extraordinary perpetual
revenue is the duty upon offices and pensions; consisting in a 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. This highly
popular taxation was imposed by statute 31 Geo. II. c. 22. and is under
the direction of the commissioners of the land tax.

THE clear neat produce of these several branches of the revenue, after all
charges of collecting and management paid, amounts annually to about
seven millions and three quarters sterling; besides two millions and a
quarter raised annually, at an average, by the land and malt tax. How these immense sums are appropriated, is next to be considered. And this is, first and principally, to the payment of the interest of the national debt.

IN order to take a clear and comprehensive view of the nature of this national debt, it must first be premised, that after the revolution, when our new connections with Europe introduced a new system of foreign politics, the expenses of the nation, not only in settling the new establishment, but in maintaining long wars, as principals, on the continent, for the security of the Dutch barrier, reducing the French monarchy, settling the Spanish succession, supporting the house of Austria, maintaining the liberties of the Germanic body, and other purposes, increased to an unusual degree: insomuch that it was not thought advisable to raise all the expenses of any one year by taxes to be levied within that year, lest the unaccustomed weight of them should create murmurs among the people. It was therefore the policy of the times, to anticipate the revenues of their posterity, by borrowing immense sums for the current service of the state, and to lay no more taxes upon the subject than would suffice to pay the annual interest of the sums so borrowed: by this means converting the principal debt into a new species of property, transferrable from one man to another at any time and in any quantity. A system which seems to have had its original in the state of Florence, A.D. 1344: which government then owed about 60000l. sterling; and, being unable to pay it, formed the principal into an aggregate sum, called metaphorically a mount or bank, the shares whereof were transferrable like our stocks, with interest at 5 per cent. the prices varying according to the exigencies of the state. /e This laid the foundation of what is called the national debt: for a few long annuities created in the reign of Charles II will hardly deserve that name. And the example then set has been so closely followed during the long wars in the reign of queen Anne, and since, that the capital of the national debt, (funded and unfunded) amounted in January 1765 to upwards of 145,000,000l. to pay the interest of which, and the charges for management, amounting annually to about four millions and three quarters, the revenues just enumerated are in the first place mortgaged, and made perpetual by parliament. Perpetual, I say; but still redeemable by the same authority that imposed them: which, if it at any time can pay off the capital, will abolish those taxes which are raised to discharge the interest.


BY this means the quantity of property in the kingdom is greatly encreased in idea, compared with former times; yet, if we coolly consider it, not at all
increased in reality. We may boast of large fortunes, and quantities of money in the funds. But where does this money exist? It exists only in name, in paper, in public faith, in parliamentary security: and that is undoubtedly sufficient for the creditors of the public to rely on. But then what is the pledge which the public faith has pawned for the security of these debts? The land, the trade, and the personal industry of the subject; from which the money must arise that supplies the several taxes. In these therefore, and these only, the property of the public creditors does really and intrinsically exist: and of course the land, the trade, and the personal industry of individuals, are diminished in their true value just so much as they are pledged to answer. If A's income amounts to 100l. per annum; and he is so far indebted to B, that he pays him 50l. per annum for his interest; one half of the value of A's property is transferred to B the creditor. The creditor's property exists in the demand which he has upon the debtor, and no where else; and the debtor is only a trustee to his creditor for one half of the value of his income. In short, the property of a creditor of the public, consists in a certain portion of the national taxes: by how much therefore he is the richer, by so much the nation, which pays these taxes, is the poorer.

THE only advantage, that can result to a nation from public debts, is the increase of circulation by multiplying the cash of the kingdom, and creating a new species of money, always ready to be employed in any beneficial undertaking, by means of its transferrable quality; and yet productive of some profit, even when it lies idle and unemployed. A certain proportion of debt seems therefore to be highly useful to a trading people; but what that proportion is, it is not for me to determine. Thus much is indisputably certain, that the present magnitude of our national incumbrances very far exceeds all calculations of commercial benefit, and is productive of the greatest inconveniences. For, first, the enormous taxes, that are raised upon the necessaries of life for the payment of the interest of this debt, are a hurt both to trade and manufactures, by raising the price as well of the artificer's subsistence, as of the raw material, and of course, in a much greater proportion, the price of the commodity itself. Secondly, if part of this debt be owing to foreigners, either they draw out of the kingdom annually a considerable quantity of specie for the interest; or else it is made an argument to grant them unreasonable privileges in order to induce them to reside here. Thirdly, if the whole be owing to subjects only, it is then charging the active and industrious subject, who pays his share of the taxes, to maintain the indolent and idle creditor who receives them. Lastly, and principally, it weakens the internal strength of a state, by
anticipating those resources which should be reserved to defend it in case of necessity. The interest we now pay for our debts would be nearly sufficient to maintain any war, that any national motives could require. And if our ancestors in king William's time had annually paid, so long as their exigences lasted, even a less sum than we now annually raise upon their accounts, they would in the time of war have borne no greater burdens, than they have bequeathed to and settled upon their posterity in time of peace; and might have been eased the instant the exigence was over.

THE produce of the several taxes beforementioned were originally separate and distinct funds; being securities for the sums advanced on each several tax, and for them only. But at last it became necessary, in order to avoid confusion, as they multiplied yearly, to reduce the number of these separate funds, by uniting and blending them together; superadding the faith of parliament for the general security of the whole. So that there are now only three capital funds of any account, 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, is 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 deficiences.

THE customs, excises, and other taxes, which are to support these 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 and annuities charged upon them, are directed by statute 3 Geo. I. c. 7. to be carried together, and to attend the disposition of parliament; and are usually denominated the sinking fund, because originally destined to sink and lower the national debt. To this have been since added many other entire duties, granted in subsequent years; and the annual interest of the sums borrowed on their respective credits is charged on and payable out of the produce of the sinking fund. However the neat surplusses and savings, after all deductions paid, amount annually to a very considerable sum; particularly in the year ending at Christmas 1764, to about two millions
and a quarter. For, as the interest on the national debt has been at several times reduced, (by the consent of the proprietors, who had their option either to lower their interest or be paid their principal) the savings from the appropriated revenues must needs be extremely large. This sinking fund is the last resort of the nation; on which alone depend all the hopes we can entertain of ever discharging or moderating our incumbrances. And therefore the prudent application of the large sums, now arising from this fund, is a point of the utmost importance, and well worthy the serious attention of parliament; which has thereby been enabled, in this present year 1765, to reduce above two millions sterling of the public debt.

BUT, 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 public 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, in the late reigns, the produce of certain branches of the excise and customs, the post-office, the duty on wine licences, the revenues of the remaining crown lands, the profits arising from courts of justice, (which articles include all the hereditary revenues of the crown) and also a clear annuity of 120000l. in money, were settled on the king for life, for the support of his majesty's household, and the honour and dignity of the crown. And, as the amount of these several branches was uncertain, (though in the last reign they were generally computed to raise almost a million) if they did not arise annually to 800,000l. the parliament engaged to make up the deficiency. But his present majesty having, soon after his accession, spontaneously 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 graciously accepted the limited sum of 80000l. per annum for the support of his civil list (and that also charged with three life annuities, to the princess of Wales, the duke of Cumberland, and the princess Amalie, to the amount of 77000l.) 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 800000l. per annum. /f Hereby the revenues themselves, being put under the same care and management as the other branches of the public patrimony, will produce more and be better collected than heretofore; and the public is a gainer of upwards of 100000l. per annum by this disinterested bounty of his majesty. The civil list, thus liquidated, together with the four millions and three quarters, interest of the national debt, and the two millions and a quarter produced from the sinking fund,
make up the seven millions and three quarters per annum, neat money, which were before stated to be the annual produce of our perpetual taxes; besides the immense, though uncertain, sums arising from the annual taxes on land and malt, but which, at an average, may be calculated at more than two millions and a quarter; and, added to the preceding sum, make the clear produce of the taxes, exclusive of the charge of collecting, which are raised yearly on the people of this country, and returned into the king's exchequer, amount to upwards of ten millions sterling. expenses defrayed by the civil list are those that in any shape relate to civil government; as, the expenses of the household; all salaries to officers of state, to the judges, and every of the king's servants; the appointments to foreign ambassadors; the maintenance of the royal family; the king's private expenses, 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; as particularly in 1724, when one million was granted for that purpose by the statute 11 Geo. I. c. 17.

THE civil list is indeed properly the whole of the king's revenue in his own distinct capacity; the rest being rather the revenue of the public, or its creditors, though collected, and distributed again, in the name and by the officers of the crown: it now standing in the same place, as the hereditary income did formerly; and, as that has gradually diminished, the parliamentary appointments have encreased. The whole revenue of queen Elizabeth did not amount to more than 600000l. a year /g: that of king Charles I was /h 800000l. and the revenue voted for king Charles II was /i 1200000l. though it never in fact amounted to quite so much. /k But it must be observed, that under these sums were included all manner of public expenses, among which lord Clarendon in his speech to the parliament computed that the charge of the navy and land forces amounted annually to 800000l. which was ten times more than before the former troubles. /l The same revenue, subject to the same charges, was settled on onking James II /m: but by the encrease of trade, and more frugal management, it amounted on an average to a million and half per annum, (besides other additional customs, granted by parliament /n, which produced an annual revenue of 400000l.) out of which his fleet and army were maintained at the yearly expense of /o1100000l. After the revolution, when the parliament took into its own hands the annual support of the forces, both maritime and military, a civil list revenue was settled on the new king and queen, amounting, with the hereditary duties,
to 700000l. per annum; and the same was continued to queen Anne and king George I. That of king George II, we have seen, was nominally augmented to 800000l. and in fact was considerably more. But that of his present majesty is expressly limited to that sum; and, by reason of the charges upon it, amounts at present to little more than 700000l. And upon the whole it is doubtless much better for the crown, and also for the people, to have the revenue settled upon the modern footing rather than the ancient. For the crown; because it is more certain, and collected with greater ease: for the people; because they are now delivered from the feudal hardships, and other odious branches of the prerogative. And though complaints have sometimes been made of the increase of the civil list, yet if we consider the sums that have been formerly granted, the limited extent under which it is now established, the revenues and prerogatives given up in lieu of it by the crown, and (above all) the diminution of the value of money compared with what it was worth in the last century, we must acknowledge these complaints to be void of any rational foundation; and that it is impossible to support that dignity, which a king of Great Britain should maintain, with an income in any degree less than what is now established by parliament.


THIS finishes our enquiries into the fiscal prerogatives of the king; or his revenue, both ordinary and extraordinary. We have therefore now chalked out all the principal outlines of this vast title of the law, the supreme executive magistrate, or the king's majesty, considered in his several capacities and points of view. But, before we entirely dismiss this subject, it may not be improper to take a short comparative review of the power of the executive magistrate, or prerogative of the crown, as it stood in former days, and as it stands at present. And we cannot but observe, that most of the laws for ascertaining, limiting, and restraining this prerogative have been made within the compass of little more than a century past; from the
petition of right in 3 Car. I. to the present time. So that the powers of the crown are now to all appearance greatly curtailed and diminished since the reign of king James the first: particularly, by the abolition of the star chamber and high commission courts in the reign of Charles the first, and by the disclaiming of martial law, and the power of levying taxes on the subject, by the same prince: by the disuse of forest laws for a century past: and by the many excellent provisions enacted under Charles the second; especially, the abolition of military tenures, purveyance, and preemption; the habeas corpus act; and the act to prevent the discontinuance of parliaments for above three years: and, since the revolution, by the strong and emphatical words in which our liberties are asserted in the bill of rights, and act of settlement; by the act for triennial, since turned into septennial, elections; by the exclusion of certain officers from the house of commons; by rendering the seats of the judges permanent, and their salaries independent; and by restraining the king’s pardon from operating on parliamentary impeachments. Besides all this, if we consider how the crown is impoverished and stripped of all its ancient revenues, so that it greatly depends on the liberality of parliament for its necessary support and maintenance, we may perhaps be led to think, that the balance is inclined pretty strongly to the popular scale, and that the executive magistrate has neither independence nor power enough left, to form that check upon the lords and commons, which the founders of our constitution intended.

BUT, on the other hand, it is to be considered, that every prince, in the first parliament after his accession, has by long usage a truly royal addition to his hereditary revenue settled upon him for his life; and has never any occasion to apply to parliament for supplies, but upon some public necessity of the whole realm. This restores to him that constitutional independence, which at his first accession seems, it must be owned, to be wanting. And then, with regard to power, we may find perhaps that the hands of government are at least sufficiently strengthened; and that an English monarch is now in no danger of being overborne by either the nobility or the people. The instruments of power are not perhaps so open and avowed as they formerly were, and therefore are the less liable to jealous and invidious reflections; but they are not the weaker upon that account. In short, our national debt and taxes (besides the inconveniences before-mentioned) have also in their natural consequences thrown such a weight of power into the executive scale of government, as we cannot think was intended by our patriot ancestors; who gloriously struggled for the abolition of the then formidable parts of the prerogative; and by an
unaccountable want of foresight established this system in their stead. The entire collection and management of so vast a revenue, being placed in the hands of the crown, have given rise to such a multitude of new officers, created by and removeable at the royal pleasure, that they have extended the influence of government to every corner of the nation. Witness the commissioners, and the multitude of dependents on the customs, in every port of the kingdom; the commissioners of excise, and their numerous subalterns, in every inland district; the postmasters, and their servants, planted in every town, and upon every public road; the commissioners of the stamps, and their distributors, which are full as scattered and full as numerous; the officers of the salt duty, which, though a species of excise and conducted in the same manner, are yet made a distinct corps from the ordinary managers of that revenue; the surveyors of houses and windows; the receivers of the land tax; the managers of lotteries; and the commissioners of hackney coaches; all which are either mediately or immediately appointed by the crown, and removeable at pleasure without any reason assigned: these, it requires but little penetration to see, must give that power, on which they depend for subsistence, an influence most amazingly extensive. To this may be added the frequent opportunities of conferring particular obligations, by preference in loans, subscriptions, tickets, remittances, and other money-transactions, which will greatly encrease this influence; and that over those persons whose attachment, on account of their wealth, is frequently the most desirable. All this is the natural, though perhaps the unforeseen, consequence of erecting our funds of credit, and to support them establishing our present perpetual taxes: the whole of which is entirely new since the restoration in 1660; and by far the greatest part since the revolution in 1688. And the same may be said with regard to the officers in our numerous army, and the places which the army has created. All which put together gives the executive power so persuasive an energy with respect to the persons themselves, and so prevailing an interest with their friends and families, as will amply make amends for the loss of external prerogative.

BUT, though this profusion of offices should have no effect on individuals, there is still another newly acquired branch of power; and that is, not the influence only, but the force of a disciplined army: paid indeed ultimately by the people, but immediately by the crown; raised by the crown, officered by the crown, commanded by the crown. They are kept on foot it is true only from year to year, and that by the power of parliament: but during that year they must, by the nature of our constitution, if raised at all, be at the absolute disposal of the crown. And there need but few words
to demonstrate how great a trust is thereby reposed in the prince by his people. A trust, that is more than equivalent to a thousand little troublesome prerogatives.

ADD to all this, that, besides the civil list, the immense revenue of seven millions sterling, which is annually paid to the creditors of the public, or carried to the sinking fund, is first deposited in the royal exchequer, and thence issued out to the respective offices of payment. This revenue the people can never refuse to raise, because it is made perpetual by act of parliament: which also, when well considered, will appear to be a trust of great delicacy and high importance.

UPON the whole therefore I think it is clear, that, whatever may have become of the nominal, the real power of the crown has not been too far weakened by any transactions in the last century. Much is indeed given up; but much is also acquired. The stern commands of prerogative have yielded to the milder voice of influence; the slavish and exploded doctrine of non-resistance has given way to a military establishment by law; and to the disuse of parliaments has succeeded a parliamentary trust of an immense perpetual revenue. When, indeed, by the free operation of the sinking fund, our national debts shall be lessened; when the posture of foreign affairs, and the universal introduction of a well planned and national militia, will suffer our formidable army to be thinned and regulated; and when (in consequence of all) our taxes shall be gradually reduced; this adventitious power of the crown will slowly and imperceptibly diminish, as it slowly and imperceptibly rose. But, till that shall happen, it will be our especial duty, as good subjects and good Englishmen, to reverence the crown, and yet guard against corrupt and servile influence from those who are intrusted with its authority; to be loyal, yet free; obedient, and yet independent: and, above every thing, to hope that we may long, very long, continue to be governed by a sovereign, who, in all those public acts that have personally proceeded from himself, hath manifested the highest veneration for the free constitution of Britain; hath already in more than one instance remarkably strengthened its outworks; and will therefore never harbour a thought, or adopt a persuasion, in any the remotest degree detrimental to public liberty.

CHAPTER THE NINTH.

OF SUBORDINATE MAGISTRATES.

IN a former chapter of these commentaries /a we distinguished magistrates into two kinds; supreme, or those in whom the sovereign power of the state resides; and subordinate, or those who act in an inferior secondary sphere. We have hitherto considered the former kind only,
namely, the supreme legislative power or parliament, and the supreme executive power, which is the king: and are now to proceed to enquire into the rights and duties of the principal subordinate magistrates.

AND herein we are not to investigate the powers and duties of his majesty's great officers of state, the lord treasurer, lord chamberlain, the principal secretaries, or the like; because I do not know that they are in that capacity in any considerable degree the objects of our laws, or have any very important share of magistracy conferred upon them: except that the secretaries of state are allowed the power of commitment, in order to bring offenders to trial. Neither shall I here treat of the office and authority of the lord chancellor, or the other judges of the superior courts of justice; because they will find a more proper place in the third part of these commentaries. Nor shall I enter into any minute disquisitions, with regard to the rights and dignities of mayors and aldermen, or other magistrates of particular corporations; because these are mere private and strictly municipal rights, depending entirely upon the domestic constitution of their respective franchises. But the magistrates and officers, whose rights and duties it will be proper in this chapter to consider, are such as are generally in use and have a jurisdiction and authority dispersedly throughout the kingdom: which are, principally, sheriffs; coroners; justices of the peace; constables; surveyors of highways; and overseers of the poor. In treating of all which I shall enquire into, first, their antiquity and original; next, the manner in which they are appointed and may be removed; and, lastly, their rights and duties. And first of sheriffs.

THE sheriff is an officer of very great antiquity in this kingdom, his name being derived from two Saxon words, shire reeve, the bailiff or officer of the shire. He 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, by reason of their high employments and attendance on the king's person, not being able to transact the business of the county, were delivered of that burden; reserving to themselves the honour, but the labour was laid on the sheriff. So that now the sheriff does all the king's business in the county; and though he be still called vice-comes, yet he is entirely independent of, and not subject to the earl; the king by his letters patent committing custodiam comitatus to the sheriff, and him alone.
SHERIFFS were formerly chosen by the inhabitants of the several counties. In confirmation of which it was ordained by statute 28 Edw. I. c. 8. that the people should have election of sheriffs in every shire, where the shrievalty is not of inheritance. For anciently in some counties, particularly on the borders, the sheriffs were hereditary; as I apprehend they are in Scotland, and in the county of Westmorland, to this day: and the city of London has also the inheritance of the shrievalty of Middlesex vested in their body by charter. The reason of these popular elections is assigned in the same statute, c. 13. "that the commons might choose such as would not be a burden to them." And herein appears plainly a strong trace of the democratical part of our constitution; in which form of government it is an indispensable requisite, that the people should choose their own magistrates. This election was in all probability not absolutely vested in the commons, but required the royal approbation. For in the Gothic constitution, the judges of their county courts (which office is executed by our sheriff) were elected by the people, but confirmed by the king: and the form of their election was thus managed; the people, or incolae territorii, chose twelve electors, and they nominated three persons, ex quibus rex unum confirmabat. But, with us in England, these popular elections, growing tumultuous, were put an end to by the statute 9 Edw. II. st. 2. which enacted, that the sheriffs should from thenceforth be assigned by the lord chancellor, treasurer, and the judges; as being persons in whom the same trust might with confidence be reposed. By statutes 14 Edw. III. c. 7. and 23 Hen. VI. c. 8. the chancellor, treasurer, chief justices, and chief baron, are to make this election; and that on the morrow of All Souls in the exchequer. But the custom now is (and has been at least ever since the time of Fortescue, who was chief justice and chancellor to Henry the sixth) that all the judges, and certain other great officers, meet in the exchequer chamber on the morrow of All Souls yearly, (which day is now altered to the morrow of St. Martin by the act for abbreviating Michaelmas term) and then and there nominate three persons to the king, who afterwards appoints one of them to be sheriff. This custom, of the twelve judges nominating threepersons, seems borrowed from the Gothic constitution beforementioned; with this difference, that among the Goths the twelve nominors were first elected by the people themselves. And this usage of ours at its first introduction, I am apt to believe, was founded upon some statute, though not now to be found among our printed laws: first, because it is materially different from the directions of all the statutes beforementioned; which it is hard to conceive that the judges would have
countenanced by their concurrence, or that Fortescue would have inserted in his book, unless by the authority of some statute: and also, because a statute is expressly referred to in the record, which sir Edward Coke tells us he transcribed from the council book of 3 Mar. 34 Hen. VI. and which is in substance as follows. The king had of his own authority appointed a man sheriff of Lincolnshire, which office he refused to take upon him: whereupon the opinions of the judges were taken, what should be done in this behalf. And the two chief justices, sir John Fortescue and sir John Prisot, delivered the unanimous opinion of them all; "that the king did an error when he made a person sheriff, that was not chosen and presented to him according to the statute; that the person refusing was liable to no fine for disobedience, as if he had been one of the three persons chosen according to the tenor of the statute; that they would advise the king to have recourse to the three persons that were chosen according to the statute, or that some other thrifty man be intreated to occupy the office for this year; and that, the next year, to eschew such inconveniences, the order of the statute in this behalf made be observed." But, notwithstanding this unanimous resolution of all the judges of England, thus entered in the council book, some of our writers have affirmed, that the king, by his prerogative, may name whom he pleases to be sheriff, whether chosen by the judges or no. This is grounded on a very particular case in the fifth year of queen Elizabeth, when, by reason of the plague, there was no Michaelmas term kept at Westminster; so that the judges could not meet there in crastino Animarum to nominate the sheriffs: whereupon the queen named them herself, without such previous assembly, appointing for the most part one of the two remaining in the last year's list. And this case, thus circumstanced, is the only precedent in our books for the making these extraordinary sheriffs. It is true, the reporter adds, that it was held that the queen by her prerogative might make a sheriff without the election of the judges, non obstante aliquo statuto in contrarium: but the doctrine of non obstante's, which sets the prerogative above the laws, was effectually demolished by the bill of rights at the revolution, and abdicated Westminster-hall when king James abdicated the kingdom. So that sheriffs cannot now be legally appointed, otherwise than according to the known and established law.

/d 3 Rep. 72.
/e Montesq. Sp. L. b. 2. c. 2.
/f Stiernhooke de jure Goth. l. 1. c. 3.
/g de L.L. c. 24.
/h 2 Inst. 559.
SHERIFFS, by virtue of several old statutes, are to continue in their office no longer than one year; and yet it hath been said that a sheriff may be appointed durante bene placito, or during the king's pleasure; and so is the form of the royal writ. Therefore, till a new sheriff be named, his office cannot be determined, unless by his own death, or the demise of the king; in which last case it was usual for the successor to send a new writ to the old sheriff: but now by statute 1 Ann. st. 1. c. 8. 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. We may farther observe, that by statute 1 Ric. II. 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.

WE shall find it is of the utmost importance to have the sheriff appointed according to law, when we consider his power and duty. These are either as a judge, as the 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 all causes of forty shillings value and under, in his county court, of which more in its proper place: and he has also judicial power in divers other civil cases. He is likewise to decide the elections of knights of the shire, (subject to the control of the house of commons) of coroners, and of verderors; to judge of the qualification of voters, and to return such as he shall determine to be duly elected.

AS the keeper of the king's peace, both by 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 county against any of the king's enemies when they come into the land: and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called the posse comitatus, or power of the county: which
summons every person above fifteen years old, and under the degree of a
peer, is bound to attend upon warning /r, under pain of fine and
imprisonment. /s But though the sheriff is thus the principal conservator
of the peace in his county, yet, by the express directions of the great
charter /t, he, together with the constable, coroner, and certain other
officers of the king, are forbidden to hold any pleas of the crown, or, in
other words, to try any criminal offence. For it would be highly
unbecoming, that the executioners of justice should be also the judges;
should impose, as well as levy, fines and amercements; should one day
condemn a man to death, and personally execute him the next. Neither
may he act as an ordinary justice of the peace during the time of his office
/u: for this would be equally inconsistent; he being in many respects the
servant of the justices.
/q Dalt. c. 95.
/r Lamb. Eiren. 315.
/s Stat. 2 Hen. V. c. 8.
/t cap. 17.
/u Stat. 1 Mar. st. 2. c. 8.

IN his ministerial capacity the sheriff is bound to execute all process
issuing from the king's courts of justice. In the commencement of civil
causes, he is to serve the writ, to arrest, and to take bail; when the cause
comes to trial, he must summon and return the jury; when it is
determined, he must see the judgment of the court carried into execution.
In criminal matters, he also arrests and imprisons, he returns the jury, he
has the custody of the delinquent, and he executes the sentence of the
court, though it extend to death itself.

AS the king's bailiff, it is his business to preserve the rights of the king
within his bailiwick; for so his county is frequently called in the writs: a
word introduced by the princes of the Norman line; in imitation of the
French, whose territory is divided into bailiwicks, as that of England into
counties, /w He must seise to the king's use all lands devolved to the
crown by attainder or escheat; must levy all fines and forfeitures; must
seise and keep all waifs, wrecks, estrays, and the like, unless they be
granted to some subject; and must also collect the king's rents within his
bailiwick, if commanded by process from the exchequer. /x
/w Fortesc. de L.L. c. 24.
/x Dalt. c. 9.
TO execute these various offices, the sheriff has under him many inferior officers; an under-sheriff, bailiffs, and gaolers; who must neither buy, sell, nor farm their offices, on forfeiture of 500l. /y

/y Stat. 3 Geo. I. c. 15.

THE under-sheriff usually performs all the duties of the office; a very few only excepted, where the personal presence of the high-sheriff is necessary. But no under-sheriff shall abide in his office above one year; /z and if he does, by statute 23 Hen. VI. c. 8. he forfeits 200l. a very large penalty in those early days. And no under-sheriff or sheriff's officer shall practice as an attorney, during the time he continues in such office /a: for this would be a great inlet to partiality and oppression. But these salutary regulations are shamefully evaded, by practising in the names of other attorneys, and putting in sham deputies by way of nominal under-sheriffs: by reason of which, says Dalton /b, the under-sheriffs and bailiffs do grow so cunning in their several places, that they are able to deceive, and it may be well feared that many of them do deceive, both the king, the high-sheriff, and the county.

/z Stat. 42 Edw. III. c. 9.
/a Stat. 1 Hen. V. c. 4.
/b of sheriffs, c. 115.

BAILIFFS, or sheriff's officers, are either bailiffs of hundreds, or special bailiffs. Bailiffs of hundreds are officers appointed over those respective districts by the sheriffs, to collect fines therein; to summon juries; to attend the judges and justices at the assises, and quarter sessions; and also to execute writs and process in the several hundreds. But, as these are generally plain men, and not thoroughly skillful in this latter part of their office, that of serving writs, and making arrests and executions, it is now usual to join special bailiffs with them; who are generally mean persons employed by the sheriffs on account only of their adroitness and dexterity in hunting and seising their prey. The sheriff being answerable for the misdemeanors of these bailiffs, they are therefore usually bound in a bond for the due execution of their office, and thence are called bound-bailiffs; which the common people have corrupted into a much more homely appellation.

GAOLERS are also the servants of the sheriff, and he must be 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 shall answer it to the king, if it be a criminal matter; or, in a civil case, to the party injured. /c And to this end the sheriff must /d have lands sufficient within the county to answer the king and his people.
The abuses of goalers and sheriff’s officers toward the unfortunate persons in their custody are well restrained and guarded against by statute 32 Geo. II. c. 28.

The vast expense, which custom had introduced in serving the office of high-sheriff, was grown such a burden to the subject, that it was enacted, by statute 13 & 14 Car. II. c. 21, that no sheriff should keep any table at the assises, except for his own family, or give any presents to the judges or their servants, or have more than forty men in livery; yet, for the sake of safety and decency, he may not have less than twenty men in England and twelve in Wales; upon forfeiture, in any of these cases, of 200l.

II. THE coroner’s is also a very ancient office at the common law. He is called coroner, coronator, because he hath principally to do with pleas of the crown, or such wherein the king is more immediately concerned. And in this light the lord chief justice of the king’s bench is the principal coroner in the kingdom, and may (if he pleases) exercise the jurisdiction of a coroner in any part of the realm. But there are also particular coroners for every county of England; usually four, but sometimes six, and sometimes fewer. This officer is of equal antiquity with the sheriff; and was ordained together with him to keep the peace, when the earls gave up the wardship of the county.

HE is still chosen by all the freeholders in the county court, as by the policy of our ancient laws the sheriffs, and conservators of the peace, and all other officers were, who were concerned in matters that affected the liberty of the people; and as verderors of the forests still are, whose business it is to stand between the prerogative and the subject in the execution of the forest laws. For this purpose there is a writ at common law de coronatore eligendo: in which it is expressly commanded the sheriff, "quod talem eligi faciat, qui melius et sciat, et velit, et possit, officio illi intendere." And, in order to effect this the more surely, it was enacted by the statute of Westm. I, that none but lawful and discreet knights should be chosen. But it seems it is now sufficient if a man have lands enough to be made a knight, whether he be really knighted or not: and there was an instance in the 5 Edw. III. of a man being removed from this office, because he was only a merchant. The coroner ought also to have
estate sufficient to maintain the dignity of his office, and answer any fines that may be set upon him for his misbehaviour /o: and if he have not enough to answer, his fine shall be levied on the county, as a punishment for electing an insufficient officer. /p Now indeed, through the culpable neglect of gentlemen of property, this office has been suffered to fall into disrepute, and get into low and indigent hands: so that, although formerly no coroner would condescend to be paid for serving his country, and they were by the aforesaid statute of Westm. I. expressly forbidden to take a reward, under pain of great forfeiture to the king; yet for many years past they have only desired to be chosen for the sake of their perquisites; being allowed fees for their attendance by the statute 3 Hen. VII. c. 1. which sir Edward Coke complains of heavily; /q though they have since his time been much enlarged. /r

/i 2 Inst. 558.
/k F.N.B. 163.
/l 3 Edw. I. c. 10.
/m F.N.B. 163, 164.
/n 2 Inst. 32.
/o F.N.B. 163, 164.
/p Mirr. c. 1. 3. 2 Inst. 175.
/r Stat. 25 Geo. II. c. 29.

THE coroner is chosen for life: but may be removed, either by being made sheriff, or chosen verderor, which are offices incompatible with the other; or 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. /s And by the statute 25 Geo. II. c. 29. extortion, neglect, or misbehaviour, are also made causes of removal.

/s F.N.B. 163, 164.

THE office and power of a coroner are also, like those of a sheriff, either judicial or ministerial; but principally judicial. This is in great measure ascertained by statute 4 Edw. I. de officio coronatoris; and consists, first, in enquiring (when any person is slain or dies suddenly) concerning the manner of his death. And this must be "super visum corporis; /t" for, if the body be not found, the coroner cannot sit. /u He must also sit at the very place where the death happened; and his enquiry is made by a jury from four, five, or six of the neighbouring towns, over whom he is to preside. If any be found guilty by this inquest of murder, he is to commit to prison for further trial, and is also to enquire concerning their lands, goods and
chattels, which are forfeited thereby: but, whether it be murder or not, he must enquire whether any deodand has accrued to the king, or the lord of the franchise, by this death: and must certify the whole of this inquisition to the court of king's bench, or the next assises. Another branch of his office is to enquire concerning shipwrecks; and certify whether wreck or not, and who is in possession of the goods. Concerning treasure trove, he is also to enquire who were the finders, and where it is, and whether any one be suspected of having found and concealed a treasure; "and that may be well perceived (saith the old statute of Edw. I.) where one liveth riotously, haunting taverns, and hath done so of long time:" whereupon he might be attached, and held to bail, upon this suspicion only.

/t 4 Inst. 271.

/u Thus, in the Gothic constitution, before any fine was payable by the neighbourhood, for the slaughter of a man therein, "de corpore delicti constare oportebat; i.e. non tam fuisse aliquem in territorio isto mortuum inventum, quam vulneratum et caesum. Potest enim homo etiam ex alia causa subito mori." Stiernhook de jure Gothor. l. 3.c. 4.

THE ministerial office of the coroner is only as the sheriff's substitute. For when just exception can be taken to the sheriff, for suspicion of partiality, (as that he is interested in the suit, or of kindred to either plaintiff or defendant) the process must then be awarded to the coroner, instead of the sheriff, for execution of the king's writs, /w 4 Inst. 271.

/w

III. THE next species of subordinate magistrates, whom I am to consider, are justices of the peace; the principal of whom is the custos rotulorum, or keeper of the records of the county. The common law hath ever had a special care and regard for the conservation of the peace; for peace is the very end and foundation of civil society. And therefore, before the present constitution of justices was invented, there were peculiar officers appointed by the common law for the maintenance of the public peace. Of these some had, and still have, this power annexed to other offices which they hold; others had it merely by itself, and were thence named custodesor conservatores pacis. Those that were so virtute officii still continue; but the latter sort are superseded by the modern justices.

THE kings majesty /x is, by his office and dignity royal, 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 of England, the lord mareschal, and lord high constable of England (when any such officers are in being) and all the
justices of the court of king's bench (by virtue of their offices) and 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 /y: the other judges are only so in their
own courts. The coroner is also a conservator of the peace within his own
county; /z as is also the sheriff; /a and both of them may take a
recognizance or security for the peace. Constables, tythingmen, and the
like, are also conservators of the peace within their own jurisdictions; and
may apprehend all breakers of the peace, and commit them till they find
sureties for their keeping it. /b
/x Lambard. Eirenarch. 12.
/y Lamb. 12.
/z Britton. 3.
/a F.N.B. 81.

THOSE that were, without any office, simply and merely conservators of
the peace, were chosen by the freeholders in full county court before the
sheriff; the writ for their election directing them to be chosen "de
probioribus et melioribus in comitatu suo in custodes pacis. /c" But when
queen Isabel, the wife of Edward II, had contrived to depose her husband
by a forced resignation of the crown, and had set up his son Edward III in
his place; this, being a thing then without example in England, it was
feared would much alarm the people; especially as the old king was living,
though hurried about from castle to castle; till at last he met with an
untimely death. To prevent therefore any risings, or other disturbance of
the peace, the new king sent writs to all the sheriffs in England, the form of
which is preserved by Thomas Walsingham /d, giving a plausible account
of the manner of his obtaining the crown; to wit, that it was done ipsius
patris beneplacito: and withal commanding each sheriff that the peace be
kept throughout his bailiwick, on pain and peril of disinheretance and loss
of life and limb. And in a few weeks after the date of these writs, it was
ordained in parliament /e, that, for the better maintaining and keeping of
the peace in every county, good men and lawful, which were no
maintainers of evil, or barretors in the country, should be assigned to keep
the peace. And in this manner, and upon this occasion, was the election of
the conservators of the peace taken from the people, and given to the king;
/f this assignment being construed to be by the king's commission. /g But
still they were called only conservators, wardens, or keepers of the peace,
till the statute 34 Edw. III. c. 1. gave them the power of trying felonies; and
then they acquired the more honorable appellation of justices. /h
THESE justices are appointed by the king’s special commission under the great seal, the form of which was settled by all the judges, A.D. 1590. 

This appoints them all, jointly and severally, to keep the peace, and any two or more of them to enquire of and determine felonies, and other misdemeanors: in which number some particular justices, or one of them, are directed to be always included, and no business to be done without their presence; the words of the commission running thus, "quorum aliquem vestrum, A. B. C. D. &c. unum esse volumus;" whence the persons so named are usually called justices of the quorum. And formerly it was customary to appoint only a select number of justices, eminent for their skill and discretion, to be of the quorum; but now the practice is to advance almost all of them to that dignity, naming them all over again in the quorum clause, except perhaps only some one inconsiderable person for the sake of propriety: and no exception is now allowable, for not expressing in the form of warrants, &c., that the justice who issued them is of the quorum.

TOUCHING the number and qualifications of these justices; it was ordained by statute 18 Edw. III. c. 2. that two, or three, of the best reputation in each county shall be assigned to be keepers of the peace. But these being found rather too few for that purpose, it was provided by statute 34 Edw. III. c. 1. that one lord, and three, or four, of the most worthy men in the county, with some learned in the law, shall be made justices in every county. But afterwards the number of justices, through the ambition of private persons, became so large, that it was thought necessary by statute 12 Ric. II. c. 10. and 14 Ric II. c. 11. to restrain them at first to six, and afterwards to eight only. But this rule is now disregarded, and the cause seems to be (as Lambard observed long ago) that the growing number of statute laws, committed from time to time to the charge of justices of the peace, have occasioned also (and very reasonably) their encrease to a larger number. And, as to their qualifications, the statutes just cited direct them to be of the best reputation, and most
worthy men in the county: and the statute 13 Ric. II. c. 10. orders them to be of the most sufficient knights, esquires, and gentlemen of the law. Also by statute 2 Hen. V. st. 1. c. 4. and st. 2. c. 1. they must be resident in their several counties. And because, contrary to these statutes, men of small substance had crept into the commission, whose poverty made them both covetous and contemptible, it was enacted by statute 18 Hen. VI. c. 11. that no justice should be put in commission, if he had not lands to the value of 20l. per annum. And, the rate of money being greatly altered since that time, it is now enacted by statute 5 Geo. II. c. 11. that every justice, except as is therein excepted, shall have 100l. per annum clear of all deductions; and, if he acts without such qualification, he shall forfeit 100l. which /n is almost an equivalent to the 20l. per annum required in Henry the sixth's time: and of this qualification /o the justice must now make oath. Also it is provided by the act 5 Geo. II. that no practising attorney, solicitor, or proctor, shall be capable of acting as a justice of the peace.

/m Lamb. 34.
/n See bishop Fleetwood's calculations in his chronicon pretiosum.
/o Stat. 18 Geo. II. c. 20.

AS the office of these justices is conferred by the king, so it subsists only during his pleasure; and is determinable, 1. By the demise of the crown; that is, in six months after. /p 2. By express writ under the great seal /q, discharging any particular person, from being any longer justice. 3. By superseding the commission by writ of supersedeas, which suspends the power of all the justices, but does not totally destroy it; seeing it may be revived again by another writ, called a procedendo. 4. By a new commission, which virtually, though silently, discharges all the former justices that are not included therein; for two commissions cannot subsist at once. 5. By accession of the office of sheriff or coroner. /r Formerly it was thought, that if a man was named in any commission of the peace, and had afterwards a new dignity conferred upon him, that this determined his office; he no longer answering the description of the commission: but now /s it is provided, that notwithstanding a new title of dignity, the justice on whom it is conferred shall still continue a justice.

/p Stat. 1 Ann. c. 8.
/q Lamb. 67.
/r Stat. 1 Mar. st. 1. c. 8.
/s Stat. 1 Edw. VI. c. 7.

THE power, office, and duty of a justice of the peace depend on his commission, and on the several statutes, which have created objects of his jurisdiction. His commission, first, empowers him singly to conserve the
peace; and thereby gives him all the power of the ancient conservators at the common law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing felons and other inferior criminals. It also empowers any two or more of them to hear and determine all felonies and other offences; which is the ground of their jurisdiction at sessions, of which more will be said in its proper place. And as to the powers given to one, two, or more justices by the several statutes, that from time to time have heaped upon them such an infinite variety of business, that few care to undertake, and fewer understand, the office; they are such and of so great importance to the public, that the country is greatly obliged to any worthy magistrate, that without sinister views of his own will engage in this troublesome service. And therefore, if a well meaning justice makes any undesigned slip in his practice, great lenity and indulgence is shewn to him in the courts of law; and there are many statutes made to protect him in the upright discharge of his office /t: which, among other privileges, prohibit such justices from being sued for any oversights without notice beforehand; and stop all suits begun, on tender made of sufficient amends. But, on the other hand, any malicious or tyrannical abuse of their office is sure to be severely punished; and all persons who recover a verdict against a justice, for any wilful or malicious injury, are entitled to double costs.

/t Stat. 7 Jac. I. c. 5. 21 Jac. I. c. 12. 24 Geo. II. c. 44.

IT is impossible upon our present plan to enter minutely into the particulars of the accumulated authority, thus committed to the charge of these magistrates. I must therefore refer myself at present to such subsequent parts of these commentaries, as will in their turns comprize almost every object of the justices' jurisdiction: and in the mean time recommend to the student the perusal of Mr Lambard's eirenarcha, and Dr Burn's justice of the peace; wherein he will find every thing relative to this subject, both in ancient and modern practice, collected with great care and accuracy, and disposed in a most clear and judicious method.

I SHALL next consider some officers of lower rank than those which have gone before, and of more confined jurisdiction; but still such as are universally in use through every part of the kingdom.

IV. FOURTHLY, then, of the constable. The word constable is frequently said to be derived from the Saxon, koning-staple, and to signify the support of the king. But, as we borrowed the name as well as the office of constable from the French, I am rather inclined to deduce it, with sir H. Spelman and Dr Cowel, from that language, wherein it is plainly derived from the Latin comes stabuli, an officer well known in the empire; so
called because, like the great constable of France, as well as the lord high
costable of England, he was to regulate all matters of chivalry, tilts,
turnaments, and feats of arms, which were performed on horseback. This
great office of lord high constable hath been disused in England, except
only upon great and solemn occasions, as the king's coronation and the
like, ever since the attainder of Stafford duke of Buckingham under king
Henry VIII; as in France it was suppressed about a century after by an
edict of Louis XIII /u: but from his office, says Lambard /w, this lower
constables' ship was at first drawn and fetched, and is as it were a very finger
of that hand. For the statute of Winchester /x, which first appoints them,
directs that, for the better keeping of the peace, two constables in every
hundred and franchise shall inspect all matters relating to arms and
armour.

/u Philips's life of Pole. ii. 111.
/w of constables, 5.
/x 13 Edw. I. c. 6.

CONSTABLES are of two sorts, high constables, and petty constables. The
former were first ordained by the statute of Winchester, as before-
mentioned; 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 removeable by the same authority that
appoints them. /y The petty constables are inferior officers in every town
and parish, subordinate to the high constable of the hundred, first
instituted about the reign of Edward III. /z These petty constables have
two offices united in them; the one ancient, the other modern. Their
ancient office is that of headborough, tithing-man, or borsholder; of whom
we formerly spoke /a, and who are as ancient as the time of king Alfred:
their more modern office is that of constable merely; which was appointed
(as was observed) so lately as the reign of Edward III, in order to assist the
high constable. /b And in general the ancient headboroughs, tithing-men,
and borsholders, were made use of to serve as petty constables; though not
so generally, but that in many places they still continue distinct officers
from the constable. They are all chosen by the jury at the court leet; or, if
no court leet be held, are appointed by two justices of the peace. /c

/y Salk. 150.
/a pag. 110.
/b Lamb. 9.
THE general duty of all constables, both high and petty, as well as of the
other officers, is to keep the king's peace in their several districts; and to
that purpose they are armed with very large powers, of arresting, and
imprisoning, of breaking open houses, and the like: of the extent of which
powers, considering what manner of men are for the most part put upon
these offices, it is perhaps very well that they are generally kept in
ignorance. One of their principal duties, arising from the statute of
Winchester, which appoints them, is to keep watch and ward in their
respective jurisdictions. Ward, guard, or custodia, is chiefly intended of
the day time, in order to apprehend rioters, and robbers on the highways;
the manner of doing which is left to the discretion of the justices of the
peace and the constable /d, the hundred being however answerable for all
robberies committed therein, by day light, for having kept negligent guard.
Watch is properly applicable to the night only, (being called among our
Teutonic ancestors wacht or wahta /e) and it begins at the time when ward
ends, and ends when that begins; for, by the statute of Winchester, in
walled towns the gates shall be closed from sunsetting to sunrising, and
watch shall be kept in every borough and town, especially in the summer
season, to apprehend all rogues, vagabonds, and night-walkers, and make
them give an account of themselves. The constable may appoint watchmen
at his discretion, regulated by the custom of the place; and these, being his
deputies, have for the time being the authority of their principal. But, with
regard to the infinite number of other minute duties, that are laid upon
constables by a diversity of statutes, I must again refer to Mr Lambard and
Dr Burn; in whose compilations may be also seen, what duties belong to
the constable or tything-man indifferently, and what to the constable only:
for the constable may do whatever the tything-man may; but it does not
hold e converso; for the tithing-man has not an equal power with the
constable.

/d Dalt. just. c. 104.
cap. 1.A.D. 815.

V. WE are next to consider the 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. From this burden
no man was exempt by our ancient laws, whatever other immunities he
might enjoy: this being part of the trinoda necessitas, to which every man's
estate was subject; viz. expeditio contra hostem, arcium constructio, et
pontium reparatio: for, though the reparation of bridges only is expressed,
yet that of roads also must be understood; as in the Roman law, ad
instructiones reparationesque itinerum et pontium, nullum genus
hominum, nulliusque dignitatis ac venerationis meritis, cessare oportet. /f
And indeed now, for the most part, the care of the roads only seems to be
left to parishes; that of bridges being in great measure devolved upon the
county at large, by statute 22 Hen. VIII. c. 5. If the parish neglected these
repairs, they might formerly, as they may still, be indicted for such their
neglect: but it was not then incumbent on any particular officer to call the
parish together, and set them upon this work; for which reason by the
statute 2 & 3 Ph. & M. c. 8. surveyors of the highways were ordered to be
chosen in every parish. /g
/f C. 11. 74. 4.
/g This office, Mr Dalton (just. cap. 50.) says, exactly answers that of the
curatores viarum of the Romans: but, I should guess that theirs was an
office of rather more dignity and authority than ours, not only from
comparing the method of making and mending the Roman ways with
those of our country parishes; but also because one Thermus, who was the
curator of the Flaminian way, was candidate for the consulship with Julius
Caesar. (Cic. ad Attic. l. 1. ep. 1.)
THESE surveyors were originally, according to the statute of Philip and
Mary, to be appointed by the constable and churchwardens of the parish;
but now /h they are constituted by two neighbouring justices, out of such
substantial inhabitants as have either 10l. per annum of their own, or rent
30l. a year, or are worth in personal estate 100l.
/h Stat. 3 W. & M. c. 12.
THEIR office and duty consists in putting in execution a variety of statutes
for the repairs of the highways; that is, of ways leading from one town to
another: by which it is enacted, 1. That they may remove all annoyances in
the highways, or give notice to the owner to remove them; who is liable to
penalties on noncompliance. 2. They are to call together all the inhabitants
of the parish, six days in every year, to labour in repairing the highways;
all persons keeping draughts, or occupying lands, being obliged to send a
team for every draught, and for every 50l. a year, which they keep or
occupy; and all other persons to work or find a labourer. The work must be
completed before harvest; as well for providing a good road for carrying in
the corn, as also because all hands are then supposed to be employed in
harvest work. And every cartway must be made eight feet wide at the least;
/i and may be increased by the quarter sessions to the breadth of four and
twenty feet. 3. The surveyors may lay out their own money in purchasing
materials for repairs, where there is not sufficient within the parish, and
shall be reimbursed by a rate, to be allowed at a special sessions. 4. In case the personal labour of the parish be not sufficient, the surveyors, with the consent of the quarter sessions, may levy a rate (not exceeding 6d. in the pound) on the parish, in aid of the personal duty; for the due application of which they are to account upon oath. As for turnpikes, which are now universally introduced in aid of such rates, and the law relating to them, these depend entirely on the particular powers granted in the several road acts, and therefore have nothing to do with this compendium of general law.

This, by the laws of the twelve tables at Rome, was the standard for roads that were straight; but, in winding ways, the breadth was directed to be sixteen feet. Ff. 8. 3. 8.

VI. I PROCEED therefore, lastly, to consider the overseers of the poor; their original, appointment, and duty.

THE poor of England, till the time of Henry VIII, subsisted entirely upon private benevolence, and the charity of welldisposed christians. For, though it appears by the mirrour /k, that by the common law the poor were to be "sustained by parsons, rector of the church, and the parishioners; so that none of them dye for default of sustenance;" and though by the statutes 12 Ric. II. c. 7. and 19 Hen. VII. c. 12. the poor are directed to be sustained in the cities or towns wherein they were born, or such wherein they had dwelt for three years (which seem to be the first rudiments of parish settlements) yet till the statute 27 Hen. VIII. c. 26. I find no compulsory method chalked out for this purpose: but the poor seem to have been left to such relief as the humanity of their neighbours would afford them. The monasteries were, in particular, their principal resource; and, among other bad effects which attended the monastic institutions, it was not perhaps one of the least (though frequently esteemed quite otherwise) that they supported and fed a very numerous and very idle poor, whose sustenance depended upon what was daily distributed in alms at the gates of the religious houses. But, upon the total dissolution of these, the inconvenience of thus encouraging the poor in habits of indolence and beggary was quickly felt throughout the kingdom: and abundance of statutes were made in the reign of king Henry the eighth, for providing for the poor and impotent; which, the preambles to some of them recite, had of late years strangelyincreased. These poor were principally of two sorts: sick and impotent, and therefore unable to work; idle and sturdy, and therefore able, but not willing, to exercise any honest employment. To provide in some measure for both of these, in and about the metropolis, his son Edward the sixth founded three royal hospitals;
Christ's, and St. Thomas's, for the relief of the impotent through infancy or sickness; and Bridewell for the punishment and employment of the vigorous and idle. But these were far from being sufficient for the care of the poor throughout the kingdom at large; and therefore, after many other fruitless experiments, by statute 43 Eliz. c. 2. overseers of the poor were appointed in every parish.

BY virtue of the statute last mentioned, these overseers are to be nominated yearly in Easter-week, or within one month after, by two justices dwelling near the parish. They must be substantial householders, and so expressed to be in the appointment of the justices.

THEIR office and duty, according to the same statute, are principally these: first, to raise competent sums for the necessary relief of the poor, impotent, old, blind, and such other, being poor and not able to work: and, secondly, to provide work for such as are able, and cannot otherwise get employment: but this latter part of their duty, which, according to the wise regulations of that salutary statute, should go hand in hand with the other, is now most shamefully neglected. However, for these joint purposes, they are empowered to make and levy rates upon the several inhabitants of the parish, by the same act of parliament; which has been farther explained and enforced by several subsequent statutes.

THE two great objects of this statute seem to have been, 1. To relieve the impotent poor, and them only. 2. To find employment for such as are able to work: and this principally by providing stocks to be worked up at home, which perhaps might be more beneficial than accumulating all the poor in one common work-house; a practice which tends to destroy all domestic connexions (the only felicity of the honest and industrious labourer) and to put the sober and diligent upon a level, in point of their earnings, with those who are dissolute and idle. Whereas, if none were to be relieved but those who are incapable to get their livings, and that in proportion to their incapacity; if no children were to be removed from their parents, but such as are brought up in rags and idleness; and if every poor man and his family were employed whenever they requested it, and were allowed the whole profits of their labour, a spirit of cheerful industry would soon diffuse itself through every cottage; work would become easy and habitual, when absolutely necessary to their daily subsistence; and the most indigent peasant would go through his task without a murmur, if assured that he and his children (when incapable of work through infancy, age, or
infirmity) would then, and then only, be intitled to support from his opulent neighbours.

THIS appears to have been the plan of the statute of queen Elizabeth; in which the only defect was confining the management of the poor to small, parochial, districts; which are frequently incapable of furnishing proper work, or providing an able director. However, the laborious poor were then at liberty to seek employment wherever it was to be had; none being obliged to reside in the places of their settlement, but such as were unable or unwilling to work; and those places of settlement being only such where they were born, or had made their abode, originally for three years, /m and afterwards (in the case of vagabonds) for one year only. /n
/m Stat. 19 Hen. VII. c. 12. 1 Edw. VI. c. 3. 3 Edw. VI. c. 16. 14 Eliz. c. 5. /n Stat. 39 Eliz. c. 4.

AFTER the restoration, a very different plan was adopted, which has rendered the employment of the poor more difficult, by authorizing the subdivision of parishes; has greatly increased their number, by confining them all to their respective districts; has given birth to the intricacy of our poor-laws, by multiplying and rendering more easy the methods of gaining settlements; and, in consequence, has created an infinity of expensive lawsuits between contending neighbourhoods, concerning those settlements and removals. By the statute 13 & 14 Car. II. c. 12. a legal settlement was declared to be gained by birth, inhabitancy, apprenticeship, or service for forty days; within which period all intruders were made removeable from any parish by two justices of the peace, unless they settled in a tenement of the annual value of 10l. The frauds, naturally consequent upon this provision, which gave a settlement by so short a residence, produced the statute 1 Jac. II. c. 17. which directed notice in writing to be delivered to the parish officers, before a settlement could be gained by such residence. Subsequent provisions allowed other circumstances of notoriety to be equivalent to such notice given; and those circumstances have from time to time been altered, enlarged, or restrained, whenever the experience of new inconveniences, arising daily from new regulations, suggested the necessity of a remedy. And the doctrine of certificates was invented, by way of counterpoise, to restrain a man and his family from acquiring a new settlement by any length of residence whatever, unless in two particular excepted cases; which makes parishes very cautious of giving such certificates, and of course confines the poor at home, where frequently no adequate employment can be had.

THE law of settlements may be therefore now reduced to the following general heads; or, a settlement in a parish may be acquired, 1. By birth;
which is always prima facie the place of settlement, until some other can be shewn. /o This is also always the place of settlement of a bastard child; for a bastard, having in the eye of the law no father, cannot be referred to his settlement, as other children may. /p But, in legitimate children, though the place of birth be prima facie the settlement, yet it is not conclusively so; for there are, 2. Settlements by parentage, being the settlement of one’s father or mother: all children being really settled in the parish where their parents are settled, until they get a new settlement for themselves. /q A new settlement may be acquired several ways; as, 3. By marriage. For a woman, marrying a man that is settled in another parish, changes her own: the law not permitting the separation of husband and wife. /r But if the man be a foreigner, and has no settlement, her’s is suspended during his life, if he be able to maintain her; but after his death she may return again to her old settlement. /s The other methods of acquiring settlements in any parish 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, 4. 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 registered) and resides there un molested for forty days after such notice, he is legally settled thereby. /t 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, 5. Renting for a year a tenement of the yearly value of ten pounds, and residing forty days in the parish, gains a settlement without notice; /u upon the principle of having substance enough to gain credit for such a house. 6. Being charged to and paying the public taxes and levies of the parish; and, 7. Executing 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 /w, when coupled with a residence of forty days. 8. Being hired for a year, when unmarried, and serving a year in the same service; and 9. Being bound an apprentice for seven years; give the servant and apprentice a settlement, without notice /x, in that place wherein they serve the last forty days. This is meant to encourage application to trades, and going out to reputable services. 10. Lastly, the 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, as by descent, gift, devise, &c., is a sufficient settlement /y: but if a man acquire it by his own act, as by purchase, (in its popular sense, in consideration of money paid) then /z unless the consideration advanced, bona side, be 30l. 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 trifling or fraudulent purchase of his own, acquire a permanent and lasting settlement.

/o 1 Lord Raym. 567.
/p Salk. 427.
/q Salk. 528. 2 Lord Raym. 1473.
/r Stra. 544.
/s Foley. 249.
/t Stat. 13 & 14 Car. II c. 12. 1 Jac. II. c. 17. 3 & 4 W. & M. c. 11.
/u Stat. 13 & 14 Car. II. c. 12.
/w Stat. 3 & 4 W. & M. c. 11.
/x Stat. 3 & 4 W. & M. c. 11. 8 & 9 W. III. c. 10. and 31 Geo. II. c. 11.
/y Salk. 524.
/z Stat. 9 Geo. I. c. 7.

ALL persons, not so settled, may be removed to their own parishes, 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 10l. per annum, or living in an annual service; for then they are not removeable. /a 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. /b But such certificated persons can gain no settlement by any of the means above-mentioned; unless by renting a tenement of 10l. per annum, or by serving an annual office in the parish, being legally placed therein: neither can an apprentice or servant to such certificated person gain a settlement by such their service. /c

/a Salk. 472.

THESE are the general heads of the laws relating to the poor, which, by the resolutions of the courts of justice thereon within a century past, are branched into a great variety. And yet, notwithstanding the pains that has been taken about them, they still remain very imperfect, and inadequate to
the purposes they are designed for: a state, that has generally attended most of our statute laws, where they have not the foundation of the common law to build on. When the shires, the hundreds, and the tithings, were kept in the same admirable order that they were disposed in by the great Alfred, there were no persons idle, consequently none but the impotent that needed relief: and the statute of 43 Eliz. seems entirely founded on the same principle. But when this excellent scheme was neglected and departed from, we cannot but observe with concern, what miserable shists and lame expedients have from time to time been adopted, in order to patch up the flaws occasioned by this neglect. There is not a more necessary or more certain maxim in the frame and constitution of society, than that every individual must contribute his share, in order to the well-being of the community: and surely they must be very deficient in sound policy, who suffer one half of a parish to continue idle, dissolute, and unemployed; and then form visionary schemes, and at length are amazed to find, that the industry of the other half is not able to maintain the whole.

CHAPTER THE TENTH.
OF THE PEOPLE, WHETHER ALIENS, DENIZENS, OR NATIVES.
HAVING, in the eight preceding chapters, treated of persons as they stand in the public relations of magistrates, I now proceed to consider such persons as fall under the denomination of the people. And herein all the inferior and subordinate magistrates, treated of in the last chapter, are included.

THE first and 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 ligeance, or as it is generally called, the allegiance of the king; and aliens, such as are born out of it. Allegiance is the tie, or ligamen, which binds the subject to the king, in return for that protection which the king affords the subject. The thing itself, or substantial part of it, is founded in reason and the nature of government; the name and the form are derived to us from our Gothic ancestors. Under the feodal system, every owner of lands held them in subjectio to some superior or lord, from whom or whose ancestors the tenant or vasal had received them: and there was a mutual trust or confidence subsisting between the lord and vasal, that the lord should protect the vasal in the enjoyment of the territory he had granted him, and, on the other hand, that the vasal should be faithful to the lord and defend him against all his enemies. This obligation on the part of the vasal
was called his sidellitas or fealty; and an oath of fealty was required, by the
feodal law, to be taken by all tenants to their landlord, which is couched in
almost the same terms as our ancient oath of allegiance /a: except that in
the usual oath of fealty there was frequently a saving or exception of the
faith due to a superior lord by name, under whom the landlord himself
was perhaps only a tenant or vasal. But when the acknowledgement was
made to the absolute superior himself, who was vasal to no man, it was no
longer called the oath of fealty, but the oath of allegiance; and therein the
tenant swore to bear faith to his sovereign lord, in opposition to all men,
without any saving or exception: "contra omnes homines sidellitatem fecit.
/b" Land held by this exalted species of fealty was called feudum ligium, a
liege fee; the vasals homines ligii, or liege men; and the sovereign their
dominus ligius, or liege lord. And when sovereign princes did homage to
each other, for lands held under their respective sovereignties, a
distinction was always made between simple homage, which was only an
acknowledgement of tenure; /c and liege homage, which included the
fealty before-mentioned, and the services consequent upon it. Thus when
Edward III, in 1329, did homage to Philip VI of France, for his ducal
dominions on that continent, it was warmly disputed of what species the
homage was to be, whether liege or simple homage; /d With us in
England, it becoming a settled principle of tenure, that all lands in the
kingdom are holden of the king as their sovereign and lord paramount, no
oath but that of fealty could ever be taken to inferior lords, and the oath of
allegiance was necessarily confined to the person of the king alone. By an
easy analogy the term of allegiance was soon brought to signify all other
engagements, which are due from subjects to their prince, as well as those
duties which were simply and merely territorial. And the oath of
allegiance, as administered for upwards of six hundred years /e, 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."
Upon which sir Matthew Hale /f makes this remark; that it was short and
plain, not entangled with long or intricate clauses or declarations, and yet
is comprehensive of the whole duty from the subject to his sovereign. But,
at the revolution, the terms of this oath being thought perhaps to favour
too much the notion of non-resistance, the present form was introduced by
the convention parliament, which is more general and indeterminate than
the former; 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 renuntiation of the pope's pretended authority: and the oath of abjuration, introduced in the reign of king William /g, very amply supplies the loose and general texture of the oath of allegiance; it recognizing the right of his majesty, derived under the act of settlement; engaging to support him to the utmost of the juror's power; promising to disclose all traiterous conspiracies against him; and expressly renouncing any claim of the pretender, by name, in as clear and explicit terms as the English language can furnish. 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. /h But the oath of allegiance may be tendered /i to all persons above the age of twelve years, whether natives, denizens, or aliens, either in the court-leet of the manor, or in the sheriff's turn, which is the court-leet of the county. /a 2 Feud. 5, 6, 7. /b 2 Feud. 99. /c 7 Rep. Calvin's case. 7. /d 2 Carte. 401. Mod. Un. Hist. xxiii. 420. /e Mirror. c. 3. 35. Fleta. 3. 16. Britton. c. 29. 7 Rep. Calvin's case. 6. /f 1 Hal. P.C. 63. /g Stat. 13 W. III. c. 6. /h Stat. 1 Geo. I. c. 13. /i 2 Inst. 121. 1 Hal. P.C. 64.

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. For as the king, by the very descent of the crown, is fully invested with all the rights and bound to all the duties of sovereignty, before his coronation; so the subject is bound to his prince by an intrinsic allegiance, before the superinduction of those outward bonds of oath, homage, and fealty; which were only instituted to remind the subject of this his previous duty, and for the better securing its performance. /k The formal profession therefore, or oath of subjection, is nothing more than a declaration in words of what was before implied in law. Which occasions sir Edward Coke very justly to observe /l, that "all subjects are equally bounden to their allegiance, as if they had taken the oath; because it is written by the finger of the law in their hearts, and the taking of the corporal oath is but an outward declaration of the same." The sanction of an oath, it is true, in case of violation of duty, makes the guilt still more accumulated, by superadding perjury to treason; but it does not
increase the civil obligation to loyalty; it only strengthens the social tie by uniting it with that of religion.

1 Hal. P.C. 61.

2 Inst. 121.

ALLEGIANCE, both express and implied, is however distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. For, immediately upon their birth, they are under the king's protection; at a time too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude; which 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. For it is a principle of universal law, that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former; for this natural allegiance was intrinsic, and primitive, and antecedent to the other; and cannot be devested without the concurrent act of that prince to whom it was first due. Indeed the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another; but it is his own act that brings him into these straits and difficulties, of owing service to two masters; and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands, by which he is connected to his natural prince.

7 Rep. 7.

2 P. Wms. 124.

1 Hal. P.C. 68.

LOCAL allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the king's dominion and protection: and it ceases, the instant such stranger transfers himself from this kingdom to another. Natural allegiance is therefore perpetual, and local temporary only: and that for this reason, evidently founded upon the nature of government; that allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. As therefore the prince is always under a constant tie to protect his natural-born subjects, at all times and in all countries, for this reason their allegiance
due to him is equally universal and permanent. But, on the other hand, as
the prince affords his protection to an alien, only during his residence in
this realm, the allegiance of an alien is confined (in point of time) to the
duration of such his residence, and (in point of locality) to the dominions
of the British empire. From which considerations sir Matthew Hale /q
deduces this consequence, that, though there be an usurper of the crown,
yet it is treason for any subject, while the usurper is in full possession of
the sovereignty, to practice any thing against his crown and dignity:
wherefore, although the true prince regain the sovereignty, yet such
attempts against the usurper (unless in defence or aid of the rightful king)
have been afterwards punished with death; because of the breach of that
temporary allegiance, which was due to him as king de facto. And upon
this footing, after Edward IV recovered the crown, which had been long
detained from his house by the line of Lancaster, treasons committed
against Henry VI were capitally punished, though Henry had been
declared an usurper by parliament.
/p 7 Rep. 6.
/q 1 Hal. P.C. 60.
THIS oath of allegiance, or rather the allegiance itself, is held to be
applicable not only to the political capacity of the king, or regal office, but
to his natural person, and blood-royal: and for the misapplication of their
allegiance, viz. to the regal capacity or crown, exclusive of the person of the
king, were the Spencers banished in the reign of Edward II. /r And from
hence arose that principle of personal attachment, and affectionate loyalty,
which induced our forefathers (and, if occasion required, would doubtless
induce their sons) to hazard all that was dear to them, life, fortune, and
family, in defence and support of their liege lord and sovereign.
/r 1 Hal. P.C. 67.
THIS allegiance then, both express and implied, is the duty of all the king's
subjects, under the distinctions here laid down, of local and temporary, or
universal and perpetual. Their rights are also distinguishable by the same
criterions of time and locality; natural-born subjects having a great variety
of rights, which they acquire by being born within the king's ligeance, and
can never forfeit by any distance of place or time, but only by their own
misbehaviour: the explanation of which rights is the principal subject of
the two first books of these commentaries. The same is also in some degree
the case of aliens; though their rights are much more circumscribed, being
acquired only by residence here, and lost whenever they remove. I shall
however here endeavour to chalk out some of the principal lines, whereby
they are distinguished from natives, descending to farther particulars when they come in course.

AN alien born may purchase lands, or other estates: but not for his own use; for the king is thereupon entitled to them. If an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the king of England; which would probably be inconsistent with that, which he owes to his own natural liege lord: besides that thereby the nation might in time be subject to foreign influence, and feel many other inconveniences. Wherefore by the civil law such contracts were also made void: but the prince had no such advantage of escheat thereby, as with us in England. Among other reasons, which might be given for our constitution, it seems to be intended by way of punishment for the alien's presumption, in attempting to acquire any landed property: for the vendor is not affected by it, he having resigned his right, and received an equivalent in exchange. Yet an alien may acquire a property in goods, money, and other personal estate, or may hire a house for his habitation: for personal estate is of a transitory and moveable nature; and, besides, this indulgence to strangers is necessary for the advancement of trade. Aliens also may trade as freely as other people; only they are subject to certain higher duties at the custom-house: and there are also some obsolete statutes of Henry VIII, prohibiting alien artificers to work for themselves in this kingdom; but it is generally held they were virtually repealed by statute 5 Eliz. c. 7. Also an alien may bring an action concerning personal property, and may make a will, and dispose of his personal estate: not as it is in France, where the king at the death of an alien is entitled to all he is worth, by the droit d'aubaine or jus albinatus, unless he has a peculiar exemption. When I mention these rights of an alien, I must be understood of alien-friends only, or such whose countries are in peace with ours; for alien-enemies have no rights, no privileges, unless by the king's special favour, during the time of war.
/s Co. Litt. 2.
/t Cod. l. 11. tit. 55.
/u 7 Rep. 17.
/w Lutw. 34.
/x The word is derived from alibi natus; Spelm. Gl. 24.

WHEN I say, that an alien is one who is born out of the king's dominions, or allegiance, this also must be understood with some restrictions. The common law indeed stood absolutely so; with only a very few exceptions: so that a particular act of parliament became necessary after the restoration, for the naturalization of children of his majesty's English
subjects, born in foreign countries during the late troubles. And this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once. Yet 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 also, he was held (by a kind of postliminium) to be born under the king of England's allegiance, represented by his father, the ambassador. To encourage also foreign commerce, it was enacted by statute 25 Edw. III. st. 2. that all children born abroad, provided both their parents were at the time of the birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England: and accordingly it hath been so adjudged in behalf of merchants. But by several more modern statutes these restrictions are still farther taken off: so that all children, born out of the king's ligeance, 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.

THE children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such. In which the constitution of France differs from ours; for there, by their jus albinatus, if a child be born of foreign parents, it is an alien.

A DENIZEN is an alien born, but who has obtained ex donatione regis letters patent to make him an English subject: a high and incommunicable branch of the royal prerogative. A denizen is in 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 may not; but cannot take by inheritance: for his parent, through whom he must claim, being an alien had no inheritable blood, and therefore could convey none to the son. And, upon a like defect of hereditary blood, the issue of a denizen, born before denization, cannot inherit to him; but his issue born after, may. A denizen is not excused from paying the alien's duty, and some other mercantile burdens. And no denizen can be of the privy
council, or either house of parliament, or have any office of trust, civil or military, or be capable of any grant from the crown. /h
/e 11 Rep. 67.
/g Stat. 22 Hen. VIII. c. 8.
/h Stat. 12 W. III. c. 2.
NATURALIZATION cannot be performed but by act of parliament: for by this an alien is put in exactly 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, or parliament, &c. /i No bill for naturalization can be received in either house of parliament, without such disabling clause in it. /k Neither can any person be naturalized or restored in blood, unless he hath received the sacrament of the Lord's supper within one month before the bringing in of the bill; and unless he also takes the oaths of allegiance and supremacy in the presence of the parliament. /l
/i Ibid.
/k Stat. 1 Geo. I. c. 4.
/l Stat. 7 Jac. I. c. 2.
THESE are the principal distinctions between aliens, denizens, and natives: distinctions, which endeavors have been frequently used since the commencement of this century to lay almost totally aside, by one general naturalization-act for all foreign protestants. An attempt which was once carried into execution by the statute 7 Ann. c. 5. but this, after three years experience of it, was repealed by the statute 10 Ann. c. 5. except one clause, which was just now mentioned, for naturalizing the children of English parents born abroad. However, every foreign seaman who in time of war serves two years on board an English ship is ipso facto naturalized; /m and all foreign protestants, and Jews, upon their residing seven years in any of the American colonies, without being absent above two months at a time, are upon taking the oaths naturalized to all intents and purposes, as if they had been born in this kingdom; /n and therefore are admissible to all such privileges, and no other, as protestants or Jews born in this kingdom are entitled to. What those privileges are /o, was the subject of very high debates about the time of the famous Jew-bill; /p which enabled all Jews to prefer bills of naturalization in parliament, without receiving the sacrament, as ordained by statute 7 Jac. I. It is not my intention to revive this controversy again; for the act lived only a few months, and was then repealed /q: therefore peace be now to its manes.
OF THE CLERGY.

THE people, whether aliens, denizens, or natural-born subjects, are divisible into two kinds; the clergy and laity: the clergy, comprehending all persons in holy orders, and in ecclesiastical offices, will be the subject of the following chapter.

THIS venerable body of men, being separate and set apart from the rest of the people, in order to attend the more closely to the service of almighty God, have thereupon large privileges allowed them by our municipal laws: and had formerly much greater, which were abridged at the time of the reformation, on account of the ill use which the popish clergy had endeavoured to make of them. For, the laws having exempted them from almost every personal duty, they attempted a total exemption from every secular tie. But it is observed by sir Edward Coke /a, that, as the overflowing of waters doth many times make the river to lose its proper channel, so in times past ecclesiastical persons, seeking to extend their liberties beyond their true bounds, either lost or enjoyed not those which of right belonged to them. The personal exemptions do indeed for the most part continue. A clergyman cannot be compelled to serve on a jury, nor to appear at a court-leet or view of frank pledge; which almost every other person is obliged to do /b: but, if a layman is summoned on a jury, and before the trial takes orders, he shall notwithstanding appear and be sworn. /c Neither can he be chosen to any temporal office; as bailiff, reeve, constable, or the like: in regard of his own continual attendance on the sacred function. /d During his attendance on divine service he is privileged from arrests in civil suits. /e In cases also of felony, a clerk in orders shall have the benefit of his clergy, without being branded in the hand; and may likewise have it more than once: in both which particulars he is distinguished from a layman. /f But as they have their privileges, so also they have their disabilities, on account of their spiritual avocations. Clergymen, we have seen /g, are incapable of sitting in the house of commons; and by statute 21 Hen. VIII. c. 13. are not allowed to take any lands or tenements to farm, upon pain of 10l. per month, and total avoidance of the lease; nor shall engage in any manner of trade, nor sell
any merchandize, under forfeiture of the treble value. Which prohibition is consonant to the canon law.

/a 2 Inst. 4.
/b F.N.B. 160. 2 Inst. 4.
/c 4 Leon. 190.
/d Finch. L. 88.
/e Stat. 50 Edw. III. c. 5. 1 Ric. II. c. 16.
/g page 169.

IN the frame and constitution of ecclesiastical polity there are divers ranks and degrees: which I shall consider in their respective order, merely as they are taken notice of by the secular laws of England; without intermeddling with the canons and constitutions, by which they have bound themselves. And under each division I shall consider, 1. The method of their appointment; 2. Their rights and duties; and 3. The manner wherein their character or office may cease.

I. AN archbishop or bishop is elected by the chapter of his cathedral church, by virtue of a licence from the crown. Election was, in very early times, the usual mode of elevation to the episcopal chair throughout all Christendom; and this was promiscuously performed by the laity as well as the clergy: till at length, it becoming tumultuous, the emperors and other sovereigns of the respective kingdoms of Europe took the election in some degree into their own hands; by reserving to themselves the right of confirming these elections, and of granting investiture of the temporalities, which now began almost universally to be annexed to this spiritual dignity; without which confirmation and investiture, the elected bishop could neither be consecrated, nor receive any secular profits. This right was acknowledged in the emperor Charlemagne, A.D. 773, by pope Hadrian I, and the council of Lateran, and universally exercised by other Christian princes: but the policy of the court of Rome at the same time began by degrees to exclude the laity from any share in these elections, and to confine them wholly to the clergy, which at length was completely effected; the mere form of election appearing to the people to be a thing of little consequence, while the crown was in possession of an absolute negative, which was almost equivalent to a direct right of nomination. Hence the right of appointing to bishopricks is said to have been in the crown of England (as well as other kingdoms in Europe) even in the Saxon times, because the rights of confirmation and investiture were in effect (though not in form) a right of complete donation. / But when, by length of time, the custom of making elections by the clergy only was fully established, the
popes began to except to the usual method of granting these investitures, which was per annulum et baculum, by the prince's delivering to the prelate a ring, and a pastoral staff or crosier; pretending, that this was an encroachment on the church's authority, and an attempt by these symbols to confer a spiritual jurisdiction: and pope Gregory VII, towards the close of the eleventh century, published a bulle of excommunication against all princes who should dare to confer investitures, and all prelates who should venture to receive them. This was a bold step towards effecting the plan then adopted by the Roman see, of rendering the clergy entirely independent of the civil authority: and long and eager were the contests occasioned by this dispute. But at length when the emperor Henry V agreed to remove all suspicion of encroachment on the spiritual character, by conferring investitures for the future per sceptrum and not per annulum et baculum; and when the kings of England and France consented also to alter the form in their kingdoms, and receive only homage from the bishops for their temporalities, instead of investing them by the ring and crosier; the court of Rome found it prudent to suspend for a while its other pretensions.

This concession was obtained from king Henry the first in England, by means of that obstinate and arrogant prelate, arch-bishop Anselm; but king John (about a century afterwards) in order to obtain the protection of the pope against his discontented barons, was prevailed upon to give up by a charter, to all the monasteries and cathedrals in the kingdom, the free right of electing their prelates, whether abbots or bishops: reserving only to the crown the custody of the temporalities during the vacancy; the form of granting a licence to elect, (which is the original of our conge d'eslire) on refusal whereof the electors might proceed without it; and the right of approbation afterwards, which was not to be denied without a reasonable and lawful cause.

This grant was expressly recognized and confirmed in
king John's magna carta /q, and was again established by statute 25 Edw. III. st. 6. 3.
/q cap. 1. edit. Oxon. 1759.

BUT by statute 25 Hen. VIII. c. 20. the ancient right of nomination was, in effect, restored to the crown: it being enacted that, at every future avoidance of a bishoprick, the king may send the dean and chapter his usual licence to proceed to election; which is always to be accompanied with a letter missive from the king, containing the name of the person whom he would have them elect: and, if the dean and chapter delay their 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 arch-bishop of the province; if it be of an arch-bishop, to the other arch-bishop and two bishops, or to four bishops; requiring them to confirm, invest, and consecrate the person so elected: which they are bound to perform immediately, without any application to the see of Rome. 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. And if such dean and chapter do not elect in the manner by this act appointed, or if such arch-bishop or bishop do refuse to confirm, invest, and consecrate such bishop elect, they shall incur all the penalties of a praemunire.

AN arch-bishop 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. /r The arch-bishop has also his own diocese, wherein he exercises episcopal jurisdiction; as in his province he exercises archiepiscopal. As arch-bishop, he, upon receipt of the king's writ, calls the bishops and clergy of his province to meet in convocation: but without the king's writ he cannot assemble them. /s To him all appeals are made from inferior jurisdictions within his province; and, as an appeal lies from the bishops in person to him in person, so it also lies from the consistory courts of each diocese to his archiepiscopal court. During the vacancy of any see in his province, he is guardian of the spiritualties thereof, as the king is of the temporalities; and he executes all ecclesiastical jurisdiction therein. If an archiepiscopal see be vacant, the dean and chapter are the spiritual guardians, ever since the office of prior of Canterbury was abolished at the reformation. /t The arch-bishop is entitled to present by lapse to all the ecclesiastical livings in the disposal of
his diocesan bishops, if not filled within six months. And the arch-bishop has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own to be provided for by such suffragan bishop; in lieu of which it is now usual for the bishop to make over by deed to the arch-bishop, his executors and assigns, the next presentation of such dignity or benefice in the bishop's disposal within that see, as the arch-bishop himself shall choose; which is therefore called his option /u: which options are only binding on the bishop himself who grants them, and not his successors. The prerogative itself seems to be derived from the legatine power formerly annexed by the popes to the metropolitan of Canterbury, /w And we may add, that the papal claim itself (like most others of that encroaching see) was probably set up in imitation of the imperial prerogative called primae or primariae preces; whereby the emperor exercises, and hath immemorially exercised /x, a right of naming to the first prebend that becomes vacant after his accession in every church of the empire. /y A right, that was also exercised by the crown of England in the reign of Edward I; /z and which probably gave rise to the royal corodies, which were mentioned in a former chapter. /a It is also the privilege, by custom, of the arch-bishop of Canterbury, to crown the kings and queens of this kingdom. And he hath also by the statute 25 Hen. VIII. c. 21. the power of granting dispensations in any case, not contrary to the holy scriptures and the law of God, where the pope used formerly to grant them: which is the foundation of his granting special licences, to marry at any place or time, to hold two livings, and the like: and on this also is founded the right he exercises of conferring degrees, in prejudice of the two universities. /b

/r Lord Raym. 541.
/s 4 Inst. 322, 323.
/t 2 Roll. Abr. 223.
/u Cowel's interpr. tit. option.
/w Sherlock of options. 1.
/x Goldast. constit. imper. tom. 3. pag. 406.
/z Rex, &c., salutem. Scribatis episcopo Karl. quod Roberto de Icard pensionem suam, quam ad preces regis praedicto Roberto concessit, de caetero solvat; et de proxima ecclesia vacatura de collatione praedicti episcopi, quam ipse Robertus acceptaverit, respiciat. Brev. 11 Edw. I. 3 Pryn. 1264.
/a ch. 8. pag. 273.
/b See the bishop of Chester's case. Oxon. 1721.
THE power and authority of a bishop, besides the administration of certain holy ordinances peculiar to that sacred order, consists principally in inspecting the manners of the people and clergy, and punishing them, in order to reformation, by ecclesiastical censures. To this purpose he has several courts under him, and may visit at pleasure every part of his diocese. His chancellor is appointed to hold his courts for him, and to assist him in matters of ecclesiastical law; who, as well as all other ecclesiastical officers, if lay or married, must be a doctor of the civil law, so created in some university. /c It is also the business of a bishop to institute and to direct induction to all ecclesiastical livings in his diocese.

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. /d Therefore a bishop must resign to his metropolitan; but the arch-bishop can resign to none but the king himself.

II. 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. /e When the rest of the clergy were settled in the several parishes of each diocese (as hath formerly /f been mentioned) these were reserved for the celebration of divine service in the bishop's own cathedral; and the chief of them, who presided over the rest, obtained the name of decanus or dean, being probably at first appointed to superintend ten canons or prebendaries.

ALL ancient deans are elected by the chapter, by conge d'eslire 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. /g The chapter, consisting of canons or prebendaries, are sometimes appointed by the king, sometimes by the bishop, and sometimes elected by each other.

THE dean and chapter are, as was before observed, the nominal electors of a bishop. The bishop is their ordinary and immediate superior; and has, generally speaking, the power of visiting them, and correcting their excesses and enormities. They had also a check on the bishop at common
law: for till the statute 32 Hen. VIII. c. 28. his grant or lease would not have bound his successors, unless confirmed by the dean and chapter. /h /h Co. Litt. 103.

DEANERIES and prebends may become void, like a bishoprick, by death, by deprivation, or by resignation to either the king or the bishop /j. Also I may here mention, once for all, that if a dean, prebendary, or other spiritual person be made a bishop, all the preferments he was before possessed of are void; and the king may present to them in right of his prerogative royal. But they are not void by the election, but only by the consecration. /i

/j Plowd. 498.
/i 2 Roll. Abr. 352. Salk. 137.

III. AN arch-deacon 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, originally derived from the bishop, but now independent and distinct from his. /k He therefore visits the clergy; and has his separate court for punishment of offenders by spiritual censures, and for hearing all other causes of ecclesiastical cognizance. /k 1 Burn. eccl. law. 68, 69.

IV. THE rural deans are very ancient officers of the church /l, but almost grown out of use; though their deaneries still subsist as an ecclesiastical division of the diocese, or archdeaconry. They seem to have been deputies of the bishop, planted all round his diocese, the better to inspect the conduct of the parochial clergy, and therefore armed with an inferior degree of judicial and coercive authority /m.

/l Kennet. par. antiq. 633.
/m Gibs. cod. 972.

V. THE next, and indeed the most numerous order of men in the system of ecclesiastical polity, are the parsons and vicars of parishes: in treating of whom I shall first mark out the distinction between them; shall next observe the method by which one may become a parson or vicar; shall then briefly touch upon their rights and duties; and shall, lastly, shew how one may cease to be either.

A PARSON, persona ecclesiae, 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 protect and defend the rights of the church (which he personates) by a perpetual succession. /n He is sometimes called the rector, or governor, of the church: but the
appellation of parson, (however it may be depreciated by familiar, clownish, and indiscriminate use) is the most legal, most beneficial, and most honourable title that a parish priest can enjoy; because such a one, (sir Edward Coke observes) and he only, is said vicem seu personam ecclesiae 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 private clergyman. This contrivance seems to have sprung from the policy of the monastic orders, who have never been deficient in subtle inventions for the increase of their own power and emoluments. At the first establishment of parochial clergy, the tithes of the parish were distributed in a foursold division; one for the use of the bishop, another for maintaining the fabrick of the church, a third for the poor, and the fourth to provide for the incumbent. When the sees of the bishops became otherwise amply endowed, they were prohibited from demanding their usual share of these tithes, and the division was into three parts only. And hence it was inferred by the monasteries, that a small part was sufficient for the officiating priest, and that the remainder might well be applied to the use of their own fraternities, (the endowment of which was construed to be a work of the most exalted piety) subject to the burden of repairing the church and providing for its constant supply. And therefore they begged and bought, for masses and obits, and sometimes even for money, all the advowsons within their reach, and then appropriated the benefices to the use of their own corporation. But, in order to complete such appropriation effectually, the king's licence, and consent of the bishop, must first be obtained; because both the king and the bishop may sometime or other have an interest, by lapse, in the presentation to the benefice; which can never happen if it be appropriated to the use of a corporation, which never dies: and also because the law reposes a confidence in them, that they will not consent to any thing that shall be to the prejudice of the church. The consent of the patron also is necessarily implied, because (as was before observed) the appropriation can be originally made to none, but to such spiritual corporation, as is also the patron of the church; the whole being indeed nothing else, but an allowance for the patrons to retain the tithes and glebe in their own hands, without presenting any clerk, they themselves undertaking to provide for the service of the church. /0 When the appropriation is thus made, the appropriators and their successors are perpetual parsons of the church;
and must sue and be sued, in all matters concerning the rights of the
church, by the name of parsons. /p
/n Co. Litt. 300.
o Plowd. 496-500.
p Hob. 307.
THIS appropriation may be severed, and the church become
disappropriate, two ways: as, 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. /q And when the clerk so
presented is distinct from the vicar, the rectory thus vested in him
becomes what is called a sine-cure; because he hath no cure of souls,
having a vicar under him to whom that cure is committed. /r Also, 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.
/q Co. Litt. 46.
r Sine-cures might also be created by other means. 2 Burn. eccl. law. 347.
IN this manner, and subject to these conditions, may appropriations be
made at this day: and thus were most, if not all, of the appropriations at
present existing originally made; being annexed to bishopricks, prebends,
religious houses, nay, even to nunneries, and certain military orders, all of
which were spiritual corporations. At the dissolution of monasteries by
statutes 27 Hen. VIII. c. 28. and 31 Hen. VIII. c. 13. the appropriations of
the several parsonages, which belonged to those respective religious
houses, (amounting to more than one third of all the parishes in England
/s) would have been by the rules of the common law disappropriated; had
not a clause in those statutes intervened, to give them to the king in as
ample a manner as the abbots, &c., formerly held the same, at the time of
their dissolution. This, though perhaps scarcely defensible, was not
without example; for the same was done in former reigns, when the alien
priories, (that is, such as were filled by foreigners only) were dissolved and
given to the crown. /t And from these two roots have sprung all the lay
appropriations or secular parsonages, which we now see in the kingdom;
they having been afterwards granted out from time to time by the crown.
/u
/s Seld. review of tith. c. 9. Spelm. Apology. 35.
t 2 Inst. 584.
Sir H. Spelman (of tythes, c. 29.) says these are now called impropriations, as being improperly in the hands of laymen. THESE appropriating corporations, or religious houses, were wont to depute one of their own body to perform divine service, and administer the sacraments, in those parishes of which the society was thus the parson. This officiating minister was in reality no more than a curate, deputy, or vicegerent of the appropriator, and therefore called vicarius, or vicar. His stipend was at the discretion of the appropriator, who was however bound of common right to find somebody, qui illi de temporalibus, episcopo de spiritualibus, debeat respondere, But this was done in so scandalous a manner, and the parishes suffered so much by the neglect of the appropriators, that the legislature was forced to interpose: and accordingly it is enacted by statute 15 Ric. II. c. 6. that in all appropriations of churches, the diocesan bishop shall ordain (in proportion to the value of the church) a competent sum to be distributed among the poor parishioners annually; and that the vicarage shall be sufficiently endowed. It seems the parish were frequently sufferers, not only by the want of divine service, but also by withholding those alms, for which, among other purposes, the payment of tithes was originally imposed: and therefore in this act a pension is directed to be distributed among the poor parochians, as well as a sufficient stipend to the vicar. But he, being liable to be removed at the pleasure of the appropriator, was not likely to insist too rigidly on the legal sufficiency of the stipend: and therefore by statute 4 Hen. IV. c. 12. it is ordained, that the vicar shall be a secular person, not a member of any religious house; that he shall be vicar perpetual, not removeable at the caprice of the monastery; and that he shall be canonically instituted and inducted, and be sufficiently endowed, at the discretion of the ordinary, for these three express purposes, to do divine service, to inform the people, and to keep hospitality. The endowments in consequence of these statutes have usually been by a portion of the glebe, or land, belonging to the parsonage, and a particular share of the tithes, which the appropriators found it most troublesome to collect, and which are therefore generally called privy, small, or vicarial, tithes; the greater, or predial, tithes being still referred to their own use. But one and the same rule was not observed in the endowment of all vicarages. Hence some are more liberally, and some more scantily, endowed; and hence many things, as wood in particular, is in some countries a predial, and in some a vicarial tithe.

Seld. tith. c. 11. 1.
THE distinction therefore of a parson and vicar is this; that the parson has for the most part the whole right to all the ecclesiastical dues in his parish; but a vicar has generally an appropriator over him, entitled 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; which augmentations were greatly assisted by the statute 29 Car. II. c. 8. enacted in favour of poor vicars and curates, which rendered such temporary augmentations (when made by the appropriators) perpetual.

THE method of becoming a parson or vicar is much the same. To both there are four requisites necessary: holy orders; presentation; institution; and induction. The method of conferring the holy orders of deacon and priest, according to the liturgy and canons /x, is foreign to the purpose of these commentaries; any farther than as they are necessary requisites to make a complete parson or vicar. By common law a deacon, of any age, might be instituted and inducted to a parsonage or vicarage: but it was ordained by statute 13 Eliz. c. 12. that no person under twenty three years of age, and in deacon's orders, should be presented to any benefice with cure; and if he were not ordained priest within one year after his induction, he should be ipso facto deprived: and now, by statute 13 & 14 Car. II. c. 4. no person is capable to be 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. But if he obtains orders, or a licence to preach, by money or corrupt practices (which seems to be the true, though not the common notion of simony) the person giving such orders forfeits /y 40l. and the person receiving 10l. and is incapable of any ecclesiastical preferment for seven years afterwards.

/x See 2 Burn. eccl. law. 103.
/y Stat. 31 Eliz. c. 6.

ANY clerk may be presented /z to a parsonage or vicarage; that is, the patron, to whom the advowson of the church belongs, may offer his clerk to the bishop of the diocese to be instituted. Of advowsons, or the right of presentation, being a species of private property, we shall find a more convenient place to treat in the second part of these commentaries. But when a clerk is presented, the bishop may refuse him upon many accounts. As, 1. If the patron is excommunicated, and remains in contempt forty days. /a Or, 2. If the clerk be unfit /b: which unfitness is of several kinds. First, with regard to his person; as if he be a bastard, an outlaw, an excommunicate, an alien, under age, or the like. /c Next, with regard to his faith or morals; as for any particular heresy, or vice that is malum in se:
but if the bishop alleges only in generals, as that he is schismaticus
inveteratus, or objects a fault that is malum prohibitum merely, as
haunting taverns, playing at unlawful games, or the like; it is not good
cause of refusal; /d Or, lastly, the clerk may be unfit to discharge the
pastoral office for want of learning. In any of which cases the bishop may
refuse the clerk. In case the refusal is for heresy, schism, inability of
learning, or other matter of ecclesiastical cognizance, there the bishop
must give notice to the patron of such his cause of refusal, who, being
usually a layman, is not supposed to have knowledge of it; else he cannot
present by lapse: but if the cause be temporal, there he is not bound to give
notice. /e
/z A layman may also be presented; but he must take priests orders before
his admission. 1 Burn. 103.
/a 2 Roll. Abr. 355.
/b Glanv. l. 13. c. 20.
/c 2 Roll. Abr. 356. 2 Inst. 632. Stat. 3 Ric. II. c. 3. 7 Ric. II. c. 12.
/d 5 Rep. 58.
/e 2 Inst. 632.

IF an action at law be brought by the patron against the bishop, for
refusing his clerk, the bishop must assign the cause. If the cause be of a
temporal nature and the fact admitted, (as, for instance, outlawry) the
judges of the king's courts must determine its validity, or, whether it be
sufficient cause of refusal: but if the fact be denied, it must be determined
by a jury. If the cause be of a spiritual nature, (as, heresy, particularly
alleged) the fact if denied shall also be determined by a jury; and if the fact
be admitted or found, the court upon consultation and advice of learned
divines shall decide its sufficiency. /f If the cause be want of learning, the
bishop need not specify in what points the clerk is deficient, but only allege
that he is deficient /g: for the statute 9 Edw. II. st. 1. c. 13. is express, that
the examination of the fitness of a person presented to a benefice belongs
to the ecclesiastical judge. But because it would be nugatory in this case to
demand the reason of refusal from the ordinary, if the patron were bound
to abide by his determination, who has already pronounced his clerk unfit;
therefore if the bishop returns the clerk to be minus sufficiens in
literatura, the court shall write to the metropolitan, to reexamine him, and
certify his qualifications; which certificate of the arch-bishop is final. /h
/f 2 Inst. 632.
/g 5 Rep. 58. 3 Lev. 313.
/h 2 Inst. 632.
IF the bishop hath no objections, but admits the patron's presentation, 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 institution the care of the souls of the parish is committed to the charge of the clerk. When a vicar is instituted, he (besides the usual forms) takes, if required by the bishop, an oath of perpetual residence; for the maxim of law is, that vicarius non habet vicarium: and as the non-residence of the appropriators was the cause of the perpetual establishment of vicarages, the law judges it very improper for them to defeat the end of their constitution, and by absence to create the very mischiefs which they were appointed to remedy: especially as, if any profits are to arise from putting in a curate and living at a distance from the parish, the appropriator, who is the real parson, has undoubtedly the elder title to them. 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: nay, even if a clerk is instituted upon the king's presentation, the crown may revoke it before induction, and present another clerk. / 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 any action for them, till induction.

/co Litt. 344.

INDUCTION is performed by a mandate from the bishop to the arch-deacon, 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, and sufficient certainty of their new minister, 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 when a clerk is thus presented, instituted, and inducted into a rectory, he is then, and not before, in full and complete possession, and is called in law persona impersonata, or parson impersonata. /n

/co Litt. 300.

THE rights of a parson or vicar, in his tithes and ecclesiastical dues, fall more properly under the second book of these commentaries: and as to his duties, they are principally of ecclesiastical cognizance; those only excepted which are laid upon him by statute. And those are indeed so numerous that it is impracticable to recite them here with any tolerable
conciseness or accuracy. Some of them we may remark, as they arise in the progress of our enquiries, but for the rest I must refer myself to such authors as have compiled treatises expressly upon this subject. /l I shall only just mention the article of residence, upon the supposition of which the law doth style every parochial minister an incumbent. By statute 21 Hen. VIII. c. 13. persons wilfully absenting themselves from their benefices, for one month together, or two months in the year, incur a penalty of 5l. to the king, and 5l. to any person that will sue for the same: except chaplains to the king, or others therein mentioned, /m during their attendance in the household of such as retain them: and also except /n all heads of houses, magistrates, and professors in the universities, and all students under forty years of age residing there, bona side, for study. Legal residence is not only in the parish, but also in the parsonage house: for it hath been resolved /o, that the statute intended residence, not only for serving the cure, and for hospitality; but also for maintaining the house, that the successor also may keep hospitality there.

/l These are very numerous: but there are only two, which can be relied on with any degree of certainty; bishop Gibson's codex, and Dr Burn's ecclesiastical law.


WE have seen that there is but one way, whereby one may become a parson or vicar: there are many ways, by which one may cease to be so. 1. By death. 2. By cession, in taking another benefice. For by statute 21 Hen. VIII. c. 13. if any one having a benefice of 8l. per annum, or upwards, in the king's books, (according to the present valuation /p,) accepts any other, the first shall be adjudged void; unless he obtains a dispensation; which no one is entitled to have, but the chaplains of the king and others therein mentioned, the brethren and sons of lords and knights, and doctors and bachelors of divinity and law, admitted by the universities of this realm. And a vacancy thus made, for want of a dispensation, is called cession. 3. By consecration; for, as was mentioned before, when a clerk is promoted to a bishoprick, all his other preferments are void the instant that he is consecrated. But there is a method, by the favour of the crown, of holding such livings in commendam. Commenda, or ecclesia commendata, is a living commended by the crown to the care of a clerk, to hold till a proper pastor is provided for it. This may be temporary, for one, two, or three years, or perpetual; being a kind of dispensation to avoid the vacancy of the living, and is called a commenda retinere. There is also acommenda
recipere, which is to take a benefice de novo, in the bishop's own gift, or
the gift of some other patron consenting to the same; and this is the same
to him as institution and induction are to another clerk. /q 4. By
resignation. But this is of no avail, till accepted by the ordinary; into whose
hands the resignation must be made. /r 5. By deprivation, either by
canonical censures, of which I am not to speak; or in pursuance of divers
criminal statutes, which declare the benefice void, for some nonfeasance or
neglect, or else some malefeasance or crime. As, for simony; /s for
maintaining any doctrine in derogation of the king's supremacy, or of the
thirty nine articles, or of the book of common-prayer; /t for neglecting
after institution to read the articles in the church, or make the declarations
against popery, or take the abjuration oath; /u for using any other form of
prayer than the liturgy of the church of England; /w or for absenting
himself sixty days in one year from a benefice belonging to a popish
patron, to which the clerk was presented by either of the universities; /x in
all which and similar cases /ythe benefice is ipso facto void, without any
formal sentence of deprivation.
/q Hob. 144.
/r Cro. Jac. 198.
/w Stat. 1 Eliz. c. 2.
/y 6 Rep. 29, 30.
VI. 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 the
real incumbent. Though there are what are called perpetual curacies,
where all the tithes are appropriated, and no vicarage endowed, (being for
some particular reasons /z exempted from the statute of Hen. IV) but,
instead thereof, such perpetual curate is appointed by the appropriator.
With regard to the other species of curates, they are the objects of some
particular statutes, which ordain, that such as serve a church during its
vacancy shall be paid such stipend as the ordinary thinks reasonable, out
of the profits of the vacancy; or, if that be not sufficient, by the successor
within fourteen days after he takes possession /a: and that, if any rector or
vicar nominates a curate to the ordinary to be licenced, the ordinary shall
settle his stipend under his hand and seal, not exceeding 50l. per annum,
nor less than 20l. and on failure of payment may sequester the profits of the benefice. /b
/z 1 Burn. eccl. law. 427.
/a Stat. 28 Hen. VIII. c. 11.
/b Stat. 12 Ann. st. 2. c. 12.
THUS much of the clergy, properly so called. There are also certain inferior ecclesiastical officers of whom the common law takes notice; and that, principally, to assist the ecclesiastical jurisdiction, where it is deficient in powers. On which officers I shall make a few cursory remarks. VII. CHURCHWARDENS are the guardians or keepers of the church, and representatives of the body of the parish. /c They are sometimes appointed by the minister, sometimes by the parish, sometimes by both together, as custom directs. They are taken, in favour of the church, to be for some purposes a kind of corporation at the common law; that is, they are enabled by that name to have a property in goods and chattels, and to bring actions for them, for the use and profit of the parish. Yet they may not waste the church goods, but may be removed by the parish, and then called to account by action at the common law: but there is no method of calling them to account, but by first removing them; for none can legally do it, but those who are put in their place. As to lands, or other real property, as the church, church-yard, &c., they have no sort of interest therein; but if any damage is done thereto, the parson only or vicar shall have the action. Their office also is to repair the church, and make rates and levies for that purpose: but these are recoverable only in the ecclesiastical court. They are also joined with the overseers in the care and maintenance of the poor. They are to levy /d a shilling forfeiture on all such as do not repair to church on sundays and holidays, and are empowered to keep all persons orderly while there; to which end it has been held that a churchwarden may justify the pulling off a man's hat, without being guilty of either an assault or trespass. /e There are also a multitude of other petty parochial powers committed to their charge by divers acts of parliament. /f
/c In Sweden they have similar officers, whom they call kiorckiowariandes. Stiernhook. l. 3. c. 7.
/d Stat. 1 Eliz. c. 2.
/e 1 Lev. 196.
/f See Lambard of churchwardens, at the end of his eirenarcha; and Dr Burn, tit.church, churchwardens, visitation.
VIII. 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, yet they cannot be deprived, by ecclesiastical censures. /g
The parish clerk was formerly always in holy orders; and some are so to this day. He is generally appointed by the incumbent, but by custom may be chosen by the inhabitants; and if such custom appears, the court of king's bench will grant a mandamus to the arch-deacon to swear him in, for the establishment of the custom turns it into a temporal or civil right. /h
/g 2 Roll. Abr. 234.
/h Cro. Car. 589.

CHAPTER THE TWELFTH.

OF THE CIVIL STATE.

THE lay part of his majesty's subjects, or such of the people as are not comprehended under the denomination of clergy, may be divided into three distinct states, the civil, the military, and the maritime.

THAT part of the nation which falls under our first and most comprehensive division, the civil state, includes all orders of men, from the highest nobleman to the meanest peasant; that are not included under either our former division, of clergy, or under one of the two latter, the military and 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. Of the nobility, the peerage of Great Britain, or lords temporal, as forming (together with the bishops) one of the supreme branches of the legislature, I have before sufficiently spoken: we are here to consider them according to their several degrees, or titles of honour.

ALL degrees of nobility and honour are derived from the king as their fountain /a: and he may institute what new titles he pleases. Hence it is that all degrees of honour are not of equal antiquity. Those now in use are dukes, marquesses, earls, viscounts, and barons. /b
/a 4 Inst. 363.
/b For the original of these titles on the continent of Europe, and their subsequent introduction into this island, see Mr Selden's titles of honour.

1. A duke, though it be with us, as a mere title of nobility, inferior in point of antiquity to many others, yet it is superior to all of them in rank; being the first title of dignity after the royal family. /c Among the Saxons the Latin name of dukes, duces, is very frequent, and signified, as among the Romans, the commanders or leaders of their armies, whom in their own language they called ; /d and in the laws of Henry I (as translated by Lambard) we find them called heretochii. But after the Norman conquest,
which changed the military polity of the nation, the kings themselves continuing for many generations dukes of Normandy, they would not honour any subjects with that title, till the time of Edward III; who, claiming to be king of France, and thereby losing the ducal in the royal dignity, in the eleventh year of his reign created his son, Edward the black prince, duke of Cornwall: and many, of the royal family especially, were afterwards raised to the same honour. However, in the reign of queen Elizabeth, A.D. 1572 /e, the whole order became utterly extinct: but it was revived about fifty years afterwards by her successor, who was remarkably prodigal of honours, in the person of George Villiers duke of Buckingham. /c Camden. Britan. tit. ordines.

/d This is apparently derived from the same root as the German , the ancient appellation of dukes in that country. Seld. tit. hon. 2. 1. 22.


2. A marquess, marchio, is the next degree of nobility. His office formerly was (for dignity and duty were never separated by our ancestors) to guard the frontiers and limits of the kingdom; which were called the marches, from the teutonic word, marche, a 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 lords marchers, or marquesses; whose authority was abolished by statute 27 Hen. VIII. c. 27: though the title had long before been made a mere ensign of honour; Robert Vere, earl of Oxford, being created marquess of Dublin, by Richard II in the eighth year of his reign. /f

/f 2 Inst. 5.

3. AN earl is a title of nobility so ancient, that its original cannot clearly be traced out. Thus much seems tolerably certain: that among the Saxons they were called ealdormen, quasi elder men, signifying the same assenior or senator among the Romans; and also schiremen, because they had each of them the civil government of a several division or shire. On the eruption of the Danes, they changed the name to eorles, which, according to Camden /g, signified the same in their language. In Latin they are called comites (a title first used in the empire) from being the king's attendants; "a societate nomen sumpserunt, reges enim tales sibi associant. /h" After the Norman conquest they were for some time called counts, or countees, from the French; but they did not long retain that name themselves, though their shires are from thence called counties to this day. It is now become a mere title, they having nothing to do with the government of the county; which, as has been more than once observed, is now entirely devolved on the sheriff, the earl's deputy, or vice-comes. In all writs, and
commissions, and other formal instruments, the king, when he mentions any peer of the degree of an earl, always styles him "trusty and well beloved cousin:" an appellation as ancient as the reign of Henry IV; who being either by his wife, his mother, or his sisters, actually related or allied to every earl in the kingdom, artfully and constantly acknowledged that connexion in all his letters and other public acts; from whence the usage has descended to his successors, though the reason has long ago failed.

/g Ibid.
/h Bracton. l. 1. c. 8. Fleta. l. i. c. 5.

4. The name of vice-comes or viscount was afterwards made use of as an arbitrary title of honour, without any shadow of office pertaining to it, by Henry the sixth; when in the eighteenth year of his reign, he created John Beaumont a peer, by the name of viscount Beaumont, which was the first instance of the kind. /i

/i 2 Inst. 5.

5. A baron's is the most general and universal title of nobility; for originally every one of the peers of superior rank had also a barony annexed to his other titles. /k But it hath sometimes happened that, when an ancient baron hath been raised to a new degree of peerage, in the course of a few generations the two titles have descended differently; one perhaps to the male descendants, the other to the heirs general; whereby the earldom or other superior title hath subsisted without a barony: and there are also modern instances where earls and viscounts have been created without annexing a barony to their other honours: so that now the rule does not hold universally, that all peers are barons. The original and antiquity of baronies has occasioned great enquiries among our English antiquarians. The most probable opinion seems to be, that they were the same with our present lords of manors; to which the name of court baron, (which is the lord's court, and incident to every manor) gives some countenance. It may be collected from king John's magna carta /l, that originally all lords of manors, or barons, that held of the king in capite, had seats in the great council or parliament, till about the reign of that prince the conflux of them became so large and troublesome, that the king was obliged to divide them, and summon only the greater barons in person; leaving the small ones to be summoned by the sheriff, and (as it is said) to sit by representation in another house; which gave rise to the separation of the two houses of parliament /m. By degrees the title came to be confined to the greater barons, or lords of parliament only; and there were no other barons among the peerage but such as were summoned by writ, in respect of the tenure of their lands or baronies, till Richard the
second first made it a mere title of honor, by conferring it on divers persons by his letters patent. /n
/k 2 Inst. 5, 6.
/l cap. 14.
/m Gilb. hist. exch. c. 3. Seld. tit. of hon. 2. 5. 21.
HAVING made this short enquiry into the original of our several degrees of nobility, I shall next consider the manner in which they may be created. The right of peerage seems to have been originally territorial; that is, annexed to lands, honors, castles, manors, and the like, the proprietors and possessors of which were (in right of those estates) allowed to be peers of the realm, and were summoned to parliament to do suit and service to their sovereign: and, when the land was alienated, the dignity passed with it as appendant. Thus the bishops 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 /o: and thus, in 11 Hen. VI, the possession of the castle of Arundel was adjudged to confer an earldom on its possessor. /p But afterwards, when alienations grew to be frequent, the dignity of peerage was confined to the lineage of the party ennobled, and instead of territorial became personal. Actual proof of a tenure by barony became no longer necessary to constitute a lord of parliament; but the record of the writ of summons to them or their ancestors was admitted as a sufficient evidence of the tenure.
/o Glanv. l. 7. c. 1.
/p Seld. tit. of hon. b. 2. c. 9. 5.
PEERS are now created either by writ, or by patent: for those who claim by prescription must suppose either a writ or patent made to their ancestors; though by length of time it is lost. 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 and 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: and therefore the most usual, because the surest, way is to grant the dignity by patent, which enures to a man and his heirs according to the limitations thereof, though he never himself makes use of it. /q 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. 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 enures only 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 lady, and not to such heirs by any former or future wife.

Let us next take a view of a few of the principal incidents attending the nobility, exclusive of their capacity as members of parliament, and as hereditary counsellors of the crown; both of which we have before considered. And first we must observe, that in criminal cases, a nobleman shall be tried by his peers. The great are always obnoxious to popular envy: were they to be judged by the people, they might be in danger from the prejudice of their judges; and would moreover be deprived of the privilege of the meanest subjects, that of being tried by their equals, which is secured to all the realm by magna carta, c. 29. It is said, that this does not extend to bishops; who, though they are lords of parliament, and sit there by virtue of their baronies which they hold jure ecclesiae, yet are not ennobled in blood, and consequently not peers with the nobility. As to peeresses, no provision was made for their trial when accused of treason or felony, till after Eleanor duchess of Gloucester, wife to the lord protector, had been accused of treason and found guilty of witchcraft, in an ecclesiastical synod, through the intrigues of cardinal Beaufort. This very extraordinary trial gave occasion to a special statute, 20 Hen. VI. c. 9. which enacts that 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 is gained, by marriage it is also 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 (either in her own right or by marriage) cannot be arrested in civil cases: and they have also many peculiar privileges annexed to their peerage in the course of judicial proceedings. A peer, sitting in judgment, gives not his verdict upon oath, like an ordinary juryman, but upon his honour: he answers also to bills in chancery upon his honour, and not upon his oath; but, when
he is examined as a witness either in civil or criminal cases, he must be sworn /y: for the respect, which the law shews to the honour of a peer, does not extend so far as to overturn a settled maxim, that in judicio non creditur nisi juratis. /z The honour of peers is however so highly tendered by the law, that it is much more penal to spread false reports of them, and certain other great officers of the realm, than of other men: scandal against them being called by the peculiar name of scandalum magnatum; and subjected to peculiar punishment by divers ancient statutes. /a
/s 3 Inst. 30, 31.
/t 2 Inst. 50.
/u Finch. L. 355. 1 Ventr. 298.
/w 2 Inst 49.
/x 1 P. Wms. 146.
/y Salk. 512.
/z Cro. Car. 64.
/a 3 Edw. I. c. 34. 2 Ric. II. st. 1. c. 5. 12 Ric. II. c. 11.
A PEER cannot lose his nobility, but by death or attainder; hough there was an instance, in the reign of Edward the fourth, of the degradation of George Nevile duke of Bedford by act of parliament /b, on account of his poverty, which rendered him unable to support his dignity. /c But this is a singular instance: which serves at the same time, by having happened, to shew the power of parliament; and, by having happened but once, to shew how tender the parliament hath been, in exerting so high a power. It hath been said indeed /d, that if a baron waste his estate, so that he is not able to support the degree, the king may degrade him: but it is expressly held by later authorities /e, that a peer cannot be degraded but by act of parliament.
/c The preamble to the act is remarkable: "forasmuch as oftentimes it is seen, that when any lord is called to high estate, and hath not convenient livelihood to support the same dignity, it induceth great poverty and indigence, and causeth oftentimes great extortion, embracery, and maintenance to be had; to the great trouble of all such countries where such estate shall happen to be: therefore, &c."
/d By lord chancellor Ellesmere. Moor. 678.
/e 12 Rep. 107. 12 Mod. 56.
THE commonalty, like the nobility, are divided into several degrees; and, as the lords, though different in rank, yet all of them are peers in respect of their nobility, so the commoners, though some are greatly superior to others, yet all are in law peers, in respect of their want of nobility. /f
THE first name of dignity, next beneath a peer, was anciently that of
vidames, vice domini, or valvasors; who are mentioned by our ancient
lawyers as viri magnae dignitatis; and sir Edward Coke speaks highly
of them. Yet they are now quite out of use; and our legal antiquarians are
not so much as agreed upon their original or ancient office.
Camden. ibid.
Bracton. l. 1. c. 8.
2 Inst. 667.
NOW therefore the first dignity after the nobility, is a knight of the order
of St. George, or of the garter; first instituted by Edward III, A.D. 1344.
Next follows a knight banneret; who indeed by statutes 5 Ric. II. st. 2. c. 4.
and 14 Ric. II. c. 11. is ranked next after barons: and that precedence was
confirmed to him by order of king James I, in the tenth year of his reign.
But, in order to intitle himself to this rank, he must have been created by
the king in person, in the field, under the royal banners, in time of open
war. Else he ranks after baronets; who are the next order: 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.
in order to raise a competent sum for the reduction of the province of
Ulster in Ireland; for which reason all baronets have the arms of Ulster
superadded to their family coat. Next follow knights of the bath; an order
instituted by king Henry IV, and revived by king 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 amongst us: for we have an
instance of king Alfred's conferring this order on his son Athelstan. The
custom of the ancient Germans was to give their young men a shield and a
lance in the great council: this was equivalent to the toga virilis of the
Romans: before this they were not permitted to bear arms, but were
accounted as part of the father's household; after it, as part of the public.
Hence some derive the usage of knighting, which has prevailed all over
the western world, since its reduction by colonies from those northern
heroes. Knights are called in Latin equites aurati; aurati, from the gilt spurs
they wore; and equites, because they always served on horseback: for it is
observable, that almost all nations call their knights by some
appellation derived from an horse. They are also called in our law milites,
because they formed a part, or indeed the whole of the royal army, in
virtue of their feodal tenures; one condition of which was, that every one
who held a knights fee (which in Henry the second's time amounted to
20l. per annum) was obliged to be knighted, and attend the king in his wars, or fine for his non-compliance. The exertion of this prerogative, as an expedient to raise money in the reign of Charles the first, gave great offence; though warranted by law, and the recent example of queen Elizabeth: but it was, at the restoration, together with all other military branches of the feodal law, abolished; and this kind of knighthood has, since that time, fallen into great disregard.

THESE, sir Edward Coke says, are all the names of dignity in this kingdom, esquires and gentlemen being only names of worship. But before these last the heralds rank all colonels, servjeants at law, and doctors in the three learned professions.

ESQUIRES and gentlemen are confounded together by sir Edward Coke, who observes, that every esquire is a gentleman, and a gentleman is defined to be one qui arma gerit, who bears coat armour, the grant of which adds gentility to a man's family: in like manner as civil nobility, among the Romans, was founded in the jus imaginum, or having the image of one ancestor at least, who had borne some curule office. It is indeed a matter somewhat unsettled, what constitutes the distinction, or who is a real esquire: for it is not an estate, however large, that confers this rank upon its owner. Camden, who was himself a herald, distinguishes them the most accurately; and he reckons up four sorts of them: 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: both which species of esquires sir H. Spelman entitles armigeri natalitii, 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 of trust 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; and the eldest sons of peers of Great Britain, who, though generally titular lords, are only esquires in the law, and must so be named in all legal proceedings. As for gentlemen, says sir Thomas Smith, they be made...
good cheap in this kingdom: for whosoever studieth the laws of the realm, who studieth in the universities, who professeth liberal sciences, and (to be short) who can live idly, and without manual labour, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman. 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. /z
/s 2 Inst. 668.
/t Ibid.
/u 2 Inst. 667.
/w Gloss. 43.
/x 3 Inst. 30. 2 Inst. 667.
/z 2 Inst. 668.

THE rest of the commonalty are tradesmen, artificers, and labourers; who (as well as all others) must in pursuance of the statute 1 Hen. V. c. 5. be styled by the name and addition of their estate, degree, or mystery, in all actions and other legal proceedings.

CHAPTER THE THIRTEENTH.
OF THE MILITARY AND MARITIME STATES.

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.

IN a land of liberty it is extremely dangerous to make a distinct order of the profession of arms. In absolute monarchies this is necessary for the safety of the prince, and arises from the main principle of their constitution, which is that of governing by fear: but in free states the profession of a soldier, taken singly and merely as a profession, is justly an object of jealousy. In these no man should take up arms, but with a view to defend his country and its laws: he puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier. The laws therefore and constitution of these kingdoms know no such state as that of a perpetual standing soldier, bred up to no other profession than that of war: and it was not till the reign of Henry VII, that the kings of England had so much as a guard about their persons.

IN the time of our Saxon ancestors, as appears from Edward the confessor's laws /a, the military force of this kingdom was in the hands of the dukes or heretochs, who were constituted through every province and
county in the kingdom; being taken out of the principal nobility, and such as were most remarkable for being "sapientes, sideles, et animosi." Their duty was to lead and regulate the English armies, with a very unlimited power; "prout eis visum suerit, ad honorem coronae et utilitatem regni." And because of this great power they were elected by the people in their full assembly, or folkmote, in the same manner as sheriffs were elected: following still that old fundamental maxim of the Saxon constitution, that where any officer was entrusted with such power, as if abused might tend to the oppression of the people, that power was delegated to him by the vote of the people themselves. /b So too, among the ancient Germans, the ancestors of our Saxon forefathers, they had their dukes, as well as kings, with an independent power over the military, as the kings had over the civil state. The dukes were elective, the kings hereditary: for so only can be consistently understood that passage of Tacitus /c, "reges ex nobilitate, duces ex virtute sumunt;" in constituting their kings, the family, or blood royal, was regarded, in chusing their dukes or leaders, warlike merit: just as Caesar relates of their ancestors in his time, that whenever they went to war, by way either of attack or defence, they elected leaders to command them. /d This large share of power, thus conferred by the people, though intended to preserve the liberty of the subject, was perhaps unreasonably detrimental to the prerogative of the crown: and accordingly we find a very ill use made of it by Edric duke of Mercia, in the reign of king Edmond Ironside; who, by his office of duke or heretoch, was entitled to a large command in the king's army, and by his repeated treacheries at last transferred the crown to Canute the Dane.

/a c. de heretochii.
/b "Isti vero viri eliguntur per commune consilium, pro communi utilitate regni, per provincias et patrias universas, et per singulos comitatus, in pleno folkmote, sicut et vice-comites provinciarum et comitatuum eligi debent." LL. Edw. Confess. ibid. See also Bede, eccl. hist. l. 5. c. 10.
/c De morib. German. 7.
/d "Quum bellum civitas aut illatum defendit, aut insert, magistratus qui ei bello praesint deliguntur." De bell. Gall. l. 6. c. 22.

It seems universally agreed by all historians, that king Alfred first settled a national militia in this kingdom, and by his prudent discipline made all the subjects of his dominion soldiers: but we are unfortunately left in the dark as to the particulars of this his so celebrated regulation; though, from what was last observed, the dukes seem to have been left in possession of too large and independent a power: which enabled duke Harold on the death of Edward the confessor, though a stranger to the royal blood, to mount
for a short space the throne of this kingdom, in prejudice of Edgar Atheling, the rightful heir.  

UPON the Norman conquest the feodal law was introduced here in all its rigor, the whole of which is built on a military plan. I shall not now enter into the particulars of that constitution, which belongs more properly to the next part of our commentaries: but shall only observe, that, in consequence thereof, all the lands in the kingdom were divided into what were called knight's fees, in number above sixty thousand; and for every knight's fee a knight or soldier, miles, was bound to attend the king in his wars, for forty days in a year; in which space of time, before war was reduced to a science, the campaign was generally finished, and a kingdom either conquered or victorious. /e By this means the king had, without any expense, an army of sixty thousand men always ready at his command. And accordingly we find one, among the laws of William the conqueror /f, which in the king's name commands and firmly enjoins the personal attendance of all knights and others; "quod habeant et teneant se semper in armis et equis, ut decet et oportet; et quod semper sint prompti et parati ad servitium suum integrum nobis explendum et peragendum, cum opus adsuerit, secundum quod debent de foedis et tenementis suis de jure nobis facere." This personal service in process of time degenerated into pecuniary commutations or aids, and at last the military part of the feodal system was abolished at the restoration, by statute 12 Car. II. c. 24.  

/e The Poles are, even at this day, so tenacious of their ancient constitution, that their pospolite, or militia, cannot be compelled to serve above six weeks, or forty days, in a year. Mod. Univ. Hist. xxxiv. 12.  

/f c. 58. See Co. Litt. 75, 76.  

IN the mean time we are not to imagine that the kingdom was left wholly without defence, in case of domestic insurrections, or the prospect of foreign invasions. Besides those, who by their military tenures were bound to perform forty days service in the field, the statute of Winchester /g obliged every man, according to his estate and degree, to provide a determinate quantity of such arms as were then in use, in order to keep the peace: and constables were appointed in all hundreds to see that such arms were provided. These weapons were changed, by the statute 4 & 5 Ph. & M. c. 2. into others of more modern service; but both this and the former provision were repealed in the reign of James I. /h While these continued in force, it was usual from time to time for our princes to issue commissions of array, and send into every county officers in whom they could confide, to muster and array (or set in military order) the inhabitants of every district: and the form of the commission of array was
settled in parliament in the 5 Hen. IV. But at the same time it was provided, that no man should be compelled to go out of the kingdom at any rate, nor out of his shire but in cases of urgent necessity; nor should provide soldiers unless by consent of parliament. About the reign of king Henry the eighth, and his children, lord lieutenants began to be introduced, as standing representatives of the crown, to keep the counties in military order; for we find them mentioned as known officers in the statute 4 & 5 Ph. & M. c. 3. though they had not been then long in use, for Camden speaks of them, in the time of queen Elizabeth, as extraordinary magistrates constituted only in times of difficulty and danger.

\[g 13 \text{Edw. I. c. 6.}\]
\[h \text{Stat. 1 Jac. I. c. 25. 21 Jac. I. c. 28.}\]
\[i \text{Rushworth. part 3. pag. 667.}\]
\[k \text{Stat. 1 Edw III. st. 2. c. 5 & 7. 25 Edw. III. st. 5. c. 8.}\]
\[l \text{Brit. 103. Edit. 1594}\]

IN this state things continued, till the repeal of the statutes of armour in the reign of king James the first: after which, when king Charles the first had, during his northern expeditions, issued commissions of lieutenancy and exerted some military powers which, having been long exercised, were thought to belong to the crown, it became a question in the long parliament, how far the power of the militia did inherently reside in the king; being now unsupported by any statute, and founded only upon immemorial usage. This question, long agitated with great heat and resentment on both sides, became at length the immediate cause of the fatal rupture between the king and his parliament: the two houses not only denying this prerogative of the crown, the legality of which right perhaps might be somewhat doubtful; but also seizing into their own hands the entire power of the militia, the illegality of which step could never be any doubt at all.

SOON after the restoration of king Charles the second, when the military tenures were abolished, it was thought proper to ascertain the power of the militia, to recognize the sole right of the crown to govern and command them, and to put the whole into a more regular method of military subordination: and the order, in which the militia now stands by law, is principally built upon the statutes which were then enacted. It is true the two last of them are apparently repealed; but many of their provisions are re-enacted, with the addition of some new regulations, by the present militia laws: the general scheme of which is to discipline a certain number of the 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 rigors of martial law, as necessary to keep them in order. This is the constitutional security, which our laws have provided for the public peace, and for protecting the realm against foreign or domestic violence; and which the statutes declare is essentially necessary to the safety and prosperity of the kingdom.

13 Car. II. c. 6. 14 Car. II. c. 3. 15 Car. II. c. 4.

WHEN the nation is engaged in a foreign war, more veteran troops and more regular discipline may perhaps be necessary, than can be expected from a mere militia. And therefore at such times particular provisions have been usually made for the raising of armies and the due regulation and discipline of the soldiery: which are to be looked upon only as temporary excrescences bred out of the distemper of the state, and not as any part of the permanent and perpetual laws of the kingdom. For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as sir Matthew Hale observes, in truth and reality no law, but something indulged, rather than allowed as a law: the necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land. Wherefore Edmond earl of Kent being taken at Pontefract, 15 Edw. II. and condemned by martial law, his attainder was reversed 1 Edw. III. because it was done in time of peace. And it is laid down, that if a lieutenant, or other, that hath commission of martial authority, doth in time of peace hang or otherwise execute any man by colour of martial law, this is murder; for it is against magna carta. And the petition of right enacts, that no soldier shall be quartered on the subject without his own consent; and that no commission shall issue to proceed within this land according to martial law. And whereas, after the restoration, king Charles the second kept up about five thousand regular troops, by his own authority, for guards and garrisons; which king James the second by degrees increased to no less than thirty thousand, all paid from his own civil list; it was made 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 consent of parliament, is against law.
Thus, in Poland, no soldier can be quartered upon the gentry, the only freemen in that republic. Mod. Univ. Hist. xxxiv. 23.

BUT, as the fashion of keeping standing armies has universally prevailed over all Europe of late years (though some of its potentates, being unable themselves to maintain them, are obliged to have recourse to richer powers, and receive subsidiary pensions for that purpose) it has also for many years past been annually judged necessary by our legislature, for the safety of the kingdom, the defence of the possessions of the crown of Great Britain, and the preservation of the balance of power in Europe, 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 by parliament.

TO prevent the executive power from being able to oppress, says baron Montesquieu, it is requisite that the armies with which it is entrusted should consist of the people, and have the same spirit with the people; as was the case at Rome, till Marius new-modelled the legions by enlisting the rabble of Italy, and laid the foundation of all the military tyranny that ensued. Nothing then, according to these principles, ought to be more guarded against in a free state, than making the military power, when such a one is necessary to be kept on foot, a body too distinct from the people. Like ours therefore, it should wholly be composed of natural subjects; it ought only to be enlisted for a short and limited time; the soldiers also should live intermixed with the people; no separate camp, no barracks, no inland fortresses should be allowed. And perhaps it might be still better, if, by dismissing a stated number and enlisting others at every renewal of their term, a circulation could be kept up between the army and the people, and the citizen and the soldier be more intimately connected together.

TO keep this body of troops in order, an annual act of parliament likewise passes, "to punish mutiny and desertion, and for the better payment of the army and their quarters." This regulates the manner in which they are to be dispersed among the several inn-keepers and victuallers throughout the kingdom; and establishes a law martial for their government. By this, among other things, it is enacted, that if any officer and soldier shall
excite, or join any mutiny, or, knowing of it, shall not give notice to the commanding officer; or shall defect, or list in any other regiment, or sleep upon his post, or leave it before he is relieved, or hold correspondence with a rebel or enemy, or strike or use violence to his superior officer, or shall disobey his lawful commands; such offender shall suffer such punishment as a court martial shall inflict, though it extend to death itself. HOWEVER expedient the most strict regulations may be in time of actual war, yet, in times of profound peace, a little relaxation of military rigor would not, one should hope, be productive of much inconvenience. And, upon this principle, though by our standing laws /w (still remaining in force, though not attended to) desertion in time of war is made felony, without benefit of clergy, and the offence is triable by a jury and before the judges of the common law; yet, by our militia laws beforementioned, a much lighter punishment is inflicted for desertion in time of peace. So, by the Roman law also, desertion in time of war was punished with death, but more mildly in time of tranquility. /x But our mutiny act makes no such distinction: for any of the faults therein mentioned are, equally at all times, punishable with death itself, if a court martial shall think proper. This discretionary power of the court martial is indeed to be guided by the directions of the crown; which, with regard to military offences, has almost an absolute legislative power. "His majesty, says the act, may 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." A vast and most important trust! an unlimited power to create crimes, and annex to them any punishments, not extending to life or limb! These are indeed forbidden to be inflicted, except for crimes declared to be so punishable by this act; which crimes we have just enumerated, and, among which, we may observe that any disobedience to lawful commands is one. Perhaps in some future revision of this act, which is in many respects hastily penned, it may be thought worthy the wisdom of parliament to ascertain the limits of military subjection, and to enact express articles of war for the government of the army, as is done for the government of the navy: especially as, by our present constitution, the nobility and gentry of the kingdom, who serve their country as militia officers, are annually subjected to the same arbitrary rule, during their time of exercise. 
/w Stat. 18 Hen. VI. c. 19. 2 & 3 Edw. VI. c. 2. 
/x Ff. 49. 16. 5. 
ONE of the greatest advantages of our English law is, that not only the crimes themselves which it punishes, but also the penalties which it inflicts, are ascertained and notorious: nothing is left to arbitrary
discretion: the king by his judges dispenses what the law has previously ordained; but is not himself the legislator. How much therefore is it to be regretted that a set of men, whose bravery has so often preserved the liberties of their country, should be reduced to a state of servitude in the midst of a nation of freemen! for sir Edward Coke will inform us /y, that it is one of the genuine marks of servitude, to have the law, which is our rule of action, either concealed or precarious: "misera est servitus, ubi jus est vagum aut incognitum." Nor is this state of servitude quite consistent with the maxims of sound policy observed by other free nations. For, the greater the general liberty is which any state enjoys, the more cautious has it usually been of introducing slavery in any particular order or profession. These men, as baron Montesquieu observes /z, seeing the liberty which others possess, and which they themselves are excluded from, are apt (like eunuchs in the eastern seraglions) to live in a state of perpetual envy and hatred towards the rest of the community; and indulge a malignant pleasure in contributing to destroy those privileges, to which they can never be admitted. Hence have many free states, by departing from this rule, been endangered by the revolt of their slaves: while, in absolute and despotic governments where there no real liberty exists, and consequently no invidious comparisons can be formed, such incidents are extremely rare. Two precautions are therefore advised to be observed in all prudent and free governments; 1. To prevent the introduction of slavery at all: or, 2. If it be already introduced, not to intrust those slaves with arms; who will then find themselves an overmatch for the freemen. Much less ought the soldiery to be an exception to the people in general, and the only state of servitude in the nation.

/y 4 Inst. 332.
/z Sp. L. 15. 12.

BUT as soldiers, by this annual act, are thus put in a worse condition than any other subjects, so, by the humanity of our standing laws, they are in some cases put in a much better. By statute 43 Eliz. c. 3. a weekly allowance is to be raised in every county for the relief of soldiers that are sick, hurt, and maimed: not forgetting the royal hospital at Chelsea for such as are worn out in their duty. Officers and soldiers, that have been in the king's service, are by several statutes, enacted at the close of several wars, at liberty to use any trade or occupation they are fit for, in any town in the kingdom (except the two universities) notwithstanding any statute, custom, or charter to the contrary. And soldiers in actual military service may make their wills, and dispose of their goods, wages, and other personal chattels, without those forms, solemnities, and expenses, which
the law requires in other cases. /a Our law does not indeed extend this privilege so far as the civil law; which carried it to an extreme that borders upon the ridiculous. For if a soldier, in the article of death, wrote any thing in bloody letters on his shield, or in the dust of the field with his sword, it was a very good military testament. /b And thus much for the military state, as acknowledged by the laws of England. 

/a Stat. 29 Car. II. c. 3. 5 W. III. c. 21. 6. 
/b Si milites quid in clypeo literis sanguine suo rutilantibus adnotaverint, aut in pulvere inscripserint gladio suo, ipso tempore quo, in praelio, vitae sortem derelinquunt, hujusmodi voluntatem stabilem esse oportet. Cod. 6. 21. 15. 

THE maritime state is nearly related to the former; though much more agreeable to the principles of our free constitution. The royal navy of England hath ever been its greatest defence and ornament: it is its ancient and natural strength; the floating bulwark of the island; an army, from which, however strong and powerful, no danger can ever be apprehended to liberty: and accordingly it has been assiduously cultivated, even from the earliest ages. To so much perfection was our naval reputation arrived in the twelfth century, that the code of maritime laws, which are called the laws of Oleron, and are received by all nations in Europe as the ground and substraction of all their marine constitutions, was confessedly compiled by our king Richard the first, at the isle of Oleron on the coast of France, then part of the possessions of the crown of England. /c And yet, so vastly inferior were our ancestors in this point to the present age, that even in the maritime reign of queen Elizabeth, sir Edward Coke /d thinks it matter of boast, that the royal navy of England then consisted of three and thirty ships. The present condition of our marine is in great measure owing to the salutary provisions of the statutes, called the navigation-acts; whereby the constant increase of English shipping and seamen was not only encouraged, but rendered unavoidably necessary. By the statute 5 Ric. II. c. 3. in order to augment the navy of England, then greatly diminished, it was ordained, that none of the king’s liege people should ship any merchandize out of or into the realm but only in ships of the king’s ligeance, on pain of forfeiture. In the next year, by statute 6 Ric. II. c. 8. this wise provision was enervated, by only obliging the merchants to give English ships, (if able and sufficient) the preference. But the most beneficial statute for the trade and commerce of these kingdoms is that navigation-act, the rudiments of which were first framed in 1650 /e, with a narrow partial view: being intended to mortify the sugar islands, which were disaffected to the parliament and still held out for Charles II, by
stopping the gainful trade which they then carried on with the Dutch; and at the same time to clip the wings of those our opulent and aspiring neighbours. This prohibited all ships of foreign nations from trading with any English plantations without licence from the council of state. In 1651 the prohibition was extended also to the mother country; and no goods were suffered to be imported into England, or any of its dependencies, in any other than English bottoms; or in the ships of that European nation of which the merchandize imported was the genuine growth or manufacture. At the restoration, the former provisions were continued, by statute 12 Car. II. c. 18. with this very material improvement, that the master and three fourths of the mariners shall also be English subjects.

MANY laws have been made for the supply of the royal navy with seamen; for their regulation when on board; and to confer privileges and rewards on them during and after their service.

1. FIRST, for their supply. The power of impressing men for the sea service by the king's commission, has been a matter of some dispute, and submitted to with great reluctance; though it hath very clearly and learnedly been shewn, by sir Michael Foster, that the practise of impressing, and granting powers to the admiralty for that purpose, is of very ancient date, and hath been uniformly continued by a regular series of precedents to the present time: whence he concludes it to be part of the common law. The difficulty arises from hence, that no statute has expressly declared this power to be in the crown, though many of them very strongly imply it. The statute 2 Ric. II. c. 4. speaks of mariners being arrested and retained for the king's service, as of a thing well known, and practised without dispute; and provides a remedy against their running away. By a later statute, if any waterman, who uses the river Thames, shall hide himself during the execution of any commission of pressing for the king's service, he is liable to heavy penalties. By another, no fisherman shall be taken by the queen's commission to serve as a mariner; but the commission shall be first brought to two justices of the peace, inhabiting near the sea coast where the mariners are to be taken, to the intent that the justices may choose out and return such a number of ablebodied men, as in the commission are contained, to serve her majesty. And, by others, especial protections are allowed to seamen in
particular circumstances, to prevent them from being impressed. All which do most evidently imply a power of impressing to reside somewhere; and, if any where, it must from the spirit of our constitution, as well as from the frequent mention of the king's commission, reside in the crown alone.

\[h\] Rep. 154.

\[i\] See also Comb. 245.

\[k\] Stat. 2 & 3 Ph. & M. c. 16.

\[l\] Stat. 5 Eliz. c. 5.

\[m\] Stat. 7 & 8 W. III. c. 21. 2 Ann. c. 6 & 5 Ann. c. 19. 13 Geo. II. c. 17. &c.

BUT, besides this method of impressing, (which is only defensible from public necessity, to which all private considerations must give way) there are other ways that tend to the increase of seamen, and manning the royal navy. Parishes may bind out poor boys apprentices to masters of merchantmen, who shall be protected from impressing for the first three years; and if they are impressed afterwards, the masters shall be allowed their wages /n: great advantages in point of wages are given to volunteer seamen in order to induce them to enter into his majesty's service /o: and every foreign seaman, who during a war shall serve two years in any man of war, merchantman, or privateer, is naturalized ipso facto. /p About the middle of king William's reign, a scheme was set on foot /q for a register of seamen to the number of thirty thousand, for a constant and regular supply of the king's fleet; with great privileges to the registered men, and, on the other hand, heavy penalties in case of their non-appearance when called for: but this registry, being judged to be rather a badge of slavery, was abolished by statute 9 Ann. c. 21.

\[n\] Stat. 2 Ann. c. 6.

\[o\] Stat. 1 Geo. II. st. 2. c. 14.

\[p\] Stat. 13 Geo. II. c. 3.

\[q\] Stat. 7 & 8 W. III. c. 21.

2. THE method of ordering seamen in the royal fleet, and keeping up a regular discipline there, is directed by certain express rules, articles and orders, first enacted by the authority of parliament soon after the restoration; /r but since new-modelled and altered, after the peace of Aix la Chapelle /s, to remedy some defects which were of fatal consequence in conducting the preceding war. In these articles of the navy almost every possible offence is set down, and the punishment thereof annexed: in which respect the seamen have much the advantage over their brethren in the land service; whose articles of war are not enacted by parliament, but framed from time to time at the pleasure of the crown. Yet from whence
this distinction arose, and why the executive power, which is limited so properly with regard to the navy, should be so extensive with regard to the army, it is hard to assign a reason: unless it proceeded from the perpetual establishment of the navy, which rendered a permanent law for their regulation expedient; and the temporary duration of the army, which subsisted only from year to year; and might therefore with less danger be subjected to discretionary government. But, whatever was apprehended at the first formation of the mutiny act, the regular renewal of our standing force at the entrance of every year has made this distinction idle. For, if from experience past we may judge of future events, the army is now lastingly ingrafted into the British constitution; with this singularly fortunate circumstance, that any branch of the legislature may annually put an end to its legal existence, by refusing to concur in its continuance.

/r Stat. 13 Car. II. st. 1. c. 9.
/s Stat. 22 Geo. II. c. 23.

3. WITH regard to the privileges conferred on sailors, they are pretty much the same with those conferred on soldiers; with regard to relief, when maimed, or wounded, or superannuate, either by county rates, or the royal hospital at Greenwich; with regard also to the exercise of trades, and the power of making informal testaments: and, farther /t, no seaman aboard his majesty's ships can be arrested for any debt, unless the same be sworn to amount to at least twenty pounds; though, by the annual mutiny acts, a soldier may be arrested for a debt which extends to half that value, but not to a less amount.

/t Stat. 1 Geo. II. st. 2. c. 14.

CHAPTER THE FOURTEENTH.
OF MASTER AND SERVANT.
HAVING thus commented on the rights and duties of persons, as standing in the public relations of magistrates and people; the method I have marked out now leads me to consider their rights and duties in private economical relations.

THE three great relations in private life are, 1. That of master and servant; which is founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labour will not be sufficient to answer the cares incumbent upon him. 2. That of husband and wife; which is founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated. 3. That of parent and child, which is consequential to that of marriage, being its principal end and design: and it is by virtue of this relation that infants are
protected, maintained, and educated. But, since the parents, on whom this
care is primarily incumbent, may be snatched away by death or otherwise,
before they have completed their duty, the law has therefore provided a
fourth relation; 4. That of guardian and ward, which is a kind of artificial
parentage, in order to supply the deficiency, whenever it happens, of the
natural. Of all these relations in their order.

IN discussing the relation of master and servant, I shall, first, consider the
several sorts of servants, and how this relation is created and destroyed:
secondly, the effects of this relation with regard to the parties themselves:
and, lastly, its effect with regard to other persons.

I. AS to the several sorts of servants: I have formerly observed /a that pure
and proper slavery does not, nay cannot, subsist in England; such I mean,
whereby an absolute and unlimited power is given to the master over the
life and fortune of the slave. And indeed it is repugnant to reason, and the
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becomes his slave. In this case therefore the buyer gives nothing, and the
seller receives nothing: of what validity then can a sale be, which destroys
the very principles upon which all sales are founded? Lastly, we are told,
that besides these two ways by which slaves "fiunt," or are acquired, they
may also be hereditarily: "servi nascentur;" the children of acquired slaves
are, jure naturae, by a negative kind of birthright, slaves also. But this
being built on the two former rights must fall together with them. If
neither captivity, nor the sale of oneself, can by the law of nature and
reason, reduce the parent to slavery, much less can it reduce the offspring.
/a pag. 123.
/b Servi aut fiunt, aut nascuntur: fiunt jure gentium, aut jure civili:
nascuntur ex ancillis nostris. Inst. 1. 3. 4.
UPON these principles the law of England abhors, and will not endure the
existence of slavery within this nation: so that when an attempt was made
to introduce it, by statute 1 Edw. VI. c. 3. which ordained, that all idle
vagabonds should be made slaves, and fed upon bread, water, or small
drink, and refuse meat; should wear a ring of iron round their necks, arms,
or legs; and should be compelled by beating, chaining, or otherwise, to
perform the work assigned them, were it never so vile; the spirit of the
nation could not brook this condition, even in the most abandoned rogues;
and therefore this statute was repealed in two years afterwards. /c And
now it is laid down /d, that a slave or negro, the instant he lands in
England, becomes a freeman; that is, the law will protect him in the
enjoyment of his person, his liberty, and his property. Yet, with regard to
any right which the master may have acquired, by contract or the like, to
the perpetual service of John or Thomas, this will remain exactly in the
same state as before: for this is no more than the same state of subjection
for life, which every apprentice submits to for the space of seven years, or
sometimes for a longer term. Hence too it follows, that the infamous and
unchristian practice of withholding baptism from negro servants, lest they
should thereby gain their liberty, is totally without foundation, as well as
without excuse. The law of England acts upon general and extensive
principles: it gives liberty, rightly understood, that is, protection, to a jew,
a turk, or a heathen, as well as to those who profess the true religion of
Christ; and it will not dissolve a civil contract, either express or implied,
between master and servant, on account of the alteration of faith in either
of the contracting parties: but the slave is entitled to the same liberty in
England before, as after, baptism; and, whatever service the heathen negro
owed to his English master, the same is he bound to render when a
christian.
1. THE first sort of servants therefore, acknowledged by the laws of England, are menial servants; so called from being intra moenia, or domestics. The contract between them and their masters arises upon the hiring. If the hiring be general without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as well when there is work to be done, as when there is not: but the contract may be made for any larger or smaller term. All single men between twelve years old and sixty, and married ones 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, for the promotion of honest industry: and no master can put away his servant, or servant leave his master, either before or at the end of his term, without a quarter's warning; unless upon reasonable cause to be allowed by a justice of the peace: but they may part by consent, or make a special bargain.

2. ANOTHER species of servants are called apprentices (from apprendre, to learn) and are usually bound for a term of years, by deed indented or indentures, to serve their masters, and be maintained and instructed by them: for which purpose our statute law has made minors capable of binding themselves. This is usually done to persons of trade, in order to learn their art and mystery; and sometimes very large sums are given with them, as a premium for such their instruction: but it may be done to husbandmen, nay to gentlemen, and others. And children of poor persons may be apprenticed out by the overseers, with consent of two justices, till twenty four years of age, to such persons as are thought fitting; who are also compellable to take them: and it is held, that gentlemen of fortune, and clergymen, are equally liable with others to such compulsion.

Apprentices to trades may be discharged on reasonable cause, either at request of themselves or masters, at the quarter sessions, or by one justice, with appeal to the sessions: who may, by the equity of the statute, if they think it reasonable, direct restitution of a ratable share of the money given with the apprentice: And parish apprentices may be discharged in the same manner, by two justices.
A THIRD species of servants are labourers, who are only hired by the day or the week, and do not live intra moenia, as part of the family; concerning whom the statute so often cited has made many very good regulations: 1. Directing that all persons who have no visible effects may be compelled to work: 2. Defining how long they must continue at work in summer and winter: 3. Punishing such as leave or desert their work: 4. Empowering the justices at sessions, or the sheriff of the county, to settle their wages: and 5. Inflicting penalties on such as either give, or exact, more wages than are so settled.

THERE is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial, capacity; such as stewards, factors, and bailiffs: whom however the law considers as servants pro tempore, with regard to such of their acts, as affect their master's or employer's property. Which leads me to consider,

II. THE manner in which this relation, of service, affects either the master or servant. And, first, by hiring and service for a year, or apprenticeship under indentures, a person gains a settlement in that parish wherein he last served forty days. In the next place persons serving as apprentices to any trade have an exclusive right to exercise that trade in any part of England. This law, with regard to the exclusive part of it, has by turns been looked upon as a hard law, or as a beneficial one, according to the prevailing humour of the times: which has occasioned a great variety of resolutions in the courts of law concerning it; and attempts have been frequently made for its repeal, though hitherto without success. At common law every man might use what trade he pleased; but this statute restrains that liberty to such as have served as apprentices: the adversaries to which provision say, that all restrictions (which tend to introduce monopolies) are pernicious to trade; the advocates for it alledge, that unskillfulness in trades is equally detrimental to the public, as monopolies. This reason indeed only extends to such trades, in the exercise whereof skill is required: but another of their arguments goes much farther; viz. that apprenticeships are useful to the commonwealth, by employing of youth, and learning them to be early industrious; but that no one would be
induced to undergo a seven years servitude, if others, though equally skillful, were allowed the same advantages without having undergone the same discipline: and in this there seems to be much reason. However, the resolutions of the courts have in general rather confined than extended the restriction. No trades are held to be within the statute, but such as were in being at the making of it: for trading in a country village, apprenticeships are not requisite: and following the trade seven years is sufficient without any binding; for the statute only says, the person must serve as an apprentice, and does not require an actual apprenticeship to have existed.

See page 352.

Stat. 5 Eliz. c. 4.

Lord Raym. 514.

1 Ventr. 51. 2 Keb. 583.

Lord Raym. 1179.

A MASTER may by law correct his apprentice or servant for negligence or other misbehaviour, so it be done with moderation: though, if the master's wife beats him, it is good cause of departure, But if any servant, workman, or labourer assaults his master or dame, he shall suffer one year's imprisonment, and other open corporal punishment, not extending to life or limb.


F.N.B. 168.

Stat. 5 Eliz. c. 4.

BY service all servants and labourers, except apprentices, become entitled to wages: according to their agreement, if menial servants; or according to the appointment of the sheriff or sessions, if labourers or servants in husbandry: for the statutes for regulation of wages extend to such servants only; it being impossible for any magistrate to be a judge of the employment of menial servants, or of course to assess their wages.

2 Jones. 47.

III. LET us, lastly, see how strangers may be affected by this relation of master and servant: or how a master may behave towards others on behalf of his servant; and what a servant may do on behalf of his master.

AND, first, the master may maintain, that is, abet and assist his servant in any action at law against a stranger: whereas, in general, it is an offence against public justice to encourage suits and animosities, by helping to bear the expense of them, and is called in law maintenance.

A master also may bring an action against any man for beating or maiming his servant; but in such case he must assign, as a special reason for so doing,
his own damage by the loss of his service; and this loss must be proved upon the trial. /a A master likewise may justify an assault in defence of his servant, and a servant in defence of his master /b: the master, because he has an interest in his servant, not to be deprived of his service; the servant, because it is part of his duty, for which he receives his wages, to stand by and defend his master. /c Also if any person do hire or retain my servant, being in my service, for which the servant departeth from me and goeth to serve the other, I may have an action for damages against both the new master and the servant, or either of them: but if the new master did not know that he is my servant, no action lies; unless he afterwards refuse to restore him upon information and demand. /d The reason and foundation upon which all this doctrine is built, seem to be the property that every man has in the service of his domestics; acquired by the contract of hiring, and purchased by giving them wages. /z 2 Roll. Abr. 115. /a 9 Rep. 113. /b 2 Roll. Abr. 546. /c In like manner, by the laws of king Alfred, c. 38. a servant was allowed to fight for his master, a parent for his child, and a husband or father for the chastity of his wife or daughter. /d F.N.B. 167, 168. AS for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given, or implied:nam qui facit per alium, facit per se. /e 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’s servants rob his guests, the master is bound to restitution /f: for as there is a confidence reposed in him, that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery; nam, qui non prohibet, cum prohibere possit, jubet. So likewise if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master /g: for, although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all is impliedly a general command. /e 4 Inst. 109. /f Noy’s Max. c. 43. /g 1 Roll. Abr. 95.
IN the same manner, whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. If I pay money to a banker’s servant, the banker is answerable for it: if I pay it to a clergyman’s or a physician’s servant, whose usual business it is not to receive money for his master, and he embezzles it, I must pay it over again. If a steward lets a lease of a farm, without the owner’s knowledge, the owner must stand to the bargain; for this is the steward’s business. A wife, a friend, a relation, that use to transact business for a man, are quoad hoc his servants; and the principal must answer for their conduct: for the law implies, that they act under a general command; and, without such a doctrine as this, no mutual intercourse between man and man could subsist with any tolerable convenience. If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes up upon trust; for here is no implied order to the tradesman to trust my servant: but if I usually send him upon trust, or sometimes on trust, and sometimes with ready money, I am answerable for all he takes up; for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority. /h

/h Dr & Stud. d. 2. c. 42. Noy’s max. c. 44.

IF a servant, lastly, by his negligence does any damage to a stranger, the master shall answer for his neglect: if a smith’s servant lames a horse while he is shoing him, an action lies against the master, and not against the servant. But in these cases the damage must be done, while he is actually employed in the master’s service; otherwise the servant shall answer for his own misbehaviour. Upon this principle, by the common law /i, if a servant kept his master’s fire negligently, so that his neighbour’s house was burned down thereby, an action lay against the master; because this negligence happened in his service: otherwise, if the servant, going along the street with a torch, by negligence sets fire to a house; for there he is not in his master’s immediate service, and must himself answer the damage personally. But now the common law is, in the former case, altered by statute 6 Ann. c. 3. which ordains that no action shall be maintained against any, in whose house or chamber any fire shall accidentally begin; for their own loss is sufficient punishment for their own or their servants’ carelessness. But if such fire happens through negligence of any servant (whose loss is commonly very little) such servant shall forfeit 100l, to be distributed among the sufferers; and, in default of payment, shall be committed to some workhouse and there kept to hard labour for eighteen months. /k

A master is, lastly, chargeable if any of his family layeth or casteth any thing out of his house into the street or common highway, to
the damage of any individual, or the common nuisance of his majesty's liege people. for the master hath the superintendence and charge of all his household. And this also agrees with the civil law; which holds, that the pater familias, in this and similar cases, "ob alterius culpam tenetur, sive servi, sive liberi."

Upon a similar principle, by the law of the twelve tables at Rome, a person by whose negligence any fire began was bound to pay double to the sufferers; or if he was not able to pay, was to suffer a corporal punishment.

WE may observe, that in all the cases here put, the master may be frequently a loser by the trust reposed in his servant, but never can be a gainer: he may frequently be answerable for his servant's misbehaviour, but never can shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong.

CHAPTER THE FIFTEENTH.
OF HUSBAND AND WIFE.

THE second private relation of persons is that of marriage, which includes the reciprocal duties of husband and wife; or, as most of our elder law books call them, of baron and feme. In the consideration of which I shall in the first place enquire, how marriages may be contracted or made; shall next point out the manner in which they may be dissolved; and shall, lastly, take a view of the legal effects and consequence of marriage.

I. OUR law considers marriage in no other light than as a civil contract. The holiness of the matrimonial state is left entirely to the ecclesiastical law: the temporal courts not having jurisdiction to consider unlawful marriages as a sin, but merely as a civil inconvenience. The punishment therefore, or annulling, of incestuous or other unscriptural marriages, is the province of the spiritual courts; which act pro salute animae. And, taking it in this civil light, the law treats it as it does all other contracts; allowing it to be good and valid in all cases, where the parties at the time of making it were, in the first place, willing to contract; secondly, able to contract; and, lastly, actually did contract, in the proper forms and solemnities required by law.

/a Salk. 121.
FIRST, they must be willing to contract. "Consensus, non concubitus, facit nuptias," is the maxim of the civil law in this case /b: and it is adopted by the common lawyers /c, who indeed have borrowed (especially in ancient times) almost all their notions of the legitimacy of marriage from the canon and civil laws.

/b Ff. 50. 17. 30.
/c Co. Litt. 33.

SECONDLY, they must be able to contract. In general, all persons are able to contract themselves in marriage, unless they labour under some particular disabilities, and incapacities. What those are, it will here be our business to enquire.

NOW these disabilities are of two sorts: first, such as are canonical, and therefore sufficient by the ecclesiastical laws to avoid the marriage in the spiritual court; but these in our law only make the marriage voidable, and not ipso facto void, until sentence of nullity be obtained. Of this nature are pre-contract; consanguinity, or relation by blood; and affinity, or relation by marriage; and some particular corporal infirmities. And these canonical disabilities are either grounded upon the express words of the divine law, or are consequences plainly deducible from thence: it therefore being sinful in the persons, who labour under them, to attempt to contract matrimony together, they are properly the object of the ecclesiastical magistrate's coercion; in order to separate the offenders, and inflict penance for the offence, pro salute animarum. But such marriages not being void ab initio, but voidable only by sentence of separation, they are esteemed valid to all civil purposes, unless such separation is actually made during the life of the parties. For, after the death of either of them, the courts of common law will not suffer the spiritual court to declare such marriages to have been void; because such declaration cannot now tend to the reformation of the parties. /d And therefore when a man had married his first wife's sister, and after her death the bishop's court was proceeding to annul the marriage and bastardize the issue, the court of king's bench granted a prohibition quoad hoc; but permitted them to proceed to punish the husband for incest. /e These canonical disabilities, being entirely the province of the ecclesiastical courts, our books are perfectly silent concerning them. But there are a few statutes, which serve as directories to those courts, of which it will be proper to take notice. By statute 32 Hen. VIII. c. 38. it is declared, that all persons may lawfully marry, but such as are prohibited by God's law; and that all marriages contracted by lawful persons in the face of the church, and consummate with bodily knowledge, and fruit of children, shall be indissoluble. And (because in the times of
popery a great variety of degrees of kindred were made impediments to marriage, which impediments might however be bought off for money; it is declared by the same statute, that nothing (God’s law except) shall impeach any marriage, but within the Levitical degrees; the farthest of which is that between uncle and niece. By the same statute all impediments, arising from pre-contracts to other persons, were abolished and declared of none effect, unless they had been consummated with bodily knowledge: in which case the canon law holds such contract to be a marriage de facto. But this branch of the statute was repealed by statute 2 & 3 Edw. VI. c. 23. How far the act of 26 Geo. II. c. 33. (which prohibits all suits in ecclesiastical courts to compel a marriage, in consequence of any contract) may collaterally extend to revive this clause of Henry VIII’s statute, and abolish the impediment of pre-contract, I leave to be considered by the canonists.

THE other sort of disabilities are those which are created, or at least enforced, by the municipal laws. And, though some of them may be grounded on natural law, yet they are regarded by the laws of the land, not so much in the light of any moral offence, as on account of the civil inconveniences they draw after them. These civil disabilities make the contract void ab initio, and not merely voidable: not that they dissolve a contract already formed, but they render the parties incapable of forming any contract at all: they do not put asunder those who are joined together, but they previously hinder the junction. And, if any persons under these legal incapacities come together, it is a meretricious, and not a matrimonial, union.

1. THE first of these legal disabilities is a prior marriage, or having another husband or wife living; in which case, besides the penalties consequent upon it as a felony, the second marriage is to all intents and purposes void: polygamy being condemned both by the law of the new testament, and the policy of all prudent states, especially in these northern climates. And Justinian, even in the climate of modern Turkey, is express, that "duas uxorres eodem tempore habere non licet."

2. THE next legal disability is want of age. This is sufficient to avoid all other contracts, on account of the imbecility of judgment in the parties contracting; a fortiori therefore it ought to avoid this, the most important
contract of any. Therefore if a boy under fourteen, or a girl under twelve years of age, marries, this marriage is only inchoate and imperfect; and, when either of them comes to the age of consent aforesaid, they may disagree and declare the marriage void, without any divorce or sentence in the spiritual court. This is founded on the civil law. But the canon law pays a greater regard to the constitution, than the age, of the parties: for if they are habiles ad matrimonium, it is a good marriage, whatever their age may be. And in our law it is so far a marriage, that, if at the age of consent they agree to continue together, they need not be married again. If the husband be of years of discretion, and the wife under twelve, when she comes to years of discretion he may disagree as well as she may: for in contracts the obligation must be mutual; both must be bound, or neither: and so it is, vice versa, when the wife is of years of discretion, and the husband under.

/k Decretal. l. 4. tit. 2. qu. 3.
l Co. Litt. 79.
m Ibid.

3. ANOTHER incapacity arises from want of consent of parents or guardians. By the common law, if the parties themselves were of the age of consent, there wanted no other concurrence to make the marriage valid: and this was agreeable to the canon law. But, by several statutes, penalties of 100l. are laid on every clergyman who marries a couple either without publication of banns (which may give notice to parents or guardians) or without a licence, to obtain which the consent of parents or guardians must be sworn to. And by the statute 4 & 5 Ph. & M. c. 8. whosoever marries any woman child under the age of sixteen years, without consent of parents or guardians, shall be subject to fine, or five years imprisonment: and her estate during the husband's life shall go to and be enjoyed by the next heir. The civil law indeed required the consent of the parent or tutor at all ages; unless the children were emancipated, or out of the parents power: and, if such consent from the father was wanting, the marriage was null, and the children illegitimate: but the consent of the mother or guardians, if unreasonably withheld, might be redressed and supplied by the judge, or the president of the province: and if the father was non compos, a similar remedy was given. These provisions are adopted and imitated by the French and Hollanders, with this difference: that in France the sons cannot marry without consent of parents till thirty years of age, nor the daughters till twenty five; and in Holland, the sons are at their own disposal at twenty five, and the
daughters at twenty. Thus hath stood, and thus at present stands, the law in other neighbouring countries. And it has been lately thought proper to introduce somewhat of the same policy into our laws, by statute 26 Geo. II. c. 33. whereby it is enacted, that all marriages celebrated by licence (for banns suppose notice) where either of the parties is under twenty one, (not being a widow or widower, who are supposed emancipated) without the consent of the father, or, if he be not living, of the mother or guardians, shall be absolutely void. A like provision is made as in the civil law, where the mother or guardian is non compos, beyond sea, or unreasonably froward, to dispense with such consent at the discretion of the lord chancellor: but no provision is made, in case the father should labour under any mental or other incapacity. Much may be, and much has been, said both for and against this innovation upon our ancient laws and constitution. On the one hand, it prevents the clandestine marriages of minors, which are often a terrible inconvenience to those private families wherein they happen. On the other hand, restraints upon marriage, especially among the lower class, are evidently detrimental to the public, by hindering the encrease of people; and to religion and morality, by encouraging licentiousness and debauchery among the single of both sexes; and thereby destroying one end of society and government, which is, concubitu prohibere vago. And of this last inconvenience the Roman laws were so sensible, that at the same time that they forbad marriage without the consent of parents or guardians, they were less rigorous upon that very account with regard to other restraints: for, if a parent did not provide a husband for his daughter, by the time she arrived at the age of twenty five, and she afterwards made a slip in her conduct, he was not allowed to disinherit her upon that account; "quia non sua culpa, sed parentum, id commississe cognoscitur."

6 & 7 W. III. c. 6. 7 & 8 W. III. c. 35. 10 Ann. c. 19.
/o Ff. 23. 2. 2, & 18.
/p Ff. 1. 5. 11.
/q Cod. 5. 4. 1, & 20.
/r Inst. 1. 10. 1.
/t Vinnius in Inst. l. 1. t. 10.
/u Nov. 115. 11.

4. A FOURTH incapacity is want of reason; without a competent share of which, as no other, so neither can the matrimonial contract, be valid. Idiots and lunatics, by the old common law, might have married; wherein it was manifestly defective. The civil law judged much more
sensibly, when it made such deprivations of reason a previous impediment; though not a cause of divorce, if they happened after marriage. \[x\] This defect in our laws is however remedied with regard to lunatics, and persons under frenzies, by the express words of the statute 15 Geo. II. c. 30. and idiots, if not within the letter of the statute, are at least within the reason of it.

\[w\] 1 Roll. Abr. 357.

\[x\] Ff. 23. tit. 1. l. 8. & tit. 2. l. 16.

LASTLY, the parties must not only be willing, and able, to contract, but actually must contract themselves in due form of law, to make it a good civil marriage. Any contract made, per verba de praesenti, or in words of the present tense, and in case of cohabitation per verba de futuro also, between persons able to contract, was before the late act deemed a valid marriage to many purposes; and the parties might be compelled in the spiritual courts to celebrate it in facie ecclesiae. But these verbal contracts are now of no force, to compel a future marriage. \[y\] Neither is any marriage at present valid, that is not celebrated in some parish church or public chapel, unless by dispensation from the arch-bishop of Canterbury. It must also be preceded by publication of banns, or by licence from the spiritual judge. Many other formalities are likewise prescribed by the act; the neglect of which, though penal, does not invalidate the marriage. It is held to be also essential to a marriage, that it be performed by a person in orders; \[z\] though the intervention of a priest to solemnize this contract is merely juris positivi, and not juris naturalis aut divini: it being said that pope Innocent the third was the first who ordained the celebration of marriage in the church; \[a\] before which it was totally a civil contract. And, in the times of the grand rebellion, all marriages were performed by the justices of the peace; and these marriages were declared valid, without any fresh solemnization, by statute 12 Car. II. c. 33. But, as the law now stands, we may upon the whole collect, that no marriage by the temporal law is 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 licence, 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; nor during their lives, unless for the canonical impediments of pre-contract, if that indeed still exists; of consanguinity; and of affinity, or corporal imbecility, subsisting previous to the marriage.
II. I AM next to consider the manner in which marriages may be dissolved; and this is either by death, or divorce. There are two kinds of divorce, the one total, the other partial; the one a vinculo matrimonii, the other merely a mensa et thoro. The total divorce, a vinculo matrimonii, must be for some of the canonical causes of impediment 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 corporal imbecility. For in cases of total divorce, the marriage is declared null, as having been absolutely unlawful ab initio; and the parties are therefore separated pro salute animarum: for which reason, as was before observed, no divorce can be obtained, but during the life of the parties. The issue of such marriage, as is thus entirely dissolved, are bastards. /b
/b Co. Litt. 235.

DIVORCE a mensa et thoro is when the marriage is just and lawful ab initio, and therefore the law is tender of dissolving it; but, for some supervenient cause, it becomes improper or impossible for the parties to live together: as in the case of intolerable ill temper, or adultery, in either of the parties. For the canon law, which the common law follows in this case, deems so highly and with such mysterious reverence of the nuptial tie, that it will not allow it to be unloosed for any cause whatsoever, that arises after the union is made. And this is said to be built on the divine revealed law; though that expressly assigns incontinence as a cause, and indeed the only cause, why a man may put away his wife and marry another. /c The civil law, which is partly of pagan original, allows many causes of absolute divorce; and some of them pretty severe ones, (as if a wife goes to the theatre or the public games, without the knowledge and consent of the husband /d) but among them adultery is the principal, and with reason named the first. /e But with us in England adultery is only a cause of separation from bed and board /f: for which the best reason that can be given, is, that if divorces were allowed to depend upon a matter within the power of either the parties, they would probably be extremely frequent; as was the case when divorces were allowed for canonical disabilities, on the mere confession of the parties /g, which is now prohibited by the canons. /h However, divorces a vinculo matrimonii, for adultery, have of late years been frequently granted by act of parliament. /c Matt. xix. 9.
/d Nov. 117.
IN case of divorce a mensa et thoro, the law allows alimony to the wife; which is that allowance, which is made to a woman for her support out of the husband’s estate; being settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case. This is sometimes called her estovers; for which, if he refuses payment, there is (besides the ordinary process of excommunication) a writ at common law de estoveriis habendis, in order to recover it. It is generally proportioned to the rank and quality of the parties. But in case of elopement, and living with an adulterer, the law allows her no alimony.

BY marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-french afeme-covert; 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. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. I speak not at present of the rights of property, but of such as are merely personal. For this reason, 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 also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage. A woman indeed may be attorney for her husband: for that implies no separation from, but is rather a representation of, her lord. And a husband may also bequeath any thing to his wife by will; for that cannot take effect till the coverture is determined by his death. The husband is bound to provide his wife with necessaries by law, as much as himself; and if she contracts debts for them, he is obliged to pay them: but for any thing besides necessaries,
he is not chargeable. /r Also if a wife elopes, and lives with another man, the husband is not chargeable even for necessaries; /s at least if the person, who furnishes them, is sufficiently apprized of her elopement. /t 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. /u If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name, as well as her own /w: neither can she be sued, without making the husband a defendant. /x There is indeed one case where the wife shall sue and be sued as a feme sole, viz. where the husband has abjured the realm, or is banished /y: for then he is dead in law; and, the husband being thus disabled to sue for or defend the wife, it would be most unreasonable if she had no remedy, or could make no defence at all. In criminal prosecutions, it is true, the wife may be indicted and punished separately; /z 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: partly because it is impossible their testimony should be indifferent; but principally because of the union of person: and therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of law, "nemo in propria causa testis esse debet;" and if against each other, they would contradict another maxim, "nemo tenetur seipsum accusare." But where the offence is directly against the person of the wife, this rule has been usually dispensed with /b: and therefore, by statute 3 Hen. VII. c. 2. in case a woman be forcibly taken away, and married, she may be a witness against such her husband, in order to convict him of felony. For in this case she can with no propriety be reckoned his wife; because a main ingredient, her consent, was wanting to the contract: and also there is another maxim of law, that no man shall take advantage of his own wrong; which the ravisher here would do, if by forcibly marrying a woman, he could prevent her from being a witness, who is perhaps the only witness, to that very fact.

/l Co. Litt. 112.
/m Ibid.
/n Cro. Car. 551.
/o F.N.B. 27.
/p Co. Litt. 112.
/q Salk. 118.
/r 1 Sid. 120.
/s Stra. 647.
/t 1 Lev. 5.
/u 3 Mod. 186.
IN the civil law the husband and wife are considered as two distinct persons; and may have separate estates, contracts, debts, and injuries; and therefore, in our ecclesiastical courts, a woman may sue and be sued without her husband.

BUT, though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done, by her, during her coverture, are void, or at least voidable; except it be a fine, or the like matter of record, in which case she must be solely and secretly examined, to learn if her 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. And in some felonies, and other inferior crimes, committed by her, through constraint of her husband, the law excuses her; but this extends not to treason or murder.

THE husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his servants or children; for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds; and the husband was prohibited to use any violence to his wife, aliter quam ad virum, ex causa regiminis et castigationis uxoris suae, licite et rationabiliter pertinet. The civil law gave the husband the same, or a larger, authority over his wife; allowing him, for some misdemeanors, flagellis et fustibus acriter verberare uxorem; for others, only modicam castigationem adhibere. But, with us, in the politer reign of Charles the second, this power of correction began to
be doubted: a wife may now have security of the peace against her husband; or, in return, a husband against his wife. Yet the lower rank of people, who were always sod of the old common law, still claim and exert their ancient privilege: and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour.

Ibid. 130.

Moor. 874.

F.N.B. 80.

Nov. 117. c. 14. & Van Leeuwen in loc.

1 Sid. 113. 3 Keb. 433.

2 Lev. 128.

Stra. 1207.

Stra. 478. 875.

THESE are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England.

CHAPTER THE SIXTEENTH.
OF PARENT AND CHILD.

THE next, and the most universal relation in nature, is immediately derived from the preceding, being that between parent and child.

CHILDREN are of two sorts; legitimate, and spurious, or bastards: each of which we shall consider in their order; and first of legitimate children.

I. A LEGITIMATE child is he that is born in lawful wedlock, or within a competent time afterwards. "Pater est quem nuptiae demonstrant," is the rule of the civil law; and this holds with the civilians, whether the nuptials happen before, or after, the birth of the child. With us in England the rule is narrowed, for the nuptials must be precedent to the birth; of which more will be said when we come to consider the case of bastardy. At present let us enquire into, 1. The legal duties of parents to their legitimate children. 2. Their power over them. 3. The duties of such children to their parents.

AND, first, the duties of parents to legitimate children: which principally consist in three particulars; their maintenance, their protection, and their education.

THE duty of parents to provide for the maintenance of their children is a principle of natural law; an obligation, says Puffendorf, laid on them not only by nature herself, but by their own proper act, in bringing them
into the world: for they would be in the highest manner injurious to their issue, if they only gave the children life, that they might afterwards see them perish. By begetting them therefore they have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have a perfect right of receiving maintenance from their parents. And the president Montesquieu /c has a very just observation upon this head: that the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children; for that ascertains and makes known the person who is bound to fulfil this obligation: whereas, in promiscuous and illicit conjunctions, the father is unknown; and the mother finds a thousand obstacles in her way; shame, remorse, the constraint of her sex, and the rigor of laws; that stifle her inclinations to perform this duty: and besides, she generally wants ability.

/b L. of N. l. 4. c. 11.
/c Sp. L. l. 23. c. 2.

THE municipal laws of all well-regulated states have taken care to enforce this duty: though providence has done it more effectually than any laws, by implanting in the breast of every parent that natural, or insuperable degree of affection, which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children, can totally suppress or extinguish.

THE civil law /d obliges the parent to provide maintenance for his child; and, if he refuses, "judex de ea re cognoscet." Nay, it carries this matter so far, that it will not suffer a parent at his death totally to disinherit his child, without expressly giving his reason for so doing; and there are fourteen such reasons reckoned up /e, which may justify such disinherison. If the parent alleged no reason, or a bad, or false one, the child might set the will aside, tanquam testamentum inofficiosum, a testament contrary to the natural duty of the parent. And it is remarkable under what colour the children were to move for relief in such a case: by suggesting that the parent had lost the use of his reason, when he made the inofficious testament. And this, as Puffendorf observes /f, was not to bring into dispute the testator's power of disinheriting his own offspring; but to examine the motives upon which he did it: and, if they were found defective in reason, then to set them aside. But perhaps this is going rather too far: every man has, or ought to have, by the laws of society, a power over his own property: and, as Grotius very well distinguishes /g, natural right obliges to give a necessary maintenance to children; but what is more
than that, they have no other right to, than as it is given them by the favour
of their parents, or the positive constitutions of the municipal law.
/d Ff. 25. 3. 5.
/e Nov. 115.
f l. 4. c. 11. 7.
g De j.b. & p. l. 2. c. 7. n. 3.

LET us next see what provision our own laws have made for this natural
duty. It is a principle of law /h, that there is an obligation on every man to
provide for those descended from his loins: and the manner, in which this
obligation shall be performed, is thus pointed out. /i The father, and
mother, grandfather, and grandmother of poor impotent persons shall
maintain them at their own charges, if of sufficient ability, according as the
quarter sessions shall direct: and /k if a parent runs away, and leaves his
children, the churchwardens and overseers of the parish shall seise his
rents, goods, and chattels, and dispose of them towards their relief. By the
interpretations which the courts of law have made upon these statutes, if a
mother or grandmother marries again, and was before such second
marriage of sufficient ability to keep the child, the husband shall be
charged to maintain it /l: for this being a debt of hers, when single, shall
like others extend to charge the husband. But at her death, the relation
being dissolved, the husband is under no farther obligation.
/h Raym. 500.
i Stat. 43 Eliz. c. 2.
/k Stat. 5 Geo. I. c. 8.
l Styles. 283. 2 Bulstr. 346.

NO person is bound to provide a maintenance for his issue, unless where
the children are impotent and unable to work, either through infancy,
disease, or accident; and then is only obliged to find them with
necessaries, the penalty on refusal being no more than 20s. a month. For
the policy of our laws, which are ever watchful to promote industry, did
not mean to compel a father to maintain his idle and lazy children in ease
and indolence: but thought it unjust to oblige the parent, against his will,
to provide them with superfluities, and other indulgences of fortune;
imagining they might trust to the impulse of nature, if the children were
deserving of such favours. Yet, as nothing is so apt to stifle the calls of
nature as religious bigotry, it is enacted, /m that if any popish parent shall
refuse to allow his protestant child a fitting maintenance, with a view to
compel him to change his religion, the lord chancellor shall by order of
court constrain him to do what is just and reasonable. But this did not
extend to persons of another religion, of no less bitterness and bigotry
than the popish: and therefore in the very next year we find an instance of a Jew of immense riches, whose only daughter having embraced christianity, he turned her out of doors; and on her application for relief, it was held she was intitled to none. But this gave occasion to another statute, which ordains, that if Jewish parents refuse to allow their protestant children a fitting maintenance, suitable to the fortune of the parent, the lord chancellor on complaint may make such order therein as he shall see proper.

Stat. 11 & 12 W. III. c. 4.
Lord Raym. 699.
1 Ann. st. 1. c. 30.

OUR law has made no provision to prevent the disinheriting of children by will; leaving every man's property in his own disposal, upon a principle of liberty in this, as well as every other, action: though perhaps it had not been amiss, if the parent had been bound to leave them at the least a necessary subsistence. By the custom of London indeed, (which was formerly universal throughout the kingdom) the children of freemen are entitled to one third of their father's effects, to be equally divided among them; of which he cannot deprive them. And, among persons of any rank or fortune, a competence is generally provided for younger children, and the bulk of the estate settled upon the eldest, by the marriage-articles. Heirs also, and children, are favourites of our courts of justice, and cannot be disinherited by any dubious or ambiguous words; there being required the utmost certainty of the testator's intentions to take away the right of an heir.

1 Lev. 130.

FROM the duty of maintenance we may easily pass to that of protection; which is also a natural duty, but rather permitted than enjoined by any municipal laws: nature, in this respect, working so strongly as to need rather a check than a spur. A parent may, by our laws, maintain and uphold his children in their lawsuits, without being guilty of the legal crime of maintaining quarrels. A parent may also justify an assault and battery in defence of the persons of his children: nay, where a man's son was beaten by another boy, and the father went near a mile to find him, and there revenged his son's quarrel by beating the other boy, of which beating he afterwards died; it was not held to be murder, but manslaughter merely. Such indulgence does the law shew to the frailty of human nature, and the workings of parental affection.

2 Inst. 564.
THE last duty of parents to their children is that of giving them an education suitable to their station in life: a duty pointed out by reason, and of far the greatest importance of any. For, as Puffendorf very well observes, it is not easy to imagine or allow, that a parent has conferred any considerable benefit upon his child, by bringing him into the world; if he afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself. Yet the municipal laws of most countries seem to be defective in this point, by not constraining the parent to bestow a proper education upon his children. Perhaps they thought it punishment enough to leave the parent, who neglects the instruction of his family, to labour under those griefs and inconveniences, which his family, so uninstructed, will be sure to bring upon him. Our laws, though their defects in this particular cannot be denied, have in one instance made a wise provision for breeding up the rising generation; since the poor and laborious part of the community, when past the age of nurture, are taken out of the hands of their parents, by the statutes for apprenticing poor children; and are placed out by the public in such a manner, as may render their abilities, in their several stations, of the greatest advantage to the commonwealth. The rich indeed are left at their own option, whether they will breed up their children to be ornaments or disgraces to their family. Yet in one case, that of religion, they are under peculiar restrictions: for it is provided, 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; in such case, besides the disabilities incurred by the child so sent, the parent or person sending shall forfeit 100l. which shall go to the sole use and benefit of him that shall discover the offence. And if any parent, or other, shall send or convey any person beyond sea, to enter into, or be resident in, or trained up in, any priory, abbey, nunnery, popish university, college, or school, or house of jesuits, or priests, or in any private popish family, in order to be instructed, persuaded, or confirmed in the popish religion; or shall contribute any thing towards their maintenance when abroad by any pretext whatever, the person both sending and sent shall be disabled to sue in law or equity, or to be executor or administrator to any person, or to enjoy any legacy or deed of gift, or to bear any office in the realm, and shall forfeit all his goods and chattels, and likewise all his real estate for life.
2. THE power of parents over their children is derived from the former consideration, their duty; this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it. And upon this score the municipal laws of some nations have given a much larger authority to the parents, than others. The ancient Roman laws gave the father a power of life and death over his children; upon this principle, that he who gave had also the power of taking away. But the rigor of these laws was softened by subsequent constitutions; so that we find a father banished by the emperor Hadrian for killing his son, though he had committed a very heinous crime, upon this maxim, that "patria potestas in pietate debet, non in atrocitate, consistere." But still they maintained to the last a very large and absolute authority: for a son could not acquire any property of his own during the life of his father; but all his acquisitions belonged to the father, or at least the profits of them for his life.

THE power of a parent by our English laws is much more moderate; but still sufficient to keep the child in order and obedience. He may lawfully correct his child, being under age, in a reasonable manner; for this is for the benefit of his education. The consent or concurrence of the parent to the marriage of his child under age, was also directed by our ancient law to be obtained: but now it is absolutely necessary; for without it the contract is void. And this also is another means, which the law has put into the parent's hands, in order the better to discharge his duty; first, of protecting his children from the snares of artful and designing persons; and, next, of settling them properly in life, by preventing the ill consequences of too early and precipitate marriages. A father has no other power over his sons 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. He may indeed have the benefit of his children's labour while they live with him, and are maintained by him: but this is no more than he is entitled to from his apprentices or servants. The legal power of a father (for a mother, as such, is entitled to no power, but
only to reverence and respect) the power of a father, I say, over the persons of his children ceases at the age of twenty one: for they are then enfranchised by arriving at years of discretion, or that point which the law has established (as some must necessarily be established) when the empire of the father, or other guardian, gives place to the empire of reason. Yet, till that age arrives, this empire of the father continues even after his death; for he may by his will appoint a guardian to his children. He may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

/d 1 Hawk. P.C. 130.
/e Stat. 26 Geo. II. c. 33.

3. THE duties of children to their parents arise from a principle of natural justice and retribution. For to those, who gave us existence, we naturally owe subjection and obedience during our minority, and honour and reverence ever after; they, who protected the weakness of our infancy, are entitled to our protection in the infirmity of their age; they who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring, in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents, which are enjoined by positive laws. And the Athenian laws /f carried this principle into practice with a scrupulous kind of nicety: obliging all children to provide for their father, when fallen into poverty; with an exception to spurious children, to those whose chastity had been prostituted by consent of the father, and to those whom he had not put in any way of gaining a livelyhood. The legislature, says baron Montesquieu /g, considered, that in the first case the father, being uncertain, had rendered the natural obligation precarious; that, in the second case, he had sullied the life he had given, and done his children the greatest of injuries, in depriving them of their reputation; and that, in the third case, he had rendered their life (so far as in him lay) an insupportable burden, by furnishing them with no means of subsistence.

/f Potter's Antiq. b. 4. c. 15.
/g Sp. L. l. 26. c. 5.

OUR laws agree with those of Athens with regard to the first only of these particulars, the case of spurious issue. In the other cases the law does not hold the tie of nature to be dissolved by any misbehaviour of the parent; and therefore a child is equally justifiable in defending the person, or
maintaining the cause or suit, of a bad parent, as a good one; and is equally compellable /h, if of sufficient ability, to maintain and provide for a wicked and unnatural progenitor, as for one who has shewn the greatest tenderness and parental piety. /h Stat. 43 Eliz. c. 2.

II. WE are next to consider the case of illegitimate children, or bastards; with regard to whom let us inquire, 1. Who are bastards. 2. The legal duties of the parents towards a bastard child. 3. The rights and incapacities attending such bastard children.

1. WHO are bastards. A bastard, by our English laws, is one that is not only begotten, but born, out of lawful matrimony. The civil and canon laws do not allow a child to remain a bastard, if the parents afterwards intermarry /i: and herein they differ most materially from our law; which, though not so strict as to require that the child shall be begotten, yet makes it an indispensable condition that it shall be born, after lawful wedlock. And the reason of our English law is surely much superior to that of the Roman, if we consider the principal end and design of establishing the contract of marriage, taken in a civil light; abstractedly from any religious view, which has nothing to do with the legitimacy or illegitimacy of the children. The main end and design of marriage therefore being to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong; this end is undoubtedly better answered by legitimating all issue born after wedlock, than by legitimating all issue of the same parties, even born before wedlock, so as wedlock afterwards ensues: 1. Because of the very great uncertainty there will generally be, in the proof that the issue was really begotten by the same man; whereas, by confining the proof to the birth, and not to the begetting, our law has rendered it perfectly certain, what child is legitimate, and who is to take care of the child. 2. Because by the Roman laws a child may be continued a bastard, or made legitimate, at the option of the father and mother, by a marriage ex post facto; thereby opening a door to many frauds and partialities, which by our law are prevented. 3. Because by those laws a man may remain a bastard till forty years of age, and then become legitimate, by the subsequent marriage of his parents; whereby the main end of marriage, the protection of infants, is totally frustrated. 4. Because this rule of the Roman laws admits of no limitations as to the time, or number, of bastards so to be legitimated; but a dozen of them may, twenty years after their birth, by the subsequent marriage of their parents, be admitted to all the privileges of legitimate children. This is plainly a great discouragement to the matrimonial state; to which one
main inducement is usually not only the desire of having children, but also the desire of procreating lawful heirs. Whereas our constitutions guard against this indecency, and at the same time give sufficient allowance to the frailties of human nature. For, if a child be begotten while the parents are single, and they will endeavour to make an early reparation for the offence, by marrying within a few months after, our law is so indulgent as not to bastardize the child, if it be born, though not begotten, in lawful wedlock: for this is an incident that can happen but once; since all future children will be begotten, as well as born, within the rules of honour and civil society. Upon reasons like these we may suppose the peers to have acted at the parliament of Merton, when they refused to enact that children born before marriage should be esteemed legitimate. /k
/i Inst. 1. 10. 13. Decretal. l. 4. t. 17. c. 1.
/k Rogaverunt omnes episcopi magnates, ut consentirent quod nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium, quia ecclesia tales habet pro legitimis. Et omnes comites et barones una voce responderunt, quod nolunt leges Angliae mutare, quae hucusque usitatae sunt et approbatae. Stat. 20 Hen. III. c. 9. See the introduction to the great charter, edit. Oxon. 1759. sub anno1253.
FROM what has been said it appears, that all children born before matrimony are bastards by our law; and so it is of all children born so long after the death of the husband, that, by the usual course of gestation, they could not be begotten by him. But, this being a matter of some uncertainty, the law is not exact as to a few days. /l And this gives occasion to a proceeding at common law, where a widow is suspected to feign herself with child, in order to produce a supposititious heir to the estate: an attempt which the rigor of the Gothic constitutions esteemed equivalent to the most atrocious theft, and therefore punished with death /m. In this case with us the heir presumptive may have a writ de ventre inspiciendo, to examine whether she be with child, or not; /n which is entirely conformable to the practice of the civil law /o: and, if the widow be upon due examination found not pregnant, any issue she may afterwards produce, though within nine months, will be bastard. But if a man dies, and his widow soon after marries again, and a child is born within such a time, as that by the course of nature it might have been the child of either husband; in this case he is said to be more than ordinarily legitimate; for he may, when he arrives to years of discretion, choose which of the fathers he pleases. /p To prevent this, among other inconveniences, the civil law ordained that no widow should marry infra annum luctus; /q a rule which obtained so early as the reign of Augustus /r, if not of Romulus: and the
same constitution was probably handed down to our early ancestors from the Romans, during their stay in this island; for we find it established under the Saxon and Danish governments. /s
/l Cro. Jac. 541.
/m Stiernhook de jure Gothor. l. 3. c. 5.
/n Co. Litt. 8.
/o Ff. 25. tit. 4. per tot.
/p Co. Litt. 8.
/q Cod. 5. 9. 2.
/r But the year was then only ten months. Ovid. Fast. I. 27.
/s Sit omnis vidua sine marito duodecim menses. LL. Ethelr. A.D. 1008.
LL. Canut. c. 71.
AS bastards may be born before the coverture, or marriage state, is begun, or after it is determined, so also children born during wedlock may in some circumstances be bastards. As if the husband be out of the kingdom of England (or, as the law somewhat loosely phrases it, extra quatuor maria) for above nine months, so that no access to his wife can be presumed, her issue during that period shall be bastard. /t But, generally, during the coverture access of the husband shall be presumed, unless the contrary can be shewn; /u which is such a negative as can only be proved by shewing him to be elsewhere: for the general rule is, praesumitur pro legitimatione, /w In a divorce a mensa et thoro, if the wife breeds children, they are bastards; for the law will presume the husband and wife conformable to the sentence of separation, unless access be proved: but, in a voluntary separation by agreement, the law will suppose access, unless the negative be shewn. /x So also if there is an apparent impossibility of procreation on the part of the husband, as if he be only eight years old, or the like, there the issue of the wife shall be bastard. /y Likewise, in case of divorce in the spiritual court a vinculo matrimonii, all the issue born during the coverture are bastards; /z because such divorce is always upon some cause, that rendered the marriage unlawful and null from the beginning.
/t Co. Litt. 244.
/u Salk. 123. 3 P.W. 276. Stra. 925.
/w 5 Rep. 98.
/x Salk. 123.
/y Co. Litt. 244.
/z Ibid. 235.
2. LET us next see the duty of parents to their bastard children, by our law; which is principally that of maintenance. For, though bastards are not
looked upon as children to any civil purposes, yet the ties of nature, of which maintenance is one, are not so easily dissolved: and they hold indeed as to many other intentions; as, particularly, that a man shall not marry his bastard sister or daughter. /a The civil law therefore, when it denied maintenance to bastards begotten under certain atrocious circumstances /b, was neither consonant to nature, nor reason, however profligate and wicked the parents might justly be esteemed.

/a Lord Raym. 68. Comb. 356.
/b Nov. 89. c. 15.

THE method in which the English law provides maintenance for them is as follows. /c 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 having got her with child, the justice shall cause such person to be apprehended, and commit him till he gives security, either to maintain the child, or appear at the next quarter sessions 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. And if such putative father, or lewd mother, run away from the parish, the overseers by direction of two justices may seize their rents, goods, and chattels, in order to bring up the said bastard child. Yet such is the humanity of our laws, that no woman can be compulsively questioned concerning the father of her child, till one month after her delivery: which indulgence is however very frequently a hardship upon parishes, by suffering the parents to escape.

/c Stat. 18 Eliz. c. 3. 7 Jac. I. c. 4. 3 Car. I. c. 4. 13 & 14 Car. II. c. 12. 6 Geo. II. c. 31.

3. I PROCEED next to the rights and incapacities which appertain to a bastard. The rights are very few, being only such as he can acquire; for he can inherit nothing, being looked upon as the son of nobody, and sometimes called filius nullius, sometimes filius populi. /d Yet he may gain a surname by reputation /e, though he has none by inheritance. All other children have a settlement in their father's parish; but a bastard in the parish where born, for he hath no father. /f However, in case of fraud, as if a woman be sent either by order of 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 removed;/g or, in the latter case, in the mother's own parish,
if the mother be apprehended for her vagrancy. /h The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for, being nullius filius, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived. A bastard was also, in strictness, incapable of holy orders; and, though that were dispensed with, yet he was utterly disqualified from holding any dignity in the church /i: but this doctrine seems now obsolete; and in all other respects, there is no distinction between a bastard and another man. And really any other distinction, but that of not inheriting, which civil policy renders necessary, would, with regard to the innocent offspring of his parents’ crimes, be odious, unjust, and cruel to the last degree: and yet the civil law, so boasted of for its equitable decisions, made bastards in some cases incapable even of a gift from their parents. /k A bastard may, lastly, be made legitimate, and capable of inheriting, by the transcendent power of an act of parliament, and not otherwise /l: as was done in the case of John of Gant’s bastard children, by a statute of Richard the second.

/d Fort. de LL. c. 40.
/e Co. Litt. 3.
/f Salk. 427.
/g Salk. 121.
/h Stat. 17 Geo. II. c. 5.
/i Fortesc. c. 40. 5 Rep. 58.
/k Cod. 6. 57. 5.
/l 4 Inst. 36.

CHAPTER THE SEVENTEENTH.
OF GUARDIAN AND WARD.
THE only general private relation, now remaining to be discussed, is that of guardian and ward; which bears a very near resemblance to the last, and is plainly derived out of it: the guardian being only a temporary parent; that is, for so long time as the ward is an infant, or under age. In examining this species of relationship, I shall first consider the different kinds of guardians, how they are appointed, and their power and duty: next, the different ages of persons, as defined by the law: and, lastly, the privileges and disabilities of an infant, or one under age and subject to guardianship.

1. THE guardian with us performs the office both of the tutor and curator of the Roman laws; the former of which had the charge of the maintenance and education of the minor, the latter the care of his fortune; or, according to the language of the court of chancery, the tutor was the committee of
the person, the curator the committee of the estate. But this office was
frequently united in the civil law; /a as it is always in our law with regard
to minors, though as to lunatics and idiots it is commonly kept distinct.
/a Ff. 26. 4. 1.
OF the several species of guardians, the first are guardians by nature: viz.
the father and (in some cases) the mother of the child. For, if an estate be
left to an infant, the father is by common law the guardian, and must
account to his child for the profits. /b And, with regard to daughters, it
seems by construction of the statute 4 & 5 Ph. & Mar. c. 8. that the father
might by deed or will assign a guardian to any woman-child under the age
of sixteen, and if none be so assigned, the mother shall in this case be
guardian. /c There are also guardians for nurture /d, which are, of course,
the father or mother, till the infant attains the age of fourteen years /e:
and, in default of father or mother, the ordinary usually assigns some
discreet person to take care of the infant's personal estate, and to provide
for his maintenance and education. /f Next are guardians in socage, (an
appellation which will be fully explained in the second book of these
commentaries) who are also called guardians by the common law. These
take place only when the minor is entitled to some estate in lands, and
then by the common law the guardianship devolves upon his next of kin,
to whom the inheritance cannot possibly descend; as, where the estate
descended from his father, in this case his uncle by the mother's side
cannot possibly inherit this estate, and therefore shall be the guardian. /g
For the law judges it improper to trust the person of an infant in his hands,
who may by possibility become heir to him; that there may be no
temptation, nor even suspicion of temptation, for him to abuse his trust.
/h The Roman laws proceed on a quite contrary principle, committing the
care of the minor to him who is the next to succeed to the inheritance,
presuming that the next heir would take the best care of an estate, to
which he has a prospect of succeeding: and this they boast to be "summa
providentia. /i" But in the mean time they forget, how much it is the
guardian's interest to remove the incumbrance of his pupil's life from that
estate, for which he is supposed to have so great a regard. /k And this
affords Fortescue /l, and sir Edward Coke, /m an ample opportunity for
triumph; they affirming, that to commit the custody of an infant to him
that is next in succession, is "quasi agnum committere lupo, ad
devorandum. /n" These guardians in socage, 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 choose his own
guardian. This he may do, unless one be appointed by father, by virtue of
the statute 12 Car. II. c. 24. which, considering the imbecility of judgment in children of the age of fourteen, and the abolition of guardianship in chivalry (which lasted till the age of twenty one, and of which we shall speak hereafter) 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 attains the age of one and twenty years. These are called guardians by statute, or testamentary guardians. 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.

/b Co. Litt. 88.
/d Co. Litt. 88.
/e Moor. 738. 3 Rep. 38.
/f 2 Jones 90. 2 Lev. 163.
/g Litt. 123.
/h Nunquam custodia alicujus de jure alicui remanet, de quo habeatur suspicio, quod possit vel velit aliquod jus in ipsa hereditate clamare. Glanv. l. 7. c. 11.
/i Ff. 26. 4. 1.
/j The Roman satyrist was fully aware of this danger, when he puts this private prayer into the mouth of a selfish guardian;
Pupillum o utinam, quem proximus haeres
Impello, expungam. Perf. 1. 12.
/l c. 44.
/m 1 Inst. 88.
/n This policy of our English law is warranted by the wise institutions of Solon, who provided that no one should be another's guardian, who was to enjoy the estate after his death. (Potter's Antiqu. l. 1. c. 26.) And Charondas, another of the Grecian legislators, directed that the inheritance should go to the father's relations, but the education of the child to the mother's; that the guardianship and right of succession might always be kept distinct. (Petit. Leg. Att. l. 6. t. 7.)
/o Co. Litt. 88.
THE power and reciprocal duty of a guardian and ward are the same, pro tempore, as that of a father and child; and therefore I shall not repeat them: but shall only add, that the guardian, when the ward comes of age, is bound to give him an account of all that he has transacted on his behalf, and must answer for all losses by his wilful default or negligence. In order therefore to prevent disagreeable contests with young gentlemen, it has
become a practice for many guardians, of large estates especially, to indemnify themselves by applying to the court of chancery, acting under its direction, and accounting annually before the officers of that court. For the lord chancellor is, by right derived from the crown, the general and supreme guardian of all infants, as well as idiots and lunatics; that is, of all such persons as have not discretion enough to manage their own concerns. In case therefore any guardian abuses his trust, the court will check and punish him; nay sometimes proceed to the removal of him, and appoint another in his stead.

1 Sid. 424. 1 P. Will. 703.

2. LET us next consider the ward, or person within age, for whose assistance and support these guardians are constituted by law; or who it is, that is said to be within age. The ages of male and female are different for different purposes. A male at twelve years old may take the oath of allegiance; at fourteen is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion be actually proved, may make his testament of his personal estate; at seventeen may be an executor; and at twenty one is at his own disposal, and may alienate his lands, goods, and chattels. A female also at seven years of age may be betrothed or given in marriage; at nine is entitled to dower; at twelve is at years of maturity, and therefore may consent or disagree to marriage, and, if proved to have sufficient discretion, may bequeath her personal estate; at fourteen is at years of legal discretion, and may choose a guardian; at seventeen may be executrix; and at twenty one may dispose of herself and her lands. So that full age in male or female, is twenty one years, which age is completed on the day preceding the anniversary of a person's birth; who till that time is an infant, and so styled in law. Among the ancient Greeks and Romans women were never of age, but subject to perpetual guardianship, unless when married, "nisi convenissent in manum viri:" and, when that perpetual tutelage wore away in process of time, we find that, in females as well as males, full age was not till twenty five years. Thus, by the constitutions of different kingdoms, this period, which is merely arbitrary, and juris positivi, is fixed at different times. Scotland agrees with England in this point; (both probably copying from the old Saxon constitutions on the continent, which extended the age of minority "ad annum vigesimum primum, et eo usque juvenes sub tutelam reponunt") but in Naples they are of full age at eighteen; in France, with regard to marriage, not till thirty; and in Holland at twenty five.

/q Salk. 44. 625.
3. INFANTS have various privileges, and various disabilities: but their very disabilities are privileges; in order to secure them from hurting themselves by their own improvident acts. An infant cannot be sued but under the protection, and joining the name, of his guardian; for he is to defend him against all attacks as well by law as otherwise: but he may sue either by his guardian, or prochein amy, his next friend who is not his guardian. This prochein amy may be any person who will undertake the infant's cause; and it frequently happens, that an infant, by his prochein amy, institutes a suit in equity against a fraudulent guardian. In criminal cases, an infant of the age of fourteen years may be capitally punished for any capital offence: but under the age of seven he cannot. The period between seven and fourteen is subject to much incertainty: for the infant shall, generally speaking, be judged prima facie innocent; yet if he was doli capax, and could discern between good and evil at the time of the offence committed, he may be convicted and undergo judgment and execution of death, though he hath not attained to years of puberty or discretion.

And sir Matthew Hale gives us two instances, one of a girl of thirteen, who was burned for killing her mistress; another of a boy still younger, that had killed his companion, and hid himself, who was hanged; for it appeared by his hiding that he knew he had done wrong, and could discern between good and evil; and in such cases the maxim of law is, that malitia supplet aetatem.

WITH regard to estates and civil property, an infant hath many privileges, which will be better understood when we come to treat more particularly of those matters: but this may be said in general, that an infant shall lose nothing by non-claim, or neglect of demanding his right; nor shall any other laches or negligence be imputed to an infant, except in some very particular cases.

IT is generally true, that an infant can neither alien his lands, nor do any legal act, nor make a deed, nor indeed any manner of contract, that will bind him. But still to all these rules there are some exceptions; part of which were just now mentioned in reckoning up the different capacities.
which they assume at different ages: and there are others, a few of which it may not be improper to recite, as a general specimen of the whole. And, first, it is true, that infants cannot alienate their estates: but /y infant trustees, or mortgagees, are enabled to convey, under the direction of the court of chancery or exchequer, the estates they hold in trust or mortgage, to such person as the court shall appoint. Also it is generally true, that an infant can do no legal act: yet an infant who has an advowson, may present to the benefice when it becomes void. /z For the law in this case dispenses with one rule, in order to maintain others of far greater consequence: it permits an infant to present a clerk (who, if unfit, may be rejected by the bishop) rather than either suffer the church to be unserved till he comes of age, or permit the infant to be debarred of his right by lapse to the bishop. An infant may also purchase lands, but his purchase is incomplete: for, when he comes to age, he may either agree or disagree to it, as he thinks prudent or proper, without alleging any reason; and so may his heirs after him, if he dies without having completed his agreement. /a It is, farther, generally true, that an infant, under twenty one, can make no deed that is of any force or effect: yet /b he may bind himself apprentice by deed indented, or indentures, for seven years; and /c he may by deed or will appoint a guardian to his children, if he has any. Lastly, it is generally true, that an infant can make no other contract that will bind him: yet he may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessaries; and likewise for his good teaching and instruction, whereby he may profit himself afterwards. /d And thus much, at present, for the privileges and disabilities of infants.

/z Co. Litt. 172.
/a Co. Litt. 2.
/b Stat. 5 Eliz. c. 4.
/c Stat. 12 Car. II. c. 24.
/d Co. Litt. 172.

CHAPTER THE EIGHTEENTH.
OF CORPORATIONS.
WE have hitherto considered persons in their natural capacities, and have treated of their rights and duties. But, as all personal rights die with the person; and, as the necessary forms of investing a series of individuals, one after another, with the same identical 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. THESE artificial persons are called bodies politic, bodies corporate, (corpora corporata) or corporations: of which there is a great variety subsisting, for the advancement of religion, of learning, and of commerce; in order to preserve entire and for ever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct.

To shew the advantages of these incorporations, let us consider the case of a college in either of our universities, founded ad studendum et orandum, for the encouragement and support of religion and learning. If this was a mere voluntary assembly, the individuals which compose it might indeed read, pray, study, and perform scholastic exercises together, so long as they could agree to do so: but they could neither frame, nor receive, any laws or rules of their conduct; none at least, which would have any binding force, for want of a coercive power to create a sufficient obligation. Neither could they be capable of retaining any privileges or immunities: for, if such privileges be attacked, which of all this unconnected assembly has the right, or ability, to defend them? And, when they are dispersed by death or otherwise, how shall they transfer these advantages to another set of students, equally unconnected as themselves? So also, with regard to holding estates or other property, if land be granted for the purposes of religion or learning to twenty individuals not incorporated, there is no legal way of continuing the property to any other persons for the same purposes, but by endless conveyances from one to the other, as often as the hands are changed. But, when they are consolidated and united into a corporation, they and their successors are then considered as one person in law: as one person, they have one will, which is collected from the sense of the majority of the individuals: this one will may establish rules and orders for the regulation of the whole, which are a sort of municipal laws of this little republic; or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws: the privileges and immunities, the estates and possessions, of the corporation, when once vested in them, will be for ever vested, without any new conveyance to new successions; for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies: in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.
THE honour of originally inventing these political constitutions entirely belongs to the Romans. They were introduced, as Plutarch says, by Numa; who finding, upon his accession, the city torn to pieces by the two rival factions of Sabines, and Romans, thought it a prudent and politic measure, to subdivide these two into many smaller ones, by instituting separate societies of every manual trade and profession. They were afterwards much considered by the civil law /a, in which they were called universitates, as forming one whole out of many individuals; or collegia, from being gathered together: they were adopted also by the canon law, for the maintenance of ecclesiastical discipline; and from them our spiritual corporations are derived. But our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation: particularly with regard to sole corporations, consisting of one person only, of which the Roman lawyers had no notion; their maxim being that "tres faciunt collegium. /b" Though they held, that if a corporation, originally consisting of three persons, be reduced to one, "si universitas ad unum redit," it may still subsist as a corporation, "et stet nomen universitatis. /c"

/a Ff. l. 3. t. 4. per tot.
/b Ff. 50. 16. 85.
/c Ff. 3. 4. 7.

BEFORE we proceed to treat of the several incidents of corporations, as regarded by the laws of England, let us first take a view of the several sorts of them; and then we shall be better enabled to apprehend their respective qualities.

THE first division of corporations is into aggregate and sole. 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: of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. 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. In this sense the king is a sole corporation /d: so is a bishop: so are some deans, and prebendaries, distinct from their several chapters: and so is every parson and vicar. And the necessity, or at least use, of this institution will be very apparent, if we consider the case of a parson of a church. At the original endowment of parish churches, the freehold of the church, the church-yard, the parsonage house, the glebe, and the tithes of the parish, were vested in the
then parson by the bounty of the donor, as a temporal recompense to him for his spiritual care of the inhabitants, and with intent that the same emoluments should ever afterwards continue as a recompense for the same care. But how was this to be effected? The freehold was vested in the parson; and, if we suppose it vested in his natural capacity, on his death it might descend to his heir, and would be liable to his debts and incumbrances: or, at best, the heir might be compellable, at some trouble and expense, to convey these rights to the succeeding incumbent. The law therefore has wisely ordained, that the parson, quatenus parson, shall never die, any more than the king; by making him and his successors a corporation. By which means all the original rights of the parsonage are preserved entire to the successor: for the present incumbent, and his predecessor who lived seven centuries ago, are in law one and the same person; and what was given to the one was given to the other also.

\textit{/d Co. Litt. 43.}

ANOTHER division of corporations, either sole or aggregate, is into ecclesiastical and lay. Ecclesiastical corporations are where the members that compose it are entirely spiritual persons; such as bishops; certain deans, and prebendaries; all archdeacons, parsons, and vicars; which are sole corporations: deans and chapters at present, and formerly prior and convent, abbot and monks, and the like, bodies aggregate. These are erected for the furtherance of religion, and the perpetuating the rights of the church. Lay corporations are of two sorts, civil and eleemosynary. The civil are such as are erected for a variety of temporal purposes. The king, for instance, is made a corporation to prevent in general the possibility of an interregnium or vacancy of the throne, and to preserve the possessions of the crown entire; for, immediately upon the demise of one king, his successor is, as we have formerly seen, in full possession of the regal rights and dignity. Other lay corporations are erected for the good government of a town or particular district, as a mayor and commonalty, bailiff and burgesses, or the like: some for the advancement and regulation of manufactures and commerce; as the trading companies of London, and other towns: and some for the better carrying on of divers special purposes; as churchwardens, for conservation of the goods of the parish; the college of physicians and company of surgeons in London, for the improvement of the medical science; the royal society, for the advancement of natural knowledge; and the society of antiquarians, for promoting the study of antiquities. And among these I am inclined to think the general corporate bodies of the universities of Oxford and Cambridge must be ranked: for it is clear they are not spiritual or
ecclesiastical corporations, being composed of more laymen than clergy: neither are they eleemosynary foundations, though stipends are annexed to particular magistrates and professors, any more than other corporations where the acting officers have standing salaries; for these are rewards pro opera et labore, not charitable donations only, since every stipend is preceded by service and duty: they seem therefore to be merely civil corporations. The eleemosynary sort are such as are constituted for the perpetual distribution of the free alms, or bounty, of the founder of them to such persons as he has directed. Of this kind are all hospitals for the maintenance of the poor, sick, and impotent; and all colleges, both in our universities and out /e of them: which colleges are founded for two purposes; 1. For the promotion of piety and learning by proper regulations and ordinances. 2. For imparting assistance to the members of those bodies, in order to enable them to prosecute their devotion and studies with greater ease and assiduity. And all these eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons /f, and although they in some things partake of the nature, privileges, and restrictions of ecclesiastical bodies. /e Such as at Manchester, Eton, Winchester, &c. /f 1 Lord Raym. 6.

HAVING thus marshalled the several species of corporations, let us next proceed to consider, 1. How corporations, in general, may be created. 2. What are their powers, capacities, and incapacities. 3. How corporations are visited. And 4. How they may be dissolved.

I. CORPORATIONS, by the civil law, seem to have been created by the mere act, and voluntary association of their members; provided such convention was not contrary to law, for then it was illicitum collegium. /g It does not appear that the prince's consent was necessary to be actually given to the foundation of them; but merely that the original founders of these voluntary and friendly societies (for they were little more than such) should not establish any meetings in opposition to the laws of the state. /g Ff. 47. 22. 1. Neque societas, neque collegium, neque hujusmodi corpus passim omnibus habere conceditur; nam et legibus, et senatus consultis, et principalibus constitutionibus ea res coercetur. Ff. 3. 4. 1. BUT, with us in England, the king's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given. The king's implied consent is to be found in corporations which exist by force of the common law, to which our former kings are supposed to have given their concurrence; common law being nothing else but custom, arising from the universal agreement of the whole community. Of this sort are the
king himself, all bishops, parsons, vicars, churchwardens, and some others; who by common law have ever been held (as far as our books can shew us) to have been corporations, virtute officii: and this incorporation is so inseparably annexed to their offices, that we cannot frame a complete legal idea of any of these persons, but we must also have an idea of a corporation, capable to transmit his rights to his successors, at the same time. Another method of implication, whereby the king's consent is presumed, is as to all corporations by prescription, such as the city of London, and many others /h, which have existed as corporations, time whereof the memory of man runneth not to the contrary; and therefore are looked upon in law to be well created. For though the members thereof can shew no legal charter of incorporation, yet in cases of such high antiquity the law presumes there once was one; and that by the variety of accidents, which a length of time may produce, the charter is lost or destroyed. The methods, by which the king's consent is expressly given, are either by act of parliament or charter. By act of parliament, of which the royal assent is a necessary ingredient, corporations may undoubtedly be created /i: but it is observable, that most of those statutes, which are usually cited as having created corporations, do either confirm such as have been before created by the king; as in the case of the college of physicians, erected by charter 10 Hen. VIII /k, which charter was afterwards confirmed in parliament; /l or, they permit the king to erect a corporation in futuro with such and such powers; as is the case of the bank of England, /m and the society of the British fishery. /n So that the immediate creative act is usually performed by the king alone, in virtue of his royal prerogative. /o

/h 2 Inst. 330.
/i 10 Rep. 29. 1 Roll. Abr. 512.
/k 8 Rep. 114.
/l 14 & 15 Hen. VIII. c. 5.
/m Stat. 5 & 6 W. & M. c. 20.
/n Stat. 23 Geo. II. c. 4.
/o See page 263.

ALL the other methods therefore whereby corporations exist, by common law, by prescription, and by act of parliament, are for the most part reducible to this of the king's letters patent, or charter of incorporation. The king's creation may be performed by the words "creamus, erigimus, fundamus, incorporamus," or the like. Nay it is held, that if the king grants to a set of men to have gildam mercatoriam, a mercantile meeting or assembly /p, this is alone sufficient to incorporate and establish them for ever. /q
Gild signified among the Saxons a fraternity, derived from the verb 'to pay', because every man paid his share towards the expenses of the community. And hence their place of meeting is frequently called the Gild-hall.

THE parliament, we observed, by its absolute and transcendent authority, may perform this, or any other act whatsoever: and actually did perform it to a great extent, by statute 39 Eliz. c. 5. which incorporated all hospitals and houses of correction founded by charitable persons, without farther trouble: and the same has been done in other cases of charitable foundations. But otherwise it is not usual thus to intrench upon the prerogative of the crown, and the king may prevent it when he pleases. And, in the particular instance before-mentioned, it was done, as sir Edward Coke observes, to avoid the charges of incorporation and licences of mortmain in small benefactions; which in his days were grown so great, that it discouraged many men to undertake these pious and charitable works.

THE king may grant to a subject the power of erecting corporations, though the contrary was formerly held: that is, he may permit the subject to name the persons and powers of the corporation at his pleasure; but it is really the king that erects, and the subject is but the instrument: for though none but the king can make a corporation, yet qui facit per alium, facit per se. In this manner the chancellor of the university of Oxford has power by charter to erect corporations; and has actually often exerted it, in the erection of several matriculated companies, now subsisting, of tradesmen subservient to the students.

WHEN a corporation is erected, a name must be given it; and by that name alone it must sue, and be sued, and do all legal acts; though a very minute variation therein is not material. Such 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. The name of incorporation, says sir Edward Coke, is as a proper name, or name of baptism; and therefore when a private founder gives his college or hospital a name, he does it only as godfather; and by that same name the king baptizes the incorporation.
II. AFTER a corporation is so formed and named, it acquires many powers, rights, capacities, and incapacities, which we are next to consider. Some of these are necessarily and inseparably incident to every corporation; which incidents, as soon as a corporation is duly erected, are tacitly annexed of course. As, 1. To have perpetual succession. This is the very end of its incorporation: for there cannot be a succession for ever without an incorporation; and therefore all aggregate corporations have a power necessarily implied of electing members in the room of such as go off. 2. To sue or be sued, implead or 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: which two are consequential to the former. 4. To have a common seal. For a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse: it therefore acts and speaks only by its common seal. For, though the particular members may express their private consents to any act, by words, or signing their names, yet this does not bind the corporation: it is the fixing of the seal, and that only, which unites the several assents of the individuals, who compose the community, and makes one joint assent of the whole. 5. To make by-laws or private statutes for the better government of the corporation; which are binding upon themselves, unless contrary to the laws of the land, and then they are void. This is also included by law in the very act of incorporation: for, as natural reason is given to the natural body for the governing it, so by-laws or statutes are a sort of political reason to govern the body politic. And this right of making by-laws for their own government, not contrary to the law of the land, was allowed by the law of the twelve tables at Rome. But no trading company is, with us, allowed to make by-laws, which may affect the king’s prerogative, or the common profit of the people, unless they be approved by the chancellor, treasurer, and chief justices, or the judges of assise in their circuits. These five powers are inseparably incident to every corporation, at least to every corporation aggregate: for two of them, though they may be practised, yet are very unnecessary to a corporation sole; viz. to have a corporate seal to testify his sole assent, and to make statutes for the regulation of his own conduct.
THERE are also certain privileges and disabilities that attend an aggregate corporation, and are not applicable to such as are sole; the reason of them ceasing, and of course the law. It must always appear by attorney; for it cannot appear in person, being, as sir Edward Coke says, invisible, and existing only in intendment and consideration of law. It can neither maintain, or be made defendant to, an action of battery or such like personal injuries; for a corporation can neither beat, nor be beaten, in its body politic. A corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may, in their distinct individual capacities. Neither is it capable of suffering a traitor's, or 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; for it cannot take an oath for the due execution of the office. It cannot be a trustee; for such kind of confidence is foreign to the ends of its institution: neither can it be compelled to perform such trust, because it cannot be committed to prison; for its existence being ideal, no man can apprehend or arrest it. And therefore also it cannot be outlawed; for outlawry always supposes a precedent right of arresting, which has been defeated by the parties absconding, and that also a corporation cannot do: for which reasons the proceedings to compel a corporation to appear to any suit by attorney are always by distress on their lands and goods. Neither can a corporation be excommunicated; for it has no soul, as is gravely observed by sir Edward Coke: and therefore also it is not liable to be summoned into the ecclesiastical courts upon any account; for those courts act only pro salute animae, and their sentences can only be enforced by spiritual censures: a consideration, which, carried to its full extent, would alone demonstrate the impropriety of these courts interfering in any temporal rights whatsoever.
The civil law also ordains that, in any misbehaviour of a body corporate, the directors only shall be answerable in their personal capacity, and not the corporation. Ff. 4. 3. 15.

Plowd. 538.
10 Rep. 32.

THERE are also other incidents and powers, which belong to some sort of corporations, and not to others. An aggregate corporation may take goods and chattels for the benefit of themselves and their successors, but a sole corporation cannot: for such moveable property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and executor; which the law is careful to avoid. In ecclesiastical and eleemosynary foundations, the king or the founder may give them rules, laws, statutes, and ordinances, which they are bound to observe: but corporations merely lay, constituted for civil purposes, are subject to no particular statutes; but to the common law, and to their own by-laws, not contrary to the laws of the realm.

Aggregate corporations also, that have by their constitution a head, as a dean, warden, master, or the like, cannot do any acts during the vacancy of the headship, except only appointing another: neither are they then capable of receiving a grant; for such corporation is incomplete without a head.

But there may be a corporation aggregate constituted without a head: as the collegiate church of Southwell in Nottinghamshire, which consists only of prebendaries; and the governors of the Charter-house, London, who have no president or superior, but are all of equal authority. In aggregate corporations also, the act of the major part is esteemed the act of the whole. By the civil law this major part must have consisted of two thirds of the whole; else no act could be performed: which perhaps may be one reason why they required three at least to make a corporation. But, with us, any majority is sufficient to determine the act of the whole body. And whereas, notwithstanding the law stood thus, some founders of corporations had made statutes in derogation of the common law, making very frequently the unanimous assent of the society to be necessary to any corporate act; (which king Henry VIII found to be a great obstruction to his projected scheme of obtaining a surrender of the lands of ecclesiastical corporations) it was therefore enacted by statute 33 Hen. VIII. c. 27. that all private statutes shall be utterly void, whereby any grant or election, made by the head, with the concurrence of the major part of the body, is liable to be obstructed by any one or more, being the minority: but this
statute extends not to any negative or necessary voice, given by the founder to the head of any such society.

\[\text{n Co. Litt. 46.}\]
\[\text{o Lord Raym. 8.}\]
\[\text{p Co. Litt. 263, 264.}\]
\[\text{q 10 Rep. 30.}\]
\[\text{r Bro. Abr. tit. Corporation. 31, 34.}\]
\[\text{s Ff. 3. 4. 3.}\]

WE before observed that it was incident to every corporation, to have a capacity to purchase lands for themselves and successors: and this is regularly true at the common law. But they are excepted out of the statute of wills; so that no devise of lands to a corporation by will is good: except for charitable uses, by statute 43 Eliz. c. 4, And also, by a great variety of statutes, their privilege even of purchasing from any living grantor is greatly abridged; so that now a corporation, either ecclesiastical or lay, must have a licence from the king to purchase, before they can exert that capacity which is vested in them by the common law: nor is even this in all cases sufficient. These statutes are generally called the statutes of mortmain; all purchases made by corporate bodies being said to be purchases in mortmain, in mortua manu: for the reason of which appellation sir Edward Coke offers many conjectures; but there is one which seems more probable than any that he has given us: viz. that these purchases being usually made by ecclesiastical bodies, the members of which (being professed) were reckoned dead persons in law, land therefore, holden by them, might with great propriety be said to be held in mortua manu.

\[\text{t 10 Rep. 30.}\]
\[\text{u 34 Hen. VIII. c. 5.}\]
\[\text{w Hob. 136.}\]
\[\text{x From magna carta, 9 Hen. III. c. 36. to 9 Geo. II. c. 36.}\]
\[\text{y By the civil law a corporation was incapable of taking lands, unless by special privilege from the emperor: collegium, si nullo speciali privilegio subnixum fit, haereditatem capere non posse, dubium non est. Cod. 6. 24. 8.}\]
\[\text{z 1 Inst. 2.}\]

I SHALL defer the more particular exposition of these statutes of mortmain, till the next book of these commentaries, when we shall consider the nature and tenures of estates; and also the exposition of those disabling statutes of queen Elizabeth, which restrain spiritual and eleemosynary corporations from aliening such lands as they are present in
legal possession of: only mentioning them in this place, for the sake of regularity, as statutable incapacities incident and relative to corporations. THE general duties of all bodies politic, considered in their corporate capacity, may, like those of natural persons, be reduced to this single one; that of acting up to the end or design, whatever it be, for which they were created by their founder.

III. I PROCEED therefore next to enquire, how these corporations may be visited. For corporations being composed of individuals, subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, enquire into, and correct all irregularities that arise in such corporations, either sole or aggregate, and whether ecclesiastical, civil, or eleemosynary. With regard to all ecclesiastical corporations, the ordinary is their visitor, so constituted by the canon law, and from thence derived to us. The pope formerly, and now the king, as supreme ordinary, is the visitor of the arch-bishop or metropolitan; the metropolitan has the charge and coercion of all his suffragan bishops; and the bishops in their several dioceses are the visitors of all deans and chapters, of all parsons and vicars, and of all other spiritual corporations. With respect to all lay corporations, the founder, his heirs, or assigns, are the visitors, whether the foundation be civil or eleemosynary; for in a lay incorporation the ordinary neither can nor ought to visit. /a

/a 10 Rep. 31.

I KNOW it is generally said, that civil corporations are subject to no visitation, but merely to the common law of the land; and this shall be presently explained. But first, as I have laid it down as a rule that the founder, his heirs, or assigns, are the visitors of all lay-corporations, let us enquire what is meant by the founder. The founder of all corporations in the strictest and original sense is the king alone, for he only can incorporate a society: and in civil incorporations, such as mayor and commonalty, &c., where there are no possessions or endowments given to the body, there is no other founder but the king: but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes, and makes two species of foundation; the onefundatio incipiens, or the incorporation, in which sense the king is the general founder of all colleges and hospitals; the other fundatio perficiens, or the dotation of it, in which sense the first gift of the revenues is the foundation, and he who gives them is in law the founder: and it is in this last sense that we generally call a man the founder of a college or hospital. /b But here the king has his prerogative: for, if the king and a private man
join in endowing an eleemosynary foundation, the king alone shall be the
founder of it. And, in general, the king being the sole founder of all civil
corporations, and the endower the perficient founder of all eleemosynary
ones, the right of visitation of the former results, according to the rule laid
down, to the king; and of the latter, to the patron or endower.

THE king being thus constituted by law the visitor of all civil corporations,
the law has also appointed the place, wherein he shall exercise this
jurisdiction: which is the court of king's bench; where, and where only, all
misbehaviours of this kind of corporations are enquired into and
redressed, and all their controversies decided. And this is what I
understand to be the meaning of our lawyers, when they say that these
civil corporations are liable to no visitation; that is, that the law having by
immemorial usage appointed them to be visited and inspected by the king
their founder, in his majesty's court of king's bench, according to the rules
of the common law, they ought not to be visited elsewhere, or by any other
authority. And this is so strictly true, that though the king by his letters
patent had subjected the college of physicians to the visitation of four very
respectable persons, the lord chancellor, the two chief justices, and the
chief baron; though the college had accepted this charter with all possible
marks of acquiescence, and had acted under it for near a century; yet, in
1753, the authority of this provision coming in dispute, on an appeal
preferred to these supposed visitors, they directed the legality of their own
appointment to be argued: and, as this college was a mere civil, and not an
eleemosynary foundation, they at length determined, upon several days
solemn debate, that they had no jurisdiction as visitors; and remitted the
appellant (if aggrieved) to his regular remedy in his majesty's court of
king's bench.

AS to eleemosynary corporations, by the dotation the founder and his
heirs are of common right the legal visitors, to see that that property is
rightly employed, which would otherwise have descended to the visitor
himself: but, if the founder has appointed and assigned any other person
to be visitor, then his assignee so appointed is invested with all the
founder's power, in exclusion of his heir. Eleemosynary corporations are
chiefly hospitals, or colleges in the university. These were all of them
considered by the popish clergy, as of mere ecclesiastical jurisdiction:
however, the law of the land judged otherwise; and, with regard to
hospitals, it has long been held /c, that if the hospital be spiritual, the
bishop shall visit; but if lay, the patron. This right of lay patrons was
indeed abridged by statute 2 Hen. V. c. 1. which ordained, that the
ordinary should visit all hospitals founded by subjects; though the king's right was reserved, to visit by his commissioners such as were of royal foundation. But the subject's right was in part restored by statute 14 Eliz. c. 5. which directs the bishop to visit such hospitals only, where no visitor is appointed by the founders thereof: and all the hospitals founded by virtue of the statute 39 Eliz. c. 5. are to be visited by such persons as shall be nominated by the respective founders. But still, if the founder appoints nobody, the bishop of the diocese must visit. /d /c Yearbook, 8 Edw. III. 28. 8 Aff. 29. /d 2 Inst. 725.

COLLEGES in the universities (whatever the common law may now, or might formerly, judge) were certainly considered by the popish clergy, under whose direction they were, as ecclesiastical, or at least as clerical, corporations; and therefore the right of visitation was claimed by the ordinary of the diocese. This is evident, because in many of our most ancient colleges, where the founder had a mind to subject them to a visitor of his own nomination, he obtained for that purpose a papal bulle to exempt them from the jurisdiction of the ordinary; several of which are still preserved in the archives of the respective societies. And I have reason to believe, that in one of our colleges, (wherein the bishop of that diocese, in which Oxford was formerly comprized, has immemorially exercised visitatorial authority) there is no special visitor appointed by the college statutes: so that the bishop's interposition can be ascribed to nothing else, but his supposed title as ordinary to visit this, among other ecclesiastical foundations. And it is not impossible, that the number of colleges in Cambridge, which are visited by the bishop of Ely, may in part be derived from the same original.

BUT, whatever might be formerly the opinion of the clergy, it is now held as established common law, that colleges are lay-corporations, though sometimes totally composed of ecclesiastical persons; and that the right of visitation does not arise from any principles of the canon law, but of necessity was created by the common law. /e And yet the power and jurisdiction of visitors in colleges was left so much in the dark at common law, that the whole doctrine was very unsettled till king William's time; in the sixth year of whose reign, the famous case of Philips and Bury happened. /f In this the main question was, whether the sentence of the bishop of Exeter, who (as visitor) had deprived doctor Bury the rector of Exeter college, could be examined and redressed by the court of king's bench. And the three puisne judges were of opinion, that it might be reviewed, for that the visitor's jurisdiction could not exclude the common
law; and accordingly judgment was given in that court. But the lord chief justice, Holt, was of a contrary opinion; and held, that by the common law the office of visitor is to judge according to the statutes of the college, and to expel and deprive upon just occasions, and to hear all appeals of course; and that from him, and him only, the party grieved ought to have redress; the founder having reposed in him so entire a confidence, that he will administer justice impartially, that his determinations are final, and examinable in no other court whatsoever. And, upon this, a writ of error being brought in the house of lords, they reversed the judgment of the court of king's bench, and concurred in sir John Holt's opinion. And to this leading case all subsequent determinations have been conformable. But, where the visitor is under a temporary disability, there the court of king's bench will interpose, to prevent a defect of justice. Thus the bishop of Chester is visitor of Manchester college: but, happening also to be warden, the court held that his power was suspended during the union of those offices; and therefore issued a peremptory mandamus to him, as warden, to admit a person intitled to a chaplainship. /g Also it is said /h, that if a founder of an eleemosynary foundation appoints a visitor, and limits his jurisdiction by rules and statutes, if the visitor in his sentence exceeds those rules, an action lies against him; but it is otherwise, where he mistakes in a thing within his power.

/e Lord Raym. 8.
/g Stra. 797.
/h 2 Lutw. 1566.

IV. WE come now, in the last place, to consider how corporations may be dissolved. Any particular member may be disfranchised, or lose his place in the corporation, by acting contrary to the laws of the society, or the laws of the land; or he may resign it by his own voluntary act. /i But the body politic may also itself be dissolved in several ways; which dissolution is the civil death of the corporation: and in this case their lands and tenements shall revert to the person, or his heirs, who granted them to the corporation; for the law doth annex a condition to every such grant, that if the corporation be dissolved, the grantor shall have the lands again, because the cause of the grant faileth. /k The grant is indeed only during the life of the corporation; which may endure for ever: but, when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life. And hence it appears how injurious, as well to private as public rights, those statutes
were, which vested in king Henry VIII, instead of the heirs of the founder, the lands of the dissolved monasteries. The debts of a corporation, either to or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover, or be charged with them, in their natural capacities /l: agreeable to that maxim of the civil law, /m "si quid universitati debetur, singulis non debetur; nec, quod debet universitas, singuli debent."
/i 11 Rep. 98.
/k Co. Litt. 13.
/l 1 Lev. 237.
/m Ff. 3. 4. 7.

A CORPORATION may be dissolved, 1. By act of parliament, which is boundless in its operations; 2. By the natural death of all its members, in case of an aggregate corporation; 3. By surrender of its franchises into the hands of the king, which is a kind of suicide; 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 a writ of quo warranto, to enquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings. The exertion of this act of law, for the purposes of the state, in the reigns of king Charles and king James the second, particularly by seising the charter of the city of London, gave great and just offence; though perhaps, in strictness of law, the proceedings were sufficiently regular: but now /n it is enacted, that the charter of the city of London shall never more be forfeited for any cause whatsoever. And, because by the common law corporations were dissolved, in case the mayor or head officer was not duly elected on the day appointed in the charter or established by prescription, it is now provided /o, that for the future no corporation shall be dissolved upon that account; and ample directions are given for appointing a new officer, in case there be no election, or a void one, made upon the charter or prescriptive day.
/n Stat. 2 W. & M. c. 8.

THE END OF THE FIRST BOOK.

BOOK THE SECOND: OF THE RIGHTS OF THINGS
Chapter the First.
Of Property, in General
The former book of these commentaries having treated at large of the jura personarum, or such rights and duties as are annexed to the persons of men, the objects of our enquiry in this second book will be the jura rerum, or those rights which a man may acquire in and to such external things as are unconnected with his person. These are what the writers on natural law style the rights of dominion, or property, concerning the nature and original of which I shall first premise a few observations, before I proceed to distribute and consider its several objects.

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few, that will give themselves the trouble to consider the original and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow creatures from a determinate spot of ground, because his father had done so before him; or why the occupier of a particular field or of a jewel, when lying on his death-bed and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These enquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reasons of making them. But, when law is to be considered not only as matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.

In the beginning of the world, we are informed by holy writ, the all-bountiful creator gave to mandominion over all the earth; and over the fish
of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth. /a This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose, that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required.

These general notions of property were then sufficient to answer all the purposes of human life; and might perhaps still have answered them, had it been possible for mankind to have remained in a state of pramaeval simplicity: as may be collected from the manners of many American nations when first discovered by the Europeans; and from the ancient method of living among the first Europeans themselves, if we may credit either the memorials of them preserved in the golden age of the poets, or the uniform accounts given by historians of those times, wherein errant omnia communia et indivisa omnibus, veluti unum cunctis pa-trimonium elset. /b Not that this communion of goods seems ever to have been applicable, even in the earliest ages, to ought but the substance of the thing; nor could be extended to the use of it. For, by the law of nature and reason, he who first began to use it, acquired therein a kind of transient property, that lasted of long as he was using it, and no longer; /c or, to speak with greater precision, the right of possession continued for the same time only that the act of possession lasted. Thus the ground was in common, and no part of it was the permanent property of any man in particular: yet whoever was in the occupation of any determinate spot of it, for rest, for shade, or the like, acquired unjust, and contrary to the law of nature, to have driven him by force; but the instant that he quitted the use or occupation of it,

/a Gen. 1. 28.
/b Justin. L. 43. c. 1.
/c Barbeyr, Puff. 1. 4. c. 4.

another might seize it without injustice. Thus also a vine or other tree might be said to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the sole property of the
fruit, which he had gathered for his own repast. A doctrine well illustrated by Cicero, who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken is for the time his own d.

But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world been continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious, and agreeable; as, habitations for shelter and safety, and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only an ususructuary property in them, which was to cease the instant that he quitted possession; --- if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other. In the case of habitations in particular, it was natural of observe, that even the brute creation, to whom every thing else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young; that the birds of the air had nests, and the beasts of the field had caverns, the invasion of which they esteemed a very flagrant injustice, and would sacrifice their lives to preserve them. Hence a property was soon established in every man's house and home-stall; which seem to have been originally mere temporary huts or

d Quemadmoaum theatrum, cum commune sit, recte tamen dici potest, ejus esse eum locum quem quisque occuparit. Ce Fin. L. 3. c. 20.

moveable cabins, suited to the design of providence for more speedily populating the earth, and suited to the wandering life of their owners, before any extensive property in the soil or ground was established. And there can be no doubt, but that moveables of every kind became sooner appropriated than the permanent substantial soil: partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right; but principally because few of them could
be fit for use, till improved and meliorated by the bodily labour of the occupant; which bodily, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein.

The article of food was a more immediate call, and therefore a more early consideration. Such, as were not contented with the spontaneous product of the earth, sought for a more solid refreshment in the flesh of beasts, which they obtained by hunting. But the frequent disappointments, incident to that method of provision, induced them to gather together such animals as were of a more tame and sequacious nature; and to establish a permanent property in their flocks and herds, in order to sustain themselves in a less precarious manner, partly by the milk of the dams, and partly by the flesh of the young. The support of these their cattle made the article of water also a very important point. And therefore the book of Genesis (the most venerable monument of antiquity, considered merely with a view to history) will furnish us with frequent instances of violent contentions concerning wells; the exclusive property of which appears to have been established in the first digger or occupant, even in such places where the ground and herbage remained yet in common. Thus we find Abraham, who was but a sojourner, asserting his right to a well in the country of Abimelech, and exacting an oath for his security, because he had digged that well e.

e Gen. 21. 30.

And Isaac, about ninety years afterwards, re-claimed this his father's property; and, after much contention with the Philistines, was suffered to enjoy it in peace f.

All this while the soil and pasture of the earth remained still in common as before, and open to every occupant: except perhaps in the neighbourhood of towns, where the necessity of a sole and exclusive property in lands (for the sake of agriculture) was earlier felt, and therefore more readily complied with. Otherwise, when the multitude of men and cattle had consumed every convenience on one spot of ground, it was deemed a natural right to seise upon and occupy such other lands as would more easily supply their necessities. This practice is still retained among the wild and uncultivated nations that have never been formed into civil states, like the Tartars and others in the east; where the climate itself, and
the boundless extent of their territory, conspire to retain them still in the same favinge state of vagrant liberty, which was universal in the earliest ages; and which Tacitus informs us continued among the Germans till the decline of the Roman empire g. We have also a striking example of the same kind in the history of Abraham and his nephew Lot h. When their joint substance became so great, that pasture and other conveniences grew scarce, the natural consequence was that a strife arose between their servants; so that it was no longer practicable to dwell together. This contention Abraham thus endeavoured to compose: let there be no strife, I pray thee, between thee and me. Is not the whole land before thee? Separate thyself, I pray thee, from me. If thou wilt take the left hand, then I will go to the right; or if thou depart to the right hand, then I will go to the left? This plainly implies an acknowledged right, in either, to occupy whatever ground he pleased, that was not pre-occupied by other tribes. And Lot lifted up his eyes, and beheld all the plain of Jordan, that it was well watered every where, even as the garden of the Lord. Then Lot chose him all the plain of Jordan, and journeyed east; and Abraham dwelt in the land of Canaan?

f Gen. 26. 15, 18 &c.  
/g Colunt discreti et diversi; ut sons, ut campus, ut nemus placuit. De mor. Germ. 16  
/h Gen. c. 13.

Upon the same principle was founded the right of migration, or sending colonies to find out new habitations, when the mother country was overcharged with inhabitants; which was practised as well by the Phaenicians and Greeks, as the Germans, Scythians, and other northern people. And, so long as it was confined to the stocking and cultivation of desart uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seising on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.

As the world by degrees grew more populous, it daily became more difficult to inhabit, without encroaching upon former occupants; and, by constantly occupying the same individual spot, the fruits of the earth were
consumed, and its spontaneous produce destroyed, without any provision for a future supply or succession. It therefore became necessary to pursue some regular method of providing a constant subsistence; and this necessity produced, or at least promoted and encouraged, the art of agriculture. And the art of agriculture, by a regular connexion and consequence, introduced and established the idea of a more permanent property in the soil, than had hitherto been received and adopted. It was clear that the earth would not produce her fruits in sufficient quantities, without the assistance of tillage: but who would be at the pains of tilling it, if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labour? Had not therefore a separate property in lands, as well as moveables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey; which, according to some philosophers, is the genuine state of nature. Whereas now (so graciously has providence interwoven our duty and our happiness together) the result of this very necessity has been the ennobling of the human species, by giving it opportunities of improving its rational faculties, as well as of exerting its natural. Necessity begat property; and, in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants; states, government, laws, punishments, and the public exercise of religious duties. Thus connected together, it was found that a part only of society was sufficient to provide, by their manual labour, for the necessary subsistence of all; and leisure was given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science.

The only question remaining is, how this property became actually vested; of what it is that gave a man an exclusive right to retain in a permanent manner that specific land, which before belonged generally to everybody, but particularly to nobody. And, as we before observed that occupancy gave the right to the temporary use of the soil, so it is agreed upon all hands that occupancy gave also the original right to the permanent property in the substance of the earth itself; which excludes every one else but the owner from the use of it. There is indeed some difference among the writers on natural law, concerning the reason why occupancy should convey this right, and invest one with this absolute property: Grotius and Puffendorf insisting, that this right of occupancy is founded upon a tacit and implied assent of all mankind, that the first occupant should become the owner; and Barbeyrac, Titius, Mr. Locke, and others, holding, that
there is no such implied assent, neither is it necessary that there should be; for that the very act of occupancy, alone, being a degree of bodily labour, is from a principle of nature justice, without any consent or compact, sufficient of itself to gain a title. A dispute that favours too much of nice and scholastic refinement! However, both sides agree in this, that occupancy is the thing by which the title was in fact originally gained; every man seising to this own continued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else.

Property, both in lands and moveables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shews an intention to abandon it: for then it becomes, naturally speaking, publici juris once more, and is liable to be again appropriated by the next occupant. So if one is possessed of a jewel, and casts it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate sinder that will seise it to his own use. But if he hides it privately in the earth, or other secret place, and it is discovered, the finder acquires no property therein; for the owner hath not by this act declared any intention to abandon it, but rather the contrary: and if he loses or drops it by accident, it cannot be collected from thence, that he designed to quit the possession; and therefore in such case the property still remains in the loser, who may claim it again of the finder. And this, we may remember, is the doctrine of the law of England, with relation to treasure trove.

But this method, of one man's abandoning his property, and another's seising the vacant possession, however well founded in theory, could not long subsist in fact. It was calculated merely for the rudiments of civil society, and necessarily ceased among the complicated interests and artificial refinements of polite and established governments. In these it was found, that what became inconvenient or useless to one man was highly convenient and useful to another; who was ready to give in exchange for it some equivalent, that was equally desirable to the former proprietor. This mutual convenience introduced commercial traffic, and the reciprocal transfer of property by sale, grant, or conveyance: which may be considered either as a con-
tinuance of the original possession which the first occupant had; or as an abandoning of the thing by the present owner, and an immediate successive occupancy of the same by the new proprietor. The voluntary dereliction of the owner, and delivering the possession to another individual, amount to a transfer of the property; the proprietor declaring his intention no longer to occupy the thing himself, but that his own right of occupancy shall be vested in the new acquirer. Or, taken in the other light, if I agree to part with an acre of by having abandoned the property, and Titius, being the only or first man acquainted with such my intention, immediately steps in and seizes the vacant possession: thus the consent expressed by the conveyance gives Titius a good right against me; and possession, or occupancy, confirms that right against all the world besides.

The most universal and effectual way, of abandoning property, is by the death of the occupant; when, both the actual possession and intention of keeping possession ceasing, the property, which is founded upon such possession and intention, ought also to cease os course. For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion: else, if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him; which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as absolute individuals, and unconnected with civil society: for then, by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed. But as, under civilized governments which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in casé he neglects to dispose of it, or is not permitted to make any disposition at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir of the deceased; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion, which its becoming again common would occasion i. And farther, in case no testament be permitted by the law, or none be made, and no heir can be found so qualified as the law requires, still, to prevent the robust title of occupancy from again taking place, the doctrine of escheats is adopted in almost
every country; whereby the sovereign of the state, and those who claim
under his authority, are the ultimate heirs, and succeed to those
inheritances, to which no other title can be formed.

The right of inheritance, or descent to the children and relations of the
deceased, seems to have been allowed much earlier than the right of
devising by testament. We are apt to conceive at first view that it has
nature on its side; yet we often mistake for nature what we find established
by long and inveterate custom. It is certainly a wise and effectual, but
clearly a political. Establishment; since the permanent right of property,
vested in the ancestor himself, was no natural, but merely a civil, right. It
is true, that the transmission of one's possession to posterity has an
evident tendency to make a man a good citizen and a useful member of
society: it sets the passions on the side of duty, and prompts a man to
deserve well of the public, when he is sure that the reward of his services
will not die with himself, but be transmitted to those with whom he is
connected by the dearest and most tender affections. Yet, reasonable as
this foundation of the right of inheritance may seem, it is probable that its
immediate original arose not
1. It is principally to prevent any vacancy of possession, that the civil law
considers father and son as one person; so that upon the death of either
the inheritance does not so properly descend, as continue in the hands of
the survivor. Ff, 28. 2. 11.

earliest witnesses of his decease. They became therefore generally the next
immediate occupants, till at length in process of time this frequent usage
ripened into general law. And therefore also in the earliest ages, on failure
of children, a man's servants born under his roof were allowed to be his
heirs; being immediately on the spot when he died. For we find the old
patriarch Abraham expressly declaring, that since God had given him no
seed, his steward Eliezer, one born in his house, was his heir k?

While property continued only for life, testaments were useless and
unknown; and, when it became inheritable, the inheritance was long
indeseafible, and the children or heirs at law were incapable of exclusion
by will. Till at length it was found, that so strict a rule of inheritance made
heirs disobedient and headstrong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigence of their families required. This introduced pretty generally the right of disposing one's property, or a part of it, by testament; that is, by written or oral instructions properly witnessed and authenticated, according to the pleasure of the deceased; which we therefore emphatically style his will. This was established in some countries much later than in others. With us in England, till modern times, a man could only dispose of one third of his moveables from his wife and children: and, in general, no will was permitted of lands till the reign of Henry the eighth; and then only of a certain portion: for it was not till after the restoration that the power of devising real property became so universal as at present.

Wills therefore and testaments, rights of inheritance and successions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them; every distinct country having different ceremonies and requisites to make a testament completely valid: neither does any thing vary more that the right of inheritance under different national establish-

/k Gen. 15. 3.

ments. In England particularly, this diversity is carried to such a length, as if it had been meant to point out the power of the laws in regulating the succession to property, and how futile every claim must be that has not its foundation in the positive rules of the state. In personal estates the father may succeed to his children; in landed property he never can be heir, by any the remotest possibility: in general only the eldest son, in some places only the youngest, in others all the sons together, have a right to succeed to the inheritance: in real estates males are preferred to females, and the eldest male will usually exclude the rest; in the division of personal estates, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed.

This one consideration may help to remove the scruples of many well-meaning persons, who set up a mistaken conscience in opposition to the rules of law. If a man disinherits his son, by a will duly executed, and leaves his estate to a stranger, there are many who consider this proceeding as contrary to natural justice: while others so scrupulously
adhere to the supposed intention of the dead, that if a will of lands be attested by only two witnesses instead of three, which the law requires, they are apt to imagine that the heir is bound in conscience to relinquish his title to the devisee. But both of them certainly proceed upon very erroneous principles: as if, on the one hand, the son had by nature a right to succeed to his father's lands; or as if, on the other hand, the owner was by nature intitled to direct the succession of his property after his own decease. Whereas the law of nature suggests, that on the death of the possessor the estate should again become common, and be open to the next occupant, unless otherwise ordered for the sake of civil peace by the positive law of society. The positive law of society, which is with us the municipal law of England, directs it to vest in such person as the last proprietor shall by will, attended with certain requisites, appoint; and, in defect of such appointment, to go to some particular person, who, from the result of certain local constitutions, appears to be the heir at law. Hence it follows, that, where the appointment is regularly made, there cannot be a shadow of right in any one but the person appointed: and, where the necessary requisites are omitted, the right of the heir is equally strong and built upon as solid a foundation, as the right of the devisee would have been, supposing such requisites were observed.

But, after all, there are some few things, which notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an ususruary property is capable of being had; and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water; which a man may occupy by means of his windows, his gardens, his mills, and other conveniences: such also are the generality of those animals which are said to be ferae nature, or of a wild and untameable disposition; which any man may seise upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to seise and enjoy them afterwards.

Again; there are other things, in which a permanent property may subsist, not only as to the temporary use, but also the solid substance; and which yet would be frequently found without a proprietor, had not the wisdom of the law provided a remedy to obviate this inconvenience. Such are forests and other waste grounds, which were omitted to be appropriated in the general distribution of lands: such also are wrecks, estrays, and that
species of wild animals, which the arbitrary constitutions of positive law have distinguished from the rest by the well-known appellation of game. With regard to these and some others, as disturbances and quarrels would frequently arise among individuals, contending about the acquisition of this species of property by first occupancy, the law has therefore wisely cut up the root of dissension, by vesting the things themselves in the sovereign of the state; or else in his representatives, appointed and authorized by him, being usually the lords of manors. And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing that wise and orderly maxim, of assigning to every thing capable of ownership a legal and determinate owner.

Chapter the Second.
Of Real Property; and, First, of Corporeal Hereditaments

The objects of dominion or property are things, as contradistinguished from persons: and things are by the law of England distributed into two kinds; things real, and things personal. Things real are such as are permanent, fixed, and immoveable, which cannot be carried out of their place; as lands and tenements: things personal are goods, money, and all other moveables; which may attend the owner's person wherever he thinks proper to go.

In treating of things real, let us consider, first, their several sorts or kinds; secondly, the tenures by which they may be holden; thirdly, the estates which may be had in them; and, fourthly, the title to them, and the manner of acquiring and losing it.

First, with regard to their several sorts or kinds, things real are usually said to consist in lands, tenements, or hereditaments. Land comprehends all things of a permanent, substantial nature; being a word of a very extensive signification, as will presently appear more at large. 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, proper, and legal sense it signifies every thing that may be holden, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial ideal kind. Thus liberum tenementum, franktenement, 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, and office a right of common, a peerage, or other property of the like unsubstantial kind, are, all of them, legally speaking, tenements b. But an hereditament, says Sir Edward Coke c, is by much the largest and most comprehensive expression; for it includes not only lands and tenements, but whatsoever may be inherited, be it corporeal, or implement of furniture which by custom descends to the heir together with an house, is neither land, nor tenement, but a mere moveable; yet, being inheritable, is comprised under the general word, hereditament; and so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament d.

Hereditaments then, to use the largest expression, are of two kinds, corporeal, and incorporeal. Corporeal consist of such as affect the senses; such as may be seen and handled by the body: incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

Corporeal hereditaments consist wholly of substantial and permanent objects; all which may be comprehended under the general denomination of land only. For land, says Sir Edward Coke e, comprehendeth in its legal signification any ground, soil, or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marishes, furzes, and heath. It legally includeth

a Co. Litt. 6.
b Co. Litt. 19, 20.
c 1. Inst. 6.
d 3 Rep. 2.
e 1 Inst. 4.

also all castles, houses, and other buildings: for they consist, saith he, of two things; land, which is the foundation; and structure thereupon: so that, if I convey the land or ground, the structure of building passeth therewith. It is observable that water is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law: and I cannot bring an action to recover possession of a pool or other piece of water, by the name of water only; either by calculating its capacity, as, for so many cubical yards; or, by superficial measure, for twenty acres.
of water; or by general description, as for a pond, a watercourse, or a rivulet: but I must bring my action for the land that lies at the bottom, and must call it twenty acres of land covered with water. For water is a moveable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, ususfructuary property therein: wherefore if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land, which that water covers, is permanent, fixed, and immoveable: and therefore in this I may have a certain, substantial property, of which the law will take notice, and not of the other.

Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. Cujus est solum, ejus est usque ad coelum, is the maxim of the law, upwards; therefore no man may erect any building, or the like, to overhang another's land: and, downwards, whatever is in a direct line between the surface of any land, and the center of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word land includes not only the face of the earth, but every thing under it, or over it. And therefore if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them, except in the instance

/f Brownl. 142.

of water; by a grant of which, nothing but a right of fishing: but the capital distinction is this; that by the name of a castle, meffuage, foft, cromt, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the name of land, which is nomen generalissimum, every thing terrestrial will pass.

/g Co. Litt. 4.
/h Ibid. 4, 5, 6.

Chapter the Third.
Of Incorporeal Hereditaments.

An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable
within, the same a. It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like; but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. In short, as the logicians speak, corporeal hereditaments are the substance, which may be always seen, always handled: incorporeal hereditaments are but a sort of accidents, which inhere in and are supported by that substance; and may belong, or not belong to it, without any visible alteration therein. Their existence is merely in idea and abstracted contemplation; though their effects and profits may be frequently objects of our bodily senses. And indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity, for instance, is an incorporeal hereditament: for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand. So tithes,

a Co. Litt. 19, 20.

if we consider the produce of them, as the tenth sheaf or tenth lamb, seem to be completely corporeal; yet they are indeed in corporeal hereditaments: for they, being merely a contingent right, collateral to and issuing out of lands, can never be the object of sense: they are neither capable of being shewn to the eye, nor of being delivered into bodily possession.

Incorporeal hereditaments are principally of ten sorts; advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents.

1. Advowson is the right of presentation to a church, or ecclesiastical benefice. Advowson, advocatio, signifies is clientelam recipere, the taking into protection; and therefore is synonymous with patronage, patronatus: and he who has the right of advowson is called the patron of the church. For, when lords of manors first built churches on their own demesnes, and appointed the tithes of those manors to be paid to the officiating ministers, which before were given to the clergy in common (from whence, as was formerly mentioned b, arose the division of parishes) the lord, who thus built a church, and endowed it with glebe or land, had of common right a
power annexed o nominating such minister as he pleased (provided he were canonically qualified) to officiate in that church of which he was the founder, endower, maintainer, or, in one word, the patron. /c

This instance of an advowson will completely illustrate the nature of an incorporeal hereditament. It is not itself the bodily possession of the church and its appendages; but it is a right to give some other man a title to such bodily possession. The advowson is the object of neither the sight, nor the touch; and yet it perpetually exists in the mind’s eye, and in contemplation of law. It cannot be delivered from man to man by any visible bodily transfer, nor can corporal possession

/c This original of the jut partematus, by building and endowing the church, appears also to have been allowed in the empire. Nov. 56. t. 12. /c. 2. Nov. 118. c. 23.

be had of it. If the patron takes corporal possession of the church, the churchyard, the glebe or the like, he intrudes on another man's property; for to these the parson has an exclusive right. The patronage can therefore be only conveyed by operation of law, by verbal grant, either oral or written, which is a kind of invisible, mental transfer: and being so vested, it lies dormant and unnoticed, till occasion calls it forth; when it produces a visible, corporeal fruit, by intitling some clerk, whom the patron shall please to nominate, to enter and receive bodily possession of the lands and tenements of the church.

Advowsons are either advowsons appendant, or advowsons in gross. Lords of manors being originally the only founders, and of course the only patrons, of churches d, the right of patronage or presentation, so long as it continues annexed to the possession of the manor, as some have done from the foundation of the church to this day, is called an advowson appendant e: and it will pass, or be conveyed, together with the manor, as incident and appendant thereto, by a grant of the manor only, without adding any other words f. But where the property of the advowson has been once separated from the property of the manor, by legal conveyance, it is called an advowson in gross, or at large, and never can be appendant any more; but is for the future annexed to the person of its owner, and not to his manor of lands /g.
Advowsons are also either presentative, collative, or donative. An advowson presentative is where the patron hath a right of presentation to the bishop or ordinary, and moreover to demand of him to institute his clerk, if he find him canonically qualified: and this is the most usual advowson. 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

/d Co. Litt. 119.
/e Ibid. 121.
/f Ibid. 397.
/g Ibid. 120.
/h Ibid.

conferring the benefice, the whole that is done in common cases, by both presentation and institution. An advowson donative is when the king, or any subject by his licence, doth found a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron; subject to his visitation only, and not to that of of the ordinary; and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction. This is said to have been anciently the only way of conferring ecclesiastical benefices in England; the method of institution by the bishop not being established more early than the time of archbishop Becket in the reign of Henry II. And therefore though pope Alexander III, in a letter to Becket, severely inveighs against the prava consuetudo, as he calls it, of investiture conferred by the patron only, this however shews what was then the common usage. Others contend, that the claim of the bishops to institution is as old as the first planting of christianity in this island; and in proof of it they allege a letter from the English nobility, to the pope in the reign of Henry the third, recorded by Matthew Paris, which speaks of presentation to the bishop as a thing immemorial. The truth seems to be, that, where the benefice was to be conferred on a mere layman, he was first presented to the bishop, in order to receive ordination, who was at liberty to examine and refuse him: but where the clerk was already in orders, the living was usually vested in him by the sole donation of the patron; till about the middle of the twelfth century, when the pope and his bishops endeavoured to introduce a kind of foedal dominion over ecclesiastical benefices, and, in consequence of that, began to claim and exercise the right of institution universally, as a species of spiritual investiture.
However this may be, if, as the law now stands, the true patron once waives this privilege of donation, and presents to the bishop, and his clerk is admitted and instituted, the advow-

/i Co. Litt. 344.
/k Seld. Tith. c. 12. 2.
/l Decretal. l. 3. t. 7. c. 3.
/m A. D. 1239.

son is now become for ever presentative, and shall never be donative any more. For these exceptions to general rules, and common right, are ever looked upon by the law in an unfavourable view, and construed as strictly as possible. If therefore the patron, in whom such peculiar right resides, does once give up that right, the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever; and will thereupon reduce it to the standard of other ecclesiastical livings.

II. A second species of incorporeal hereditaments is that of tithes; which are defined to be the tenth part of the increase, yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants: the first species being usually called predial, as of corn, grass, hops, and wood n; the second mixed, as of wool, milk, pigs, &c o, consisting of natural products, but nurtured and preserved in part in gross: the third personal, as of manual occupations, trades, fisheries, and the like; and of these only the tenth part of the clear gains and profits is due p.

It is not be expected from the nature of these general commentaries, that I should particularly specify, what things are tithable, and what not, the time when, or the manner and proportion in which, tithes are usually due. For this I must refer to such authors as have treated the matter in detail: and shall only observe, that, in general, tithes are to be paid for every thing that yields an annual increase, as corn, hay, fruit, cattle, poultry, and the like; but not for any thing that is of the substance of the earth, or is not of annual increase, as stone, lime, chalk, and the like; nor for creatures that are of a wild nature, or fera nature, as deer, hawks, &c, whose increase, so as to profit the owner, is not annual, but casual q. It will rather
be our business to consider, 1. The original of the right of tithes. 2. In whom that right at present subsists. 3. Who may be discharged, either totally or in part, from paying them.

1. As to their original. I will not put the title of the clergy to tithes upon any divine right; though such a right certainly commenced, and I believe as certainly ceased, with the Jewish theocracy. Yet an honourable and competent maintenance for the ministers of the gospel is, undoubtedly, jure divino; whatever the particular mode of that maintenance may be. For, besides the positive precepts of the new testament, natural reason will tell us, that an order of men, who are separated from the world, and excluded from other lucrative professions, for the sake of the rest of mankind, have a right to be furnished with the necessaries, conveniences, and moderate enjoyments of life, at their expense, for whose benefit they forego the usual means of providing them. Accordingly all municipal laws have provided a liberal and decent maintenance for their national priests or clergy: ours in particular have established this of tithes, probably in imitation of the Jewish law: and perhaps, considering the degenerate state of the world in general, it may be more beneficial to the English clergy to found their title on the law of the land, than upon any divine right whatsoever, unacknowledged and unsupported by temporal sanctions.

We cannot precisely ascertain the time when tithes were first introduced into this country. Possibly they were contemporary with the planting of christianity among the Saxons, by augustin the monk, about the end of the sixth century. But the first mention of them, which I have met with in any written English law, is in a constitutional decree, made in a synod held A. D. 786 r, wherein the payment of tithes in general is strongly enjoined. This canon, or decree, which at first bound not the laity, was effectually confirmed by two kingdoms of the heptarchy, in their parliamentary conventions of estates, respectively consisting of the kings of Mercia and

/r Selden, c. 8.
Northumberland, the bishops, dukes, senators, and people. Which was a few years later than the time that Charlemagne established the payment of them in France, and made that famous division of them into four parts; one to maintain the edifice of the church, the second to support the poor, the third the bishop, and the fourth the parochial clergy.

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

However, arbitrary consecrations of tithes took place again afterwards, and became in general use till the time of king John. Which was probably owing to the intrigues of the regular clergy, or monks of the Benedictine and other rules, under arch-bishop Dunstan and his successors; who endeavoured to wean the people from paying their dues to the secular or parochial clergy, (a much more valuable set of men than themselves) and were then in hopes to have drawn, by sanctimonious pretences to extraordinary purity of life, all ecclesiastical profits to the coffers of their own societies. And this will naturally enough account for the number and riches of the monasteries and religious houses, which were founded in those days, and which were frequently endowed with tithes. For a layman, who was obliged to pay his tithes somewhere, might think it good policy to erect an abbey, and there pay them to his own monks; or grant them to some abbey already erected; since for this dotation, which really cost the patron little or nothing, he might, according to the superstition of the times, have masses for ever sung for his soul. But, in process of years, the income of the poor laborious parish priests being scandalously reduced by these arbitrary consecrations of tithes, it was remedied by pope Innocent the third about the year 1200 in a decretal epistle, sent to the arch-bishop of Canterbury, and dated from the palace of Lateran: which has occasioned sir Henry Hobart and others to mistake it for a decree of the council of Lateran held A. D. 1179, which only prohibited what was called the infeodation of tithes, or their being granted to mere laymen; whereas
this letter of pope Innocent to the arch-bishop enjoined the payment of
tithes to the Parsons of the respective parishes where every man inhabited,
agreeable to what was afterwards directed by the same pope in other
countries f. This epistle, says sir Edward Coke g, bound not the lay subjects
of this realm; but, being reasonable
/c Selden. c. 11.
d Opera Innocent. III. tom. 2. pag. 452.
e Decretal. l. 3. t. 30. c. 19.
f Ibid. c. 26.
g 2 Inst. 641.

and just (and, he might have added, being correspondent to the ancient
law) it was allowed of, and so became lex terrae. This put an effectual stop
to all the arbitrary consecrations of tithes; except some footsteps which
still continue in those portions of tithes, which the parson of one parish
hath, though rarely, a right to claim in another: for it is now universally
held h, that tithes are due, of common right, to the parson of the parish,
unless there be a special exemption. This parson of the parish, we have
formerly seen I, may be either the actual incumbent, or else the
appropriator of the benefice: appropriations being a method of endowing
monasteries, which seems to have been devised by the regular clergy, by
way of substitution to arbitrary consecrations of tithes k.

3. We observed that tithes are due to the parson of common right, unless
by special exemption: let us therefore see, thirdly, who may be exempted
from the payment of tithes, and how. Lands, and their occupiers, may be
exempted or discharged from the payment of tithes, either in part or
totally, first, by a real composition; or, secondly, by custom or
prescription.

First, a real composition is when an agreement is made between the owner
of the lands, and the parson or vicar, with the consent of the ordinary and
the patron, that such lands shall for the future be discharged from
payment of tithes, by reason of some land or other real recompense given
to the parson, in lieu and satisfaction thereof l. This was permitted by law,
because it was supposed that the clergy would be no losers by such
composition; since the consent of the ordinary, whose duty it is to take
care of the church in general, and of the patron, whose interest it is to
protect that particular church, were both made necessary to render the
composition effectual: and hence have arisen all such compositions as
exist at this day by force of the common law. But, experience shewing that
even this caution was ineffectual, and the possessions of the church

/h Regist. 46. Hob. 296.
/i Book I. pag. 372.

In extraparochial places the king, by his royal prerogative, has a right to all
the tithes. See book I. pag. 110.


being, by this and other means, every day diminished, the disabling statute
13 Eliz. c. 10. was made; which prevents, among other spiritual persons, all
parsons and vicars from making any conveyances of the estates of their
churches, other than for three lives or twenty one years. So that now, by
virtue of this statute, no real composition made since the 13 Eliz. is good
for any longer term than three lives or twenty one years, though made by
consent of the patron and ordinary: which has indeed effectually
demolished this kind of traffick; such compositions being now rarely heard
of, unless by authority of parliament.

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

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

To make a good and sufficient modus, the following rules must be observed. 1. It must be certain and invariable, for payment of different sums will prove it to be no modus, that is, no original real composition; because that must have been one and the same, from its first original to the present time. 2. The thing given, in lieu of tithes, must be beneficial to the parson, and not for the emolument of third persons only: thus a modus, to repair the church in lieu of tithes, is not good, because that is an advantage to the parish only; but to repair the chancel is a good modus, for that is an advantage to the parson. 3. It must be something different from the thing compounded for: one load of hay, in lieu of all tithe hay, is no good modus: for no parson would, bona fide, make a composition to receive less than his due in the same species of tithe; and therefore the law will not suppose it possible for such composition to have existed. 4. One cannot be discharged from payment of one species of tithe, by paying a modus for another. Thus a modus of 1 d. for every milch cow will discharge the tithe of milch kine, but not of barren cattle: for tithe is, of common right, due for both; and therefore a modus for one shall never be a discharge for the other. 5. The recompense must be in its nature as durable as the tithes discharged by it; that is, an inheritance certain: and therefore a modus that every inhabitant of a house shall pay 4d. a year, in lieu of the owner's tithes, is no good modus; for possibly the house may not be inhabited, and then the recompense will be lost. 6. The modus must not be too large, which in law is called 2 rank modus: as if the real value of the tithes be 60 l. per annum, and a modus in suggested of 40 l. this modus will not be good; though on of 40s. might have been valid. For, in these cases of prescriptive or customary modus's, the law supposes an original real composition to have been regularly made; which being lost by length of time, the immemorial usage is admitted.

/m 1 Keb. 602.
/n 1 Roll. Abr. 649.
/o 1 Lev. 179.
/q 2 P. Wm2. 462.
/r 11 Mod. 60.
as evidence to shew that it once did exist, and that from thence such usage was derived. Now time of memory hath been long ago ascertained by the law to commence from the reign of Richard the first s; and any custom may be destroyed by evidence of its non-existence in any part of the long period from his days to the present: wherefore, as this real composition is supposed to have been an equitable contract, or the full value of the tithes, at the time of making it, if the modus set up is so rank and large, as that it beyond dispute exceeds the value of the tithes in the time of Richard the first, this modus is selo de se and destroys itself. For, as it would be destroyed by any direct evidence to prove its non-existence at any time since that era, so also it is destroyed by carrying in itself this internal evidence of a much later original.

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 t. So a vicar shall pay no tithes to the rector, nor the rector to the vicar, for ecclesia decimas non solvit ecclesiaeau. But these privileges are personal to both the king and the clergy; for their tenant or lessee shall pay tithes of the same land, though in their own occupation it is not tithable. And, generally speaking, it is an established rule, that in lay hands, modus de non decimando non valet w. but spiritual persons or corporations, as monasteries, abbots, bishops, and the like, were always capable of having their lands totally discharged of tithes, by variously ways x: as, 1. By real composition: 2. By the pope's bull of exemption: 3. By unity of possession; as when the rectory of a parigh, and lands in the same parigh, both belonged to a religious house, those lands

1. This rule was adopted, when by the statute of Westm. 1. (3 Edw. I. c. 39.) the reign of Richard I. was made the time of limitation in a writ of right. But, since by the statute 32 Hen. VIII. C. 2. this period (in a writ of right) hath been very rationally reduced to sixty years, it seems unaccountable, that the date of legal prescription or memory should still continue to be reckoned from an era so very antiquated. See 2 Roll. Abr. 269. ;p. 16.

/t Cro. Eliz. 511.
/u Ibid. 479.
/w Ibid. 511.
/x Hob. 309. Cro. Jac. 308.
were discharged of tithes by this unity of possession: 4. By prescription; having never been liable to tithes, by being always in spiritual hands: 5. By virtue of their order; as the knights templars, cistercians, and others, whose lands were privileged by the pope with a discharge of tithes y. 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. VIII. 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.

III. 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 beasts, to catch fish, to dig turf, to cut wood, or the like. And hence common is chiefly of four sorts; common of pasture, of piscary, of turbary, and of estovers.

1. Common of pasture is a right of feeding one's beasts on another's land; for in those waste grounds, which are usually called commons, the property of the soil is generally in the lord of the manor; as in common fields it is in the particular tenants. This kind of common is either appendant, appurtenant, because of vicinage, or in gross a.

/y 2 Rep. 44. Seld. tith. c. 13.  2.
/z Finch, law. 157.
/a Co. Litt. 122.

Common appendant is a right, belonging to the owners or occupiers of arable land, to put commonable beasts upon the lord's waste, and upon the land of other persons within the same manor. Commonable beasts are either beasts of the plough, or such as manure the ground. This is a matter
of most universal right; and it was originally permitted, not only for the encouragement of agriculture, but for the necessity of the thing. For, when lords of manors granted out parcels of land to tenants, for services either done or to be done, these tenants could not plough or manure the land without beasts; these beasts could not be sustained without pasture; and pasture could not be had but in the lord's wastes, and on the uninclosed fallow grounds of themselves and the other tenants. The law therefore annexed this right of common, as inseparably incident, to the grant of the lands; and this was the original of common appurtenant: which obtains in Sweden, and the other northern kingdoms, much in the same manner as in England. Common appurtenant is where the owner of land has a right to put in other beasts, besides such as are generally commonable; as hogs, goats, and the like, which neither plough nor manure the ground. This, not arising from the necessity of the thing, like common appurtenant, is therefore not of common right; but can only be claimed by immemorial usage and prescription, which the law esteems sufficient proof of a special grant or agreement for this purpose. Common because of vicinage, or neighbourhood, is where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another; the beasts of the one straying mutually into the other's fields, without any molestation from either. This is indeed only a permissive right, intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits: and therefore either township may enclose and bar out the other, though they have intercommoned time out of mind. Neither hath any person of one town a right to put his beasts originally into the other's common; but if they escape, an stray thither of themselves, the law winds at the trespass. Common in gross, or at large, is such as is neither appurtenant nor appurtenant to land, but is annexed to a man's person; being granted to him and his heirs by deed: or it may be claimed by prescriptive right, as by parson of a church, or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor.
All these species, of pasturable common, may be and usually are limited as to number and time; but there are also commons without stint, and which last all the year. By the statute of Merton however, and other subsequent statutes f, the lord of a manor may enclose so much of the waste as he pleases, for tillage or woodground, provided he leaves common sufficient for such as are entitled thereto. This enclosure, when justifiable, is called in law approving; an ancient expression signifying the same as sim porving. /g The lord hath the sole interest in the soil; but the interest of the lord and commoner, in the common, are looked upon in law as mutual. They may both bring actions for damage done, either against strangers, or each other; the lord for the public injury, and each commoner for his private damage h.

2, 3. Common of piscary is a liberty of fishing in another man's waters; as common of turbary is a liberty of digging turf upon another's ground i. There is also a common of digging for coals, minerals, stones, and the like. All these bear a resemblance to common of pasture in many respects; though in one point they go much farther: common of pasture being only a right of feeding on the herbage and vesture of the soil, which renews annually; but common of turbary, and the rest, are a right of carrying away the very soil itself.

/e Co. Litt. 122.  
/f 20 Hen. III. c. 4. 29 Geo. II. c. 36. and 31 Geo. II. c. 41.  
/g 2 Inst. 474.  
/i Co. Litt. 122.

4. Common of estovers (from estosser, to furnish) is a liberty of taking necessary wood, for the use or furniture of a house or farm, from off another's estate. The Saxon word, bote, is of the same signification with the French estovers; and therefore house-bote is a sufficient allowance of wood, to repair, or to burn in, the house; which latter is sometimes called fire-bote: plough-bote and cart-bote are wood to be employed in making and repairing all instruments of husbandry: and hay-bote or hedge-bote is wood for repairing of hays, hedges, or fences. These botes or estovers must be reasonable ones; and such any tenant or lessee may take off the land let or demised to him, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary. /k
These several species of commons do all originally result from the same necessity as common of pasture; viz. for the maintenance and carrying on of husbandry: common of piscary being given for the sustenance of the tenant's family; common of turbary and fire-bote for his sue; and house-bote, plough-bote, cart-bote, and hedge-bote, for repairing his house, his instruments of tillage, and the necessary fences of his grounds.

IV. A fourth species of incorporeal hereditaments is that of ways; or the right of going over another man's ground. I speak not here of common ways, leading from a village into the fields; but of private ways, in which a particular man may have an interest and a right, though another be owner of the soil. This may be grounded on a special permission; as when the owner of the land grants to another a liberty of passing over his grounds, to go to church, to market, or the like: in which case the gift or grant is particular, and confined to the grantee alone; it dies with the person; and, if the grantee leaves the country, he cannot assign over his right to any other; nor

/k Co. Litt. 41.

can he justify taking another person in his company l. A way may be also by prescription; as if all the owners and occupiers of such a farm have immemorially used to cross another's ground: for this immemorial usage supposes an original grant, whereby a right of way thus appurtenant to land may clearly be created. A right of way may also arise by act and operation of law: for, if a man grants me a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives me a way to come at it; and I may cross his land for that purpose without trespass m. For when the law doth give any thing to one, it giveth impliedly whatsoever is necessary for enjoying the same n. By the law of the twelve tables at Rome, where a man had the right of way over another's land, and the road was out of repair, he who had the right of way might go over any part of the land he pleased: which was the established rule in public as well as private ways. And the law of England, in both cases, seems to correspond with the Roman o.

V. Offices, which are a right to exercise a public or private employment, and the fees and emoluments thereunto belonging, are also incorporeal hereditaments: whether public, as those of magistrates; or private, as of
bailiffs, receivers, and the like. For a man may have an estate in them, either to him and his heirs, or for life, or for a term of years, or during pleasure only: save only that offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice, for then they might perhaps vest in executors or administrators. Neither can any judicial office be granted in reversion; because, though the grantee may be able to perform it at the time of the grant, yet before the office falls he may become unable and insufficient: but ministerial offices may be so granted; for those may be executed by deputy. Also, by statute 5 and 6 Edw. VI. c. 16. no public office shall be sold, under pain of disability to dispose of or hold it. For the law presumes that he, who buys an office, will by bribery,

1 Finch. law. 31.
m Ibid. 63.
n Co. Litt. 56.
o Lord Raym. 725. 1 Brownl. 212. 2 Show. 28. 1 Jon. 297.
q 11 Rep. 4.

extortion, or other unlawful means, make his purchase good, to the manifest detriment of the public.

VI. Dignities bear a near relation to offices. Of the nature of these we treated at large in the former book: it will therefore be here sufficient to mention them as a species of incorporeal hereditaments, wherein a man may have a property or estate.

VII. Franchises are a seventh species. Franchise and liberty are used as synonymous terms: and their definition is s, a royal privilege, or branch of the king’s prerogative, subsisting in the hands of a subject. Being therefore derived from the crown, they must arise from the king’s grant; or, in some cases, may be held by prescription, which, as has been frequently said, presupposes a grant. The kinds of them are various, and almost infinite: I will here briefly touch upon some of the principal; premising only, that they may be vested in either natural persons or bodies politic; in one man, or in many: but the same identical franchise, that has before been granted to one, cannot be bestowed on another; for that would prejudice the former grant.
To be a county palatine is a franchise, vested in a number of persons. It is likewise a franchise for a number of persons to be incorporated, and subsist as a body politic, with a power to maintain perpetual secession and do other corporate acts: and each individual member of such corporation is also said to have a franchise or freedom. Other franchises are, to hold a court leet: to have a manor or lordship; or, at least, to have a lordship paramount: to have waiss, wrecks, estrays, treasure-trove, royal fish, so features, and deodands: to have a court of one's own, or liberty of holding pleas, and trying causes: to have the cognizance of pleas; which is a still greater liberty, being an exclusive right, so that no other court shall try causes arising within that jurisdiction: to have a bailiwick, or liberty exempt from the sheriff of the county, wherein the grantee only, and his officers, are to execute all process: to have a fair or market; with the right of taking toll, either there or at any other public places, as at bridges, wharfs, and the like; which tolls must have a reasonable clause of commencement, (as in consideration of repairs, or the like) else the franchise is illegal and void: or, lastly, to have a forest, chase, park, warren, or fishery, endowed with privileges of royalty; which species of franchise may require a more minute discussion.

As to a forest: this, in the hands of a subject, is properly the same thing with a chase; being subject to the common law, and not to the forest laws. But a chase differs from a park, in that it is not enclosed, and also in that a man may have a chase in another man's ground as well as his own; being indeed the liberty of keeping beasts of chase or royal game therein, protected even from the owner of the land, with a power of hunting them thereon. A park is an enclosed chase, extending only over a man's own grounds. The word park indeed properly signifies any enclosure; but yet it is not every field or common, which a gentleman pleases to surround with a wall or paling, and to stock with a herd of deer, that is thereby constituted a legal park: for the king's grant, or at least immemorial prescription, is necessary to make it so. Though now the difference between a real park, and such enclosed grounds, is in many respects not very material: only that it is unlawful at common law for any person to kill any beasts of park or chase, except such as possess these franchises of

r See Book I. ch. 12.
s Fiach. L. 164.
forest, chase, or park. Free-warren is a similar franchise, erected for 
preservation or custody (which the word signifies) of beasts and fowls of 
warren y; which, being ferae naturae, every one had a natural right to kill 
as he could:

u 2 Inst. 220.
v 4 Inst. 314.
w Co. Litt. 233. 2 Inst. 199. 11 Rep. 86.

1. These are properly buck, doe, fox martin, and roe; but in a common and 
legal sense extend likewise to all the beasts of the forest: which, besides the 
other, are reckoned to be hart, hind, hare, boar, and wolf, and in a word, 
all wild beasts of venary or hunting (Co. Litt. 233.)
2. The beasts are hares, conies, and roes: the fowls are either campestres, 
as partridges, sails, and quails; or sylvestres, as woodcocks and pheasants; 
or aqua tiles, as mallards and herons. (Ibid.)
but upon the introduction of the forest laws at the Norman conquest, as 
will be shewn hereafter, these animals being looked upon as royal game 
and the sole property of our savage monarchs, this franchise of free-
warren was invented to protect them; by giving the grantee a sole and 
exclusive power of killing such game, so far as his warren extended, on 
condition of his preventing other persons. A man therefore that has the 
franchise of warren, is in reality no more than a royal game-
keeper: but no 
man, not even a lord of a manor, cou 

z. This franchise is almost fallen into disregard, since the new statutes for 
preserving the game; the name being now chiefly preserved in gro 
unds 
that are set apart for breeding hares and rabbets. There are many 
instances of keen sportsmen in ancient times, who have sold their estates, 
and reserved the free-warren over another's ground a. A free fisbery, or 
exclusive right of fishing in a publi 

c. This opening was extended, by the second d and third d 
charters of Henry III, to those also that were fenced under Richard I; so 
that a franchise of free fishery ought now to be at least as old as the reign 
of Henry II. This differs from a several fishery; because he that has a
several fishery must also be the owner of the soil, which in a free fishery is not requisite. It differs also from a common of piscary before-mentioned, in that

z Salk. 637.
a Bro. Abr. tit. Warren. 3.
c cap. 47. edit. Oxon.
d cap. 20.
e 9 Hen. III. c. 16.

free fishery is an exclusive right, the common of piscary is not so: and therefore, in a free fishery, a man has a property in the fish before they are caught; in a common of piscary, not till afterwards f. Some indeed have considered a free fishery not as a royal franchise, but merely as a private grant of a liberty to fish in the several fishery of the grantor g. But the considering such right as originally a flower of the prerogative, till restrained by magna carta, and derived by royal grant (previous to the reign of Richard I.) to such as now claim it by prescription, may remove some difficulties in respect to this matter, with which our books are embarassed.

VIII. Corodies are a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance h. In lieu of which (especially when due from ecclesiastical persons) a pension or sum of money is sometimes substituted i. And these may be reckoned another species of incorporeal hereditaments; though not chargeable on, or issuing from, any corporeal inheritance, but only charged on the person of the owner in respect of such his inheritance. To these may be added,

IX. Annuities, which are much of the same nature; only that these arise from temporal, as the former from spiritual, persons. An annuity is a thing very distinct from a rent-charge, with which it is frequently confounded: a rent-charge being a burden imposed upon and issuing out of lands, whereas an annuity is a yearly sum chargeable only upon the person of the grantor j. Therefore, if a man by deed grant to another the sum of 20l. per annum, without expressing out of what lands it shall issue, no land at all shall be charged with it; but it is a mere personal annuity: which is of so little account in the law, that, if granted to an eleemosynary corporation, it
is not within the statutes of mort main \( k \); and yet a man may have a real estate in it, though his security is merely personal.

\( f \) F. N. B. 88. Salk, 637.  
\( g \) a Sid. 8.  
\( h \) Finch. L. 162.  
\( i \) See Book I. ch. 8.  
\( j \) Co. Litt. 144.  
\( k \) Ibid. 2.

X. Rents are the last species of incorporeal hereditaments. The word, rent, or render, reditus, signifies a compensation, or return; it being in the nature of an acknowledgement given for the possession of some corporeal inheritance \( l \). It is defined to be a certain profit issuing yearly out of lands and tenements corporeal. It must be a profit; yet there is no occasion for it to be, as it usually is, a sum of money: for spurs, capons, horses, corn, and other mantes may be rendered, and frequently are rendered, by way of rent \( m \). It may also consist in services or manual operations; as, to plough so many acres of ground, to attend the king or the lord to the wars, and the like; which service in the eye of the law are profits. This profit must also be certain; or that which may be reduced to a certainty by either party. It must also issue yearly; though there is no occasion for it to issue every successive year; but it may be reserved every second, third, or fourth year \( n \): yet, as it is to be produced out of the profits of lands and tenements corporeal, as a recompose for being permitted to hold and enjoy them, it ought to be reserved yearly, because those profits do annually arise and are annually renewed. It must issue out of the thing granted, and not be part of the land or thing itself; wherein it differs from an exception in the grant, which is always of part of the thing granted \( o \). It must, lastly, issue out of lands and tenements corporeal; that is, form some inheritance whereunto the owner or grantee of the rent may have recourse to distrein. Therefore a rent cannot be reserved out of an advowson, a common, an office, a franchise, or the like \( p \). But a grant of such annuity or sum may operate as a personal contract, and oblige the grantor to pay the money reserved, or subject him to an action of debt \( q \); though it doth not affect the inheritance, and is no legal rent in contemplation of law.

There are at common law \( r \) three manner of rents; rent-service, rent-charge, and rent-seck. Rent-
service is so called because it hath some corporal service incident to it, as at the least fealty, or the feodal oath of sidility. For, if a tenant holds his land by fealty, and ten shillings rent; or by the service of ploughing the lord's land, and five shillings rent; these pecuniary rents, being connected with personal services, are therefore called rent-service. And for these, in case they be behind, or arrere, at the day appointed, the lord may distrein of common right, without reserving any special power of distress; provided the hath in himself the reversion, or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired. A rent-charge, is where the owner of the rent hath no future interest, or reversion expectant in the land; as where a man by deed maketh over to others his whole estate in fee simple, with a certain rent payable there out, and adds to the deed a covenant or clause of distress, that if the rent be arrere, or behind, it shall be lawful to distrein for the same. In this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed: and therefore it is called a rent-charge, because in this manner the land is charged with a distress for the payment of it. Rent-seck, reditus siccus, or barren rent, is in effect nothing more than a rent reserved by deed, but without any clause of distress.

There are also other species of rents, which are reducible to these three. Rents of assise are the certain established rents of the freeholders and ancient copyholders of a manor, which cannot be parted from or varied. Those of the freeholders are frequently called chief rents, reditus capitals; and both sorts are indifferently denominated quit rents, quieti redivtus; because thereby the tenant goes quit and free of all other services. When these payments were reserved in silver or white money, they were anciently called white-rents, or blanch-farms, reditus albi; in contradistinction to rents reserved in work, grain, &c. which were

s Co. Litt. 142.
In Scotland this kind of small payment is called blench-holding, or reditus albas firmae.

called reditus nigri, or black-maile y. Reck-rent I only a rent of the full value of the tenement, or near it. A feefarm-rent is a rent-charge issuing out o an estate in fee; of at least one fourth of the value of the lands, at the time of its reservation z: for a grant of lands, reserving so considerable a rent, is indeed only letting lands to farm in fee simple instead of the usual methods for life or years.

These are the general divisions of rent; but the difference between them (in respect to the remedy for recovering them) is now totally abolished; and all persons may have the like remedy by distress for rents-seck, rents of assise, and chief-rents, as in casé of rents reserved upon lease a.

Rent is regularly due and payable upon the land srom whence it issues, if no particular place is mentioned in the reservation b: but, in case of the king, the payment must be either to his officers at the exchequer, or to his receiver in the country c. And, strictly, the rent is demandable and payable before the time of sunset of the day whereon it is reserved d; though some have thought it not absolutely due till midnight e.

With regard to the original of rents, something will be said in the next chapter: and, as to distresses and other remedies for their recovery, the doctrine relating thereto, and the several proceedings thereon, these belong properly to the third part of our commentaries, which will treat of civil injuries, and the means whereby the are redressed.

y 2 Inst. 19.
z Co. Litt. 143.
a Stat. 4 Geo. II. c. 28.
b Co. Litt. 201.
c 4 Rep. 73.
d Adners. 253.
e 1 Saund. 287. 1 Chan. Prec. 555.
Chapter the Fourth.
Of the Feodal System.

It is impossible to understand, with any degree of accuracy, either the civil constitution of this kingdom, or the laws which regulate its landed property, without some general acquaintance with the nature and doctrine of feuds, or the feodal law: a system so universally received throughout Europe, upwards of twelve centuries ago, that sir Henry Spelman a does not scruple to call it the law of nations in our western world. This chapter will be therefore dedicated to this inquiry. And though, in the course of our observations in this and many other parts of the present book, we may have occasion to search pretty highly into the antiquities of our English jurisprudence, yet surely no industrious student will imagine his time mis-employed, when he is led to consider that the obsolete doctrines of our laws are frequently the foundation, upon which what remains is erected; and that it is impracticable to comprehend many rules of the modern law, in a scholarlike scientifical manner, without having recourseto the ancient. Nor will these researches be altogether void of rational entertainment as well as use: as in viewing the majestic ruins of Rome or Athens, of Balbec or Palmyra, it administers both pleasure and instruction to compare them with the draughts of the same edifices, in their pristine proportion and splendor.

a of parliaments. 57.

The constitution of feuds b had its original from the military policy of the northern or Celtic nations, the Goths, the Hunns, the Franks, the Vandals, and the Lombards, who all migrating from the same officina gentium, as Crag very justly entitles it c, poured themselves in vast quantities into all the regions of Europe, at the declension of the Roman empire. It was brought by them from their own countries, and continued in their respective colonies as the most likely means to secure their new acquisitions: and, to that end, large districts or parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again in smaller parcels or allotments to the inferior officers and most deserving soldiers d. These allotments in the northern languages e signifies a conditional stipend or reward f. Rewards or stipends they evidently were; and the condition annexed to them was, that the possessor should do service faithfully, both at home and in the wars, to him by whom they were given; for which purpose he took the juramentum
sidelitatis, or oath of fealty g: and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them h.

Allotments thus acquired, naturally engaged such as accepted them to defend them: and, as they

b See Spelman of feuds, and Wright of tenures, per tot.
c De jure feod. 19, 20.
d Wright: 7.
e Spelm. Gl. 216.

1. Pontoppidan in his history of Norway (page 290) observes, that in the northern languages odh signifies proprietas and all totum. Hence he derives the odhal right in those countries; and hence too perhaps is derived the udal right in Finland, &c. (See Mac Doual. Inst. Part. 2.) Now the transposition of these northern syllables, allodh, will give us the true etymology of the allodium, or absolute property of the feudists; as, by a similar combination of the latter syllable with the word see (which signifies, we have seen, a conditional reward or stipend) feeodh or feodum will denote stipendiary property.
g See this Oath explained at large in Feud. l. 2. t. 7.
h Feud. l. 2. t. 24.

all sprang from the same right of conquest, no part could subsist independent of the whole; wherefore all givers as well as receivers were mutually bound to defend each others possessions. But, as that could not effectually be done in a tumultuous irregular way, government, and to that purpose subordination, was necessary. Every receiver of lands, or feudatory, was therefore bound, when called upon by his benefactor, or immediate lord of his feud or fee, to do all in his power to defend him. Such benefactor or lord was likewise subordinate to and under the command of his immediate benefactor or superior; and so upwards to the prince or general himself. And the several lords were also reciprocally bound, in their respective gradations, to protect the possessions they had given. Thus the feodal connection was established, a proper military subjection was naturally introduced, and an army of feudatories were always ready enlisted, and mutually prepared to muster, not only in defence of each man's own several property, but also in defence of the whole, and of every part of this their newly acquired country i: the
prudence of which constitution was soon sufficiently visible in the strength and spirit, with which they maintained their conquests.

The universality and early use of this feodal plan, among all those nations which in complaisance to the Romans we still call barbarous, may appear from what is recorded k of the Cimbri and Teutones, nations of the same northern original as those whom we have been describing, at their first eruption into Italy about a century before the christian era. They demanded of the Romans, ut martius populus aliquid fibi terrae daret, quafi ftipendi-dium: caeterum, ut vellet, minibus atque armis fuis uteretur. The sense of which may be thus rendered; they desired stipendiary lands (that is, feuds) to be allowed them, to be held by military and other personal services, whenever their lords should call upon them. This was evidently the same constitution, that displayed itself more fully about seven hundred years afterwards; when the Salii, Burgundians, and Franks broke in upon Gaul,

i Wright. 8,
k L. Florus. l. 3. c. 3.

the Visigoths on Spain, and the Lombards upon Italy, and introduced with themselves this northern plan of polity, serving at once to protect, the territories they had newly gained. And from hence it is probable that the emperor Alexander Severus took the hint, of dividing lands conquered from the enemy among his generals and victorious soldiery, on condition of receiving military service from them and their heirs for ever.

Scarce had these northern conquerors established themselves in their new dominions, when the wisdom of their constitutions, as well as their personal valour, alarmed all the princes of Europe; that is, of those countries which had formerly been Roman provinces, but had revolted, or were deserted by their old masters, in the general wreck of the empire. Wherefore most, if not all, of them thought it necessary to enter into the same or a similar plan of policy. For whereas, before, the possessions of their subjects were perfectly allodial; (that is, wholly independent, and held of no superior at all) now they parcelled out their royal territories, or persuaded their subjects to surrender up and retake their own landed property, under the like feodal obligation of military fealty m. And thus, in the compass of a very few years, the feodal constitution, or the doctrine of tenure, extended itself over all the western world. Which alteration of
landed property, in so very material a point, necessarily drew after it an alteration of laws and customs: so that the feudal laws soon drove out the Roman, which had hitherto universally obtained, but now became for many centuries lost and forgotten; and Italy itself (as some of the civilians, with more spleen than judgment, have expressed it) belluinas, atque ferinas, immanefque Longobardorum leges accepit n.

1.Sola, quae de hostibus capta sunt, limi-taneis ducibus et militibus donavit; ita ut corum ita essent, si hae redes illorum militarent, nec unquam ad privates pertinent: dicens attentius illos militaturos, si etiam fua ruradefenderent. Addidit fane his et animalia etservos, ut possent colere quod acceperant; neppe inopiam hominum vel per senectutum deferrentur rura vicina barbariae, quod turpif-femum ille ducebat. (Æl. Lamprid. In vita Alex. Severi.)

m Wright. 10.

n Gravin. Orig. l. 1. 139.

But this feudal polity, which was thus by degrees established over all the continent of Europe, seems not to have been received in this part of our island, at least not universally and as a part of the national constitution, till the reign of William the Norman o. Not but that it is reasonable to believe, from abundant traces in our history and laws, that even in the times of the Saxons, who were a swarm from what sir William Temple calls the same northern hive, something similar to this was in use: yet not so extensively, nor attended with all the rigor that was afterwards imported by the Normans. For the Saxons were firmly settled in this island, at least as early as the year 600: and it was not till two centuries after, that sueds arrived to their full vigor and maturity, even on the continent of Europe p.

This introduction however of the feudal tenures into England, by king William, does not seem to have been effected immediately after the conquest, nor by the mere arbitrary will and power of the conqueror; but to have been consented to by the great council of the nation long after his title was established. Indeed from the prodigious slaughter of the English nobility at the battle of Hastings, and the fruitless insurrections of those who survived, such numerous forfeitures had accrued, that he was able to reward his Norman followers with very large and extensive possessions: which gave a handle to the monkish historians, and such as have implicitly followed them, to represent him as having by right of the sword seised on
all the lands of England, and dealt them out again to his own favourites. A
supposition, grounded upon a mistaken sense of the word conquest;
which, in its feodal acceptation, signifies no more than acquisition: and
this has led many hasty writers into a strange historical mistake, and one
which upon the slightest examination will be found to be most untrue.
However, certain it is, that the Normans now began to gain very large
possessions in England: and their regard for the feodal law, under which
they

p Crag. l. 1. t. 4.

had long lived, together with the king's recommendation of this policy to
the English, as the best way to put themselves on a military footing, and
thereby to prevent any future attempts from the continent, were probably
the reasons that prevailed to effect its establishment here. And perhaps we
may be able to ascertain the time of this great revolution in our landed
property with a tolerable degree of exactness. For we learn from the Saxon
Chronicle q, that in the nineteenth year of king William's reign an invasion
was apprehended from Denmark; and the military constitution of the
Saxons being then laid aside, and no other introduced in its stead, the
kingdom was wholly defenceless: which occasioned the king to bring over
a large army of Normans and Bretons, who were quartered upon every
landholder, and greatly oppressed the people. This apparent weakness,
together with the grievances occasioned by a foreign force, might co-
operation with the king's remonstrances, and the better encline the
nobility to listen to his proposals for putting them in a posture of defence.
For, as soon as the danger was over, the king held a great council to
inquire into the state of the nation r; the immediate consequence of which
was finished in the next year: and in the latter end of that very year the
king was attended by all his nobility at Sarum; where all the principal
landholders submitted their lands to the yoke of military tenure, became
the king's vasals, and did homage and fealty to his person s. This seems to
have been the era of formally introducing the feodal tenures by law; and
probably the very law, thus made at the council of Sarum, is that which is
still extant t, and couched in these remarkable words:ftatuimus, ut omnes
liberihominess foedere et facramento affirment, quod intra et extra uni-
versum regnum Angliae Wilhelmo regi domino fuo sideled esse
volunt;terras et honores illius omni sidelitate ubique servare cum eo, et


t cap. 52. Wilk. 228.

contra inimicos et alienigenas defendere. The terms of this law (as Martin Wright has observed) are plainly feudal: for, first, it requires the oath of fealty, which made in the sense of the feudists every man that took it a tenant or vassal; and, secondly, the tenants obliged themselves to defend their lord's territories and titles against all enemies foreign and domestic. But what puts the matter out of dispute is another law of the same collection, which exacts the performance of the military feudal services, as ordained by the general council. Omnes comites, et barones, et milites, et servientes, et universi liberi homines totiusregni noftri praedicti, habeant et tenoant fe femper bene in armis et in equis, ut decet et oportet: et fint femper prompti et bene paratiad servitium sum integrum nobis expleendum et peragendum cumopus suerit; secundum quod nobis debent de feodis et tenementis suis 'de jure facere; et ficit illis ftatuimus per commune concilium totiusregni noftri praedicti.

This new polity therefore seems not to have been imposed by the conqueror, but nationally and freely adopted by the general assembly of the whole realm, in the same manner as other nations of Europe had before adopted it, upon the same principle of self-security. And, in particular, they had the recent example of the French nation before their eyes; which had gradually surrendered up all its alodial or free lands into the king's hands, who restored them to the owners as a beneficium or feud, to be held to them and such of their heirs as they previously nominated to the king: and thus by degrees all the alodial estates of France were converted into feuds, and the freemen became the vasals of the crown. The only difference between this change of tenures in France, and that in England, was, that the former was effected gradually, by the consent of private persons; the latter was done at once, all over England, by the common consent of the nation.
1. Pharaoh thus acquired the dominion of all the lands in Egypt, and granted them out to the Egyptians, reserving an annual render of the fifth part of their value. (Gen. c. 47.)

In consequence of this change, it became a fundamental maxim and necessary principle (though in reality a mere fiction) of our English tenures, that the king is the universal lord and original proprietor of all the lands in his kingdom; and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feudal services. For, this being the real case in pure, original, proper feuds, other nations who adopted this system were obliged to act upon the same supposition, as a substruction and foundation of their new polity, though the fact was indeed far otherwise. And indeed by thus consenting to the introduction of feudal tenures, our English ancestors probably meant no more than to put the kingdom in a state of defence by establishing a military system; and to oblige themselves (in respect of their lands) to maintain the king’s title and territories, with equal vigor and fealty, as if they had received their lands from his bounty upon these express conditions, as pure, proper, beneficiary feudalatories. But, whatever their meaning was, the Norman interpreters, skilled in all the niceties of the feudal constitutions, and well understanding the import and extent of the feudal terms, gave a very different construction to this preceding; and thereupon took a handle to introduce not only the rigorous doctrines which prevailed in the duchy of Normandy, but also such fruits and dependencies, such hardships and services, as were never known to other nations; as if the English had in fact, as well as theory, owed every thing they had to the bounty of their sovereign lord.

Our ancestors therefore, who were by no means beneficiaries, but had barely consented to this fiction of tenure from the crown, as the basis of a military discipline, with reason looked upon these deductions as grievous impositions, and arbitrary conclusions from principles that, as to them, had no foundation in truth. However, this king, and his son William Rufus, kept up with
a high hand all the rigors of the feodal doctrines: but their successors, Henry I, found it expedient, when he set up his pretensions to the crown, to promise a restitution of the laws of king Edward the confessor, or ancient Saxon system; and accordingly, in the first year of his reign, granted a charter whereby the gave up the greater grievances, but still reserved the fiction of feodal tenure, for the same military purposes which engaged his father to introduce it. But this charter was gradually broke through, and the former grievances were revived and aggravated, by himself and succeeding prince; till in the reign of king John they became so intolerable, that they occasioned his barons, or principal feudatories, to rife up in arms against him: which at length produced the famous great charte at Runing-mead, which, with some alterations, was confirmed by his son Henry III. And, though its immunities (especially as altered on its last edition by his son c) are very greatly short of those granted by Henry I, it was justly esteemed at the time a vast acquisition to English liberty. Indeed, by the farther alteration of tenures that has since happened, many of these immunities may now appear, to a common observer, of much less consequence than they really were when granted: but this, properly considered, will shew, not that the acquisitions under John were small, but that those under Charles were greater. And from hence also arises another inference; that the liberties of Englishmen are not (as some arbitrary writers would represent them) mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakness; but a restoration of that ancient constitution, of which our ancestors had been defrauded by the art and finesse of the Norman lawyers, rather than deprived by the force of the Norman arms.

Having given this short of their rife and progress, we will next consider the nature, doctrine, and principal laws of feuds; wherein we shall evidently trace the groundwork of many parts of our public polity, and also the original of such of our

b LL. Hen. I. c. 3.
c 9 Hen. III.

own tenures, as were either abolished in the last century, or still remain in force.
The grand and fundamental maxim of all feudal tenure is this; that all lands were originally granted out by the sovereign, and are therefore holden, either mediately or immediately, of the crown. The grantor was called the proprietor, or lord; being he who retained the dominion or ultimate property of the feud or fee: and the grantee, who had only the use and possession, according to the terms of the grant, was styled the feudal or vasal, which was only another name for the tenant or holder of the lands; though, on account of the prejudices we have justly conceived against the doctrines that were afterwards grafted on this system, we now use the word vasal opprobriously, as synonymous to slave or bondman. The manner of the grant was by words of gratuitous and pure donation, dedi et conceffi; which are still the operative words in our modern infeodations or deeds of feoffment. This was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession in the presence of the other vasaals, which perpetuated among them the era of the new acquisition, at a time when the art of writing was very little known: and therefore the evidence of property was reposed in the memory of the neighbourhood; who, in case of a disputed title, were afterwards called upon to decide the difference, not only according to external proofs, adduced by the parties litigant, but also by the internal testimony of their own private knowledge.

Besides an oath of fealty, or profession of faith to the lord, which was the parent of our oath of allegiance, the vasal or tenant upon investiture did usually homage to his lord; openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between those of the lord, who sat before him. And there professing that he did become honour: and then he received a kiss from his lord d. Which ceremony was denominated homagium, or manhood, by the feudists, from the stated form of words, devenio vester homo. /e

When the tenant had thus professed himself to be the man of his superior or lord, the next consideration was concerning the service, which, as such, he was bound to render, in ecompense for the land he held. This, in pure, proper, and original feuds, was only twosold: t follow, or do suit to, the
lord in his courts in time of peace; and in his armies or warlike retinue, when necessity called him to the field. The lord was, in early times, the legislator and judge over all his feudatories: and therefore the vasals of the inferior lords were bound by their fealty to attend their domestic courts baron \( f \), (which were instituted in every manor or barony, for doing speedy and effectual justice to all the tenants) in order as well to answer such complaints as might be alleged against themselves, as to form a jury or homage for the trial of their fellow-tenants; and upon this account, in all the feudal institutions both here and on the continent, they are distinguished by the appellation of the peers of the court; pares curtis, or pares curiae. In like manner the barons themselves, or lords of inferior districts, were denominated peers of the king's court, and were bound to attend him upon summons, to hear causes of greater consequence in the king's presence and under the direction of his grand justiciary; till in many countries the power of that officer was broken and distributed into other courts of judicature, the peers of the king's court still reserving to themselves (in almost every feudal government) the right of appeal from those subordinate courts in the last resort. The military branch of service consisted in attending the lord to the wars, if called upon, with such a retinue, and for such a number of days,

1. It was an observation of Dr. Arbuthnot, that tradition was no where preserved so pure and incorrupt as among children, whose games and plays are delivered down invariably from one generation to another. (Warburton's notes on Pope. vi. 134. 80.) Perhaps it may be thought puerile to observe (in confirmation of this remark) that in one of our ancient pastimes (the bafilinda of Julius Pollux, Onomaftic. l. 9.c. 7.) the ceremonies and language of feudal homage are preserved with great exactness.

\( f \) Feud. l. 2. t. 55.

as were stipulated at the first donation, in proportion to the quantity of the land.

At the first introduction of feuds, as they were gratuitous, so also they were precarious and held at the will of the lord \( g \), who was the sole judge whether his vassal performed his services faithfully. Then they became certain, for one or more years. Among the ancient Germans they continued only from year to year; an annual distribution of lands being made by their
leaders in their general councils or assemblies h. This was professedly done, lest their thoughts should be diverted from war to agriculture; lest the strong should incroach upon the possessions of the weak; and lest luxury and avarice should be encouraged by the erection of permanent houses, and too curious an attention to convenience and the elegant superfluitics of life. But, when the general migration was pretty well over, and a peaceable possession of their new-acquired settlements had introduced new customs and manners; when the fertility of the soil had encouraged the study of husbandry, and an affection for the spots they had cultivated began naturally to arise in the tillers; a more permanent degree of property was introduced, and feuds began now to be granted for the life of the feudatory i. But still feuds were not yet hereditary; though frequently granted, by the favour of the lord, to the children of the former possessor; till in process of time it became unusual, and was therefore thought hard, to reject the heir, if he were capable to perform the services k: and therefore infants, women, and professed monks, who were incapable of bearing arms, were also incapable of succeeding to a genuine feud. But the heir, when admitted to the feud which his ancestor possessed, used generally to pay a fine or acknowledgement to the lord, in

g Feud. l. 1. t. 1.

1. Thus Tacitus: (de mor. Germ. c. 26.) agri ab universis per vices occupantur: arvaper annos mistant. And Caefar yet more fully; (de bell. Gall. l. 6. c. 21.) Nequequifquam agri modum certum, aut fines pro- prios habet; fed magiftratus et principes, inannis fingulos, gentibus et cognitionibus ho-minum qui una coierunt quantum cis et quo loco visum eft, attribuunt agri, ataue annopoft alio tranfire cogunt.
i Fend. l. t. 1.
k Wright. 14.

horses, arms, money, and the like, for such renewal of the sued: which was called a relief, because it re-established the inheritance, or, in the words of the feudal writers, incertam et cadu-cam hereditatem relevabat. This relief was afterwards, when feuds became absolutely hereditary, continued on the death of the tenant, though the original foundation of it had ceased.

For in process of time feuds came by degrees to be universally extended, beyond the life of the first vasal, to his sons, or perhaps to such one of them, as the lord should name; and in this case the form of the donation
was strictly observed: for if a feud was given to a man and his sons, all his sons succeeded him in equal portions; and as they died off, their shares reverted to the lord, and did not descend to their children, or even to their surviving brothers, as not being specified in the donation. But when such a feud was given to a man, and his heirs, in general terms, then a more extended rule of succession took place; and when a feudatory died, his male descendants in infinitum were admitted to the succession. When any such descendant, who thus had succeeded, died, his male descendants were also admitted in the first place; and, in defect of them, such of his male collateral kindred as were of the blood or lineage of the first feudatory, but no others. For this was an unalterable maxim in feudal succession, that none was capable of inheriting a feud, but suchas was of the blood of, that is, lineally descended from, the first feudatory. And the descent, being thus confined to males, originally extended to all the males alike; all the sons, without any distinction of primogeniture, succeeding to equal portions of the father's feud. but this being found upon many accounts inconvenient, (particularly, by dividing the services, and thereby weakening the strength of the feudal union) and honorary feuds (or titles of nobility) being now introduced, which were not of a divisible nature, but could only be inherited by the eldest son; in imitation of these, military feuds (or those we are now describing) began also in most countries to descend ac-

l Wright. 17.

m Ibid. 183.

n Feud. 2. t. 55.

cording to the same rule of primogeniture, to the eldest son, in exclusion of all the rest.

Other qualities of feuds were, that the feudatory could not alienate or dispose of his feud; neither could he exchange, nor yet mortgage, nor even devise it by will, without the consent of the lord. For, the reason of conferring the feud being the personal abilities of the feudatory to serve in war, it was not fit he should be at liberty to transfer this gift, either from himself, or his posterity who were presumed to inherit his valour, to others who might prove less able. And, as the feudal obligation was looked upon as reciprocal, the feudatory being entitled to the lord's protection, in return for his own fealty and service; therefore the lord could no more transfer his feignory or protection without consent of his vasal, than the
vasal could his feud without consent of his lord: it being equally unreasonable, that the lord should extend his protection to a person to whom he had exceptions, and that the vasal should owe subjection to a superior not of his own choosing.

These were the principal, and very simple, qualities of the genuine or original feuds; being then all of a military nature, and in the hands of military persons: though the feudatories, being under frequent incapacities of cultivating and manuring their own lands, soon found it necessary to commit part of them to inferior tenants; obliging them to such returns in service, corn, cattle, or money, as might enable the chief feudatories to attend their military duties without distraction: which returns, or reditus, were the original of rents. And by this means the feudal polity was greatly extended; these inferior feudatories (who held what are called in the Scots lawre-fiefs?) being under similar obligations of fealty, to do suit of court, to answer the stipulated renders or rent-service, and to promote the welfare of their immediate superiours or lords. But this at the same time demolished

/o Wright. 32.
/p Ibid. 29.
/q Ibid. 30.
/r Wright. 20.

the ancient simplicity of feuds; and an inroad being once made upon their constitution, it subjected them, in a course of time, to great varieties and innovations. Feuds came to be bought and sold, and deviations were made from the old fundamental rules of tenure and succession; which were held no longer sacred, when the feuds themselves no longer continued to be purely military. Hence these tenures began now to be divided into feoda propria et impropria, proper and improper feuds; under the former of which divisions were comprehended such, and such only, of which we have before spoken; and under that of improper or derivative feuds were comprised all such as do not fall within the other description: such, for instance, as were originally bartered and sold to the feudatory for a price; such as were held upon base or less honourable services, or upon a rent, in lieu of military service; such as were in themselves alienable, without mutual licence; and such as might descend indifferently either to males or females. But, where a difference was not expressed in the creation, such
new-created feuds did in all other respects follow the nature of an original, genuine, and proper feuds.

But as soon as the feudal system came to be considered in the light of a civil establishment, rather than as a military plan, the ingenuity of the same ages, which perplexed all theology with the subtility of scholastic disquisitions, and bewildered philosophy in the mazes of metaphysical jargon, began also to exert its influence on this copious and fruitful subject: in pursuance of which, the most refined and oppressive consequences were drawn from what originally was a plan of simplicity and liberty, equally beneficial to both lord and tenant, and prudently calculated for their mutual protection and defence. From this one foundation, in different countries of Europe, very different superstructures have been raised: what effect it has produced on the landed property of England will appear in the following chapters.

Chapter the Fifth.
Of the Ancient English Tenures.

In this chapter we shall take a short view of the ancient tenures of our English estates, or the manner in which lands, tenements, and hereditaments might have been holden; as the same stood in force, till the middle of the last century. In which we shall easily perceive, that all the particularities, all the seeming and real hardships, that attended those tenures, were to be accounted for upon feudal principles and no other; being fruits of, and deduced from, the feudal policy.

Almost all the real property of this kingdom is by the policy of our laws supposed to be granted by, dependent upon, and holden of some superior or lord, by and in consideration of certain services to be rendered to the lord by the tenant or possessor of this property. The thing holden is therefore styled a tenement, the possessors thereof tenants, and the manner of their possession a tenure. Thus all the land in the kingdom is supposed to be holden, mediately or immediately, of the king; who is styled the lord paramount, or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king; and, thus partaking of a middle nature, were called mesne, or middle, lords. So that if the king granted a
manor to A, and he granted a portion of the land to B, now B was said to hold of A, and A of the king; or, in other words, B held his lands immediately of A, but mediately of the king. The king therefore was styled lord paramount; A was both tenant and lord, or was a mesne lord; and B was called tenant paravail, or the lowest tenant; being he who is supposed to make avail, or profit, of the land a. In this manner are all the lands of the kingdom held, which are in the hands of subjects: for, according to sir Edward Coke b, in the law of England we have not properly allodium; which, we have seen c, is the name by which the feudists abroad distinguish such estates of the subject, as are not holden of any superior. So that at the first glance we may observe, that our lands are either plainly feuds, or partake very strongly of the feudal nature.

All tenures being thus derived, or supposed to be derived, from the king, those that held immediately under him, in right of his crown and dignity, were called his tenants in capite, or in chief; which was the most honourable species of tenure, but at the same time subjected the tenants to greater and more burdensome services, than inferior tenures did d. This distinction ran through all the different sorts of tenure, of which I now proceed to give an account.

I. There seem to have subsisted among our ancestors four principal species of lay tenures, to which all others may be reduced: the grand criteria of which were the natures of the several services or renders, that were due to the lords from their tenants. The services, in respect of their quality, were either free or base services; in respect of their quantity and the time of exacting them, were either certain or uncertain. Free services such as were not unbecoming the character of a soldier, or a free-

a 2 Inst. 296.
b 1 Inst. L.
c pag. 47.

1. In the Germanic constitution, the electors, the bishops, the secular princes, the imperial cities, &c, which hold directly from the emperor, are called the immediate states of the empire; all other landholders being denominated mediate ones. Mod. Un. Hist. xlii. 61.

man, to perform; as to serve under his lord in the wars, to pay a sum of money, and the like. Base services were such as were fit only for peasants,
or persons of a servile rank; as to plough the lord's land, to make his hedges, to carry out his dung, or other mean employments. The certain services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence; as, to pay a stated annual rent, or to plough such a field for three days. The uncertain depended upon unknown contingencies; as to do military service in person, or pay an assessment in lieu of it, when called upon; or to wind a horn whenever the Scots invaded the realm; which are free services: or to do whatever the lord should command; which is a base or villein service.

From the various combinations of these services have arisen the four kinds of lay tenure which subsisted in England, till the middle of the last century; and three of which subsist to this day. Of these Bracton (who wrote under Henry the third) seems to give the clearest and most compendious account, of any author ancient or moderne; of which the following is the outline or abstract f.Tenements are of two kinds, frank-tenement, and villenage. And, of frank-tenements, some are held freely inconsideration of homage and knight-service; others in free-focage with the service of fealty only. And again, of villenages, some are pure, and others privileged. He that holds in pure-villenage shall do whatsoever is commanded him, and always bebound to an uncertain service. The other king of villenage is called villein-focage; and these villein-focmen do villein services, but such as are certain and determined. Of which the sense seems to be as follows: first, where the service was free, but uncertain, as military service with homage, that tenure was called

1. Tenementorum aliud liberum, aliud villenagium. Item, liberorum aliud tenetur libere pro homagio et servitio militari; aliud in libere focagio cum sidelitate tantum. I.
2. Villenagiorum aliud purum, alium privilegiatum. 2ui tenet in puro villenagio faciet quiequid ei praeceptum suerit, et femper tenobitur ad incerta. Aliud genus villenagii di itur villanum focagium; et hujusmodi villain focmannivillana faciunt servitia, fed certa et determinate. 5.

the tenure in chivalry, per servitium militare, or by knight-service.

Secondly, where the service was not only free, but also certain, as by fealty only, by rent and fealty, &c, that tenure was called liberum focagium, or free focage. These were the only free holdings or tenements; the others were villenous or servile: as, thirdly, where the service was base in its
nature, and uncertain as to time and quantity, the tenure was purum villenagium, absolute or pure villenage. Lastly, where the service was base in its nature, but reduced to a certainty, this was still villenage, but distinguished from the other by the name of privileged villenage, villenagium privilegiatum; or it might be still called focage (from the certainty of its services) but degraded by their baseness into the inferior title of villanum focagium, villein-focage.

I. The first, most universal, and esteemed the most honourable species of tenure, was that by knight-service, called in Latin servitium militare, and in law French chivalry, or service de chivaler, answering to the fief d'haubert of the Normans h, which name is expressly given it by the mirrour i. This differed in very few points, as we shall presently fee, from a pure and proper feud, being entirely military, and the genuine effect of the feudal establishment in England. To make a tenure by knight-service, a determinate quantity of land was necessary, which was called a knight's fee, feodum militare; the value of which, not only in the reign of Edward II k, but also of Henry II l, and therefore probably at its original in the reign of the conqueror, was stated at 20 l. per annum and a certain number of these knight's fees were requisite to make up a barony. And he who held this proportion of land to the wars for forty days in every year, if called upon: which attendance was his reditus or return, his rent or service, for the land he claimed to hold. If he held only half a knight's fee, he was only bound to attend twenty days, and so in proportion m. And there is reason to apprehend, that this ser-

h Spelm. Gloff. 219.
i c. 2. 27.
k Stat. de milit. 1. Edw. II. Co. Litt. 69.
l Glanvil. l.9. c. 4.
m Litt.95.

vice was the whole that our ancestors meant to subject themselves to; the other fruits and consequences of this tenure being fraudulently superinduced, as the regular (though unforeseen) appendages of the feudal system.

This tenure of knight-service had all the marks of a strict and regular feud: it was granted by words of pure donation, dedi et conceffi n; was transferred by investiture or delivering corporal possession of the land,
usually called livery of seisin; and was perfected by homage and fealty. It also drew after it these seven fruits and consequences, as inseparably incident to the tenure in chivalry; viz. aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheat: all which I shall endeavour to explain, and shew to be of feudal original.

I. Aids were originally mere benevolences granted by the tenant to his lord, in times of difficulty and distress; but in process of time they grew to be considered as a matter of right, and not of discretion. These aids were principally three: first, to ransom the lord's person, if taken prisoner; a necessary consequence of the feudal attachment and sirliness; insomuch that the neglect of doing it, whenever it was in the vasal's power, was, by the strict rigor of the feudal law, an absolute forfeiture of his estate.

Secondly, to make the lord's eldest son a knight; a matter that was formerly attended with great ceremony, pomp, and expense. This aid could not be demanded till the heir was fifteen years old, or capable of bearing arms; the intention of it being to breed up the eldest son, and heir apparent of the feignory, to deeds of arms and chivalry, for the better defence of the nation. Thirdly, to marry the lord's eldest daughter, by giving her a suitable portion: for daughters' portions were in those days extremely tender; few lords being able to save much out of their income for this purpose; nor could they acquire money by other means, being wholly conversant in matters of arms; nor, by the nature of their tenure, could they charge their lands with this, or any other incumbrances. From bearing their proportion to these aids no rank or profession was exempted: and therefore even the monasteries, till the time of their dissolution, contributed to the knighting of their founder's male heir (of whom their lands were holden) and the marriage of his female descendants.

And one cannot but observe, in this particular, the great resemblance which the lord and vasal of the feudal law bore to the patron and client of the Roman republic; between whom also there subsisted a mutual fealty, or engagement of defence and protection. With regard to the matter of
aids, there were three which were usually raised by the client; viz. to marry the patron's daughter; to pay his debts; and to redeem his person from captivity.

BUT besides these ancient feodal aids, the tyranny of lords by degrees exacted more and more; as, aids to pay the lord's debts, (probably in imitation of the Romans) and aids to enable him to pay aids or reliefs to his superior lord; from which last indeed the king's tenants in capite were, from the nature of their tenure, excused, as they held immediately of the king who had no superior. To prevent this abuse, king John's magna carta ordained, that no aids be taken by the king without consent of parliament, nor in any wife by inferior lords, save only the three ancient ones above mentioned. But this provision was omitted in Henry III's charter, and the same oppressions were continued till the 25 Edw. I; when the statute called confirmatio chartarum was enacted; which in this respect revived king John's charter, by ordaining that none but the ancient aids should be taken. But though the species of aids was thus restrained, yet the quantity of each aid remained arbitrary and uncertain. King John's charter indeed ordered, that all aids taken by inferior lords should be reasonable; and that the aids taken by the king of his tenants in capite should be settled by parliament. But they were never completely ascertained and adjusted till the statute Westm. 1.3 Edw. 1. c. 36. which fixed the aids of inferior lords at twenty shillings, or the supposed twentieth part of every knight's fee. For making the eldest son a knight, or marrying the eldest daughter; and the same was done with regard to the king's tenants in capite by statute 25 Edw. III. c 11. The other aid, for ransom of the lord's person, being not in its nature capable of any certainty, was therefore never ascertained.

2. Relief, relevium, was before mentioned as incident to every feodal tenure, by way of fine or composition with the lord for taking up the estate, which was lapsed or fallen in by the death of the last tenant. But, though reliefs had their original while feuds were only life-estates, yet they
continued after feuds became hereditary; and were therefore looked upon, very justly, as one of the greatest grievances of tenure: especially when, at the first, they were merely arbitrary and at the will of the lord; of that, if he pleased to demand an exorbitant relief, it was in effect to disinherit the heir. The English ill brooked this consequence of their new adopted policy; and therefore William the conqueror by his laws ascertained the relief, by directing (in imitation of the Danish heriots) that a certain quantity of arms and habiliments of war should be paid by the earls, barons, and va-vafours respectively; and, if the latter had no arms, they should pay 100 s. William Rufus broke through this composition, and again demanded arbitrary uncertain reliefs, as due by the feodal laws; thereby in effect obliging every heir to new-purchase or redeem his land: but his brother Henry I by the charter before-mentioned restored his father's law; and ordained, that the relief

/a cap. 15.
/b ibid. 14.
/c Wright. 99.
/d C. 22, 23, 24.
/e 2 Roll. Abr. 514.

To be paid should be according to the law so established, and not an arbitrary redemption. But afterwards, when, by an ordinance in 27 Hen. II. Called the assise of arms, it was provided that every mans, armour should descend to his heir, for defence of the realm; and it thereby became impracticable to pay these acknowledgements in arms, according to the laws of the conqueror, the composition was universally accepted so 100 s. for every knight’s fee; as we find it ever after established. But it must be remembered, that this relief was only then payable, if the heir at the death of his ancestor had attained his full age of one and twenty years.

3. PRIMER seisin was a feodal burden, only incident to the king's tenants in capite, and not to those who held of inferior or mesne lords. It was right which the king had, when any of his tenants in capite died seised of a knight's fee, to receive of the heir (provided he were of full age) one whole year's profits of the lands, if they were in immediate possession; and half a year's profits, if the lands were in reversion expectant on an estate for life. This seems to be little more than an additional relief: but grounded upon this feodal reason; that, by the ancient law of feuds, immediately upon a death of a vasal the superior was in titled to enter and take seisin or
possession of the land, by way of protection against intruders, till the heir appeared to claim it, and receive investiture: and, for the time the lord so held it, he was entitled to take the profits; and unless the heir claimed within a year and day, it was by the strict law a forfeiture d. This practice however seems not to have long obtained in England, if ever, with regard to tenures under inferior lords; but, as to the king's tenures in capite, this prima seisina was expressly declared, under Henry III and Edward II, to belong to the king by prerogative, in contradistinction to other lords c. And the king was intitled to enter and receive the whole profits of the land, till livery was

aHaeres non redimet terram fuam, ficutfaciebat tempore fratris mei, fed legitima etjusta relaxatione rekuabit cam. (Text. Reffens. Cap.34.)
bGlanv. 1. 9. c. 4. Litte. 112.
cCo. Litt.77.
dFend. 1. 2. 1. 24.
eState. Marlbr. C. 16. 17 Edw.11. c.3.

sued; which suit being commonly within a year and day next after the death of the tenant, therefore the king used to take at an average the first fruits, that is to say, one year's profits of the land f. And this afterwards gave a handle to the popes, who climed to be feodal lords of the church, to claim in like manner from every clergyman in England the first year's profits of his benefice, by way of primitiae, or first fruits.

4. THESE payments were only due if the heir was of full age; but if he was under the age of twenty one, being a male, or fourteen, being a female b, the lord was intitled to the ward-ship of the heir, and was called the guardian in chivalry. This wardship consisted in having the custody of the body and lands of such heir, without any account of he profits, till the age of twenty one in males, and sixteen in females. For the law supposed the heir-male unable to perform knight-service till twenty one; but as for the female, she was supposed capable at fourteen to marry, and then her husband might perform the service. The lord therefore had no wardship, if at the death of the acefctor the heirmale was of the full age of twenty one, or the heir-female of fourteen: yet, if she was then under fourteen, and the lord once had her in ward, he might keep her so till sixteen, by virtue of the statute of Westm. 1. 3Edw.1.c.22. the two additional years being given by the legislature for no other reason but merely to benefit the lord h.
THIS wardship, of far as it related to land, though it was not nor could be part of the low of feuds, so long as they were arbitrary, temporary, or for life only; yet, when they became hereditary, and did consequently often descend upon infants, who by reason of their age could neither perform nor stipulate for the services of the feud, does not seem upon feodal principles to have been unreasonable. For the wardship of the land, or custody of the feud, was retained by the lord, that he might out of the profits thereof provide a fit person to supply the infants's services,

fStaundf. Prerog.12.
h ibid.
blitt. 103.

Till he should be of age to perform them himself. And, if we consider a feud in its original import, as a stipend, fee, or reward for actual service, it could not be thought hard that the lord should withhold the stipend, to long as the service suspended. Though undoubtedly to our English ancestors, where such stipendiary do- nation was mere suppotition or figment, it carried abundance of hardship; and accordingly it was relieved by the charter of Henry I before- mentioned, which took this custody from the lord, and ordained that the custody, both of the land and the children, should belong to the widow or next of kin. But this noble immunity din not continue many years.

THE wardship of the body was a consequence of he wardship of the land; for he who enjoyed the infant's estate was the properest person to educate and maintain him in his infancy : and also, in a political view, the lord was most concerned to give his tenant a suitable education, in order to qualify him the better to perform those services which in his maturity he was bound to render.

WHEN the male heir arrived to the age of twenty one, or the heir-female to that of sixteen, they might sue out their livery or ousterlemain I ; that is, the delivery of their lands out their guardian's hands. For this they were obliged to pay a fine, namely, half a year's profits of the land; though this seems expressly contrary to magna carta k. However, in consideration of their lands having been so long in ward, they were excused all reliefs, and the king's tenants also all primer seisins i. In order to ascertain the profits that arose to the crown by these fruits of tenure, and to grant the heir his livery, the itinerant justices, or justices in eyre, had it formerly in charge to
make inquisition concerning them by a jury of the county \( m \), commonly
called an inquifitio poft mortem; which was instituted to enquire ( at the
death of any man of fortune) the value of his estate, the tenure by which it

I Co. Litt.77.
j Co.Litte. 77.
k 9 Hen.III. c. 3.
m Hoveden. Fub Ric. I.

Was holden, and who, and of what age, his heir was; thereby to ascertain
the relief and value of the primer seisin, or the wardship and livery
accruing to the king thereupon. A manner of proceeding that came in
process of time to be greatly abused, and at length an intolerable grivance;
it being one of the principal accusations against Empson and Dudley, the
wicked engines of Henry VII, that by colour of false inquisitions they
compelled many persons to sue out livery from the crown, who by no
means were tenants thereunto \( n \). And, afterwards, a court of wards and
liveries was erected \( o \), for conducting the same enquiries in amore solemn
and legal manner.

When the heir thus came of full age, provided he held a knight's fee, he
was to receive the order of knighthood, and was compellable to take it
upon him, or else pay a fine to the king. For, in those heroical times, no
person was qualified for deeds of arms and chivalry who had not received
this order, which was conferred with much preparation and solemnity. We
may plainly discover the footsteps of a similar custom in what Tacitus
relates of the Germans, who in order to qualify their young men to bear
arms, presented them in a full assembly with a shield and lance; which
ceremony, as was formerly hinted \( p \), is supposed to have been the original
of the feodal knighthood \( q \). This prerogative, of compelling the vasals to
be knighted, or to pay a fine, was expressly recognized in parliament, by
the statute de militibus, I Edw. II; was exerted as an expedient of raising
money by many of our best princes, particularly by Edward VI and queen
Elizabeth: but yet was the occasion of heavy murmurs when exerted by
Charles I: among whose many misfortunes it was, that neither himself nor
his people seemed able to distinguish between the arbitrary stretch, and
the legal exertion, of prerogative. However,

\( n \) 4 Inft. 198.
\( o \) Stat. 32 Hen. VIII. C.46.
Chapter the Fifth.
The Rights of Things.

Among the other concessions made by that unhappy prince, before the fatal recourse to arms, he agreed to divest himself of this undoubted flower of his crown, and it was accordingly abolished by statute 16 Car. I. c. 20.

5. But, before they came of age, there was still another piece of authority, which the guardian was at liberty to exercise over his infant wards; I mean the right of marriage, (maritagium, as contradistinguished from matrimonium) which in its feudal sense signifies the power, which the lord or guardian in chivalry had of disposing of his infant ward in matrimony. For, while the infant was in ward, the guardian had the power of tendering him or her a suitable match, without disparagement, or inequality: which if the infants refused, they forfeited the value of the marriage, valorem maritagii, to their guardian r; that is, so much as a jury would assess, or any one would bona side give to the guardian for such an alliance s: and, if the infants married themselves without the guardian's consent, they forfeited double the value, duplicem valorem maritagii t. This seems to have been of the greatest hardships of our ancient tenures. There are indeed substantial reasons why the lord should have the restraint and control of the ward's marriage, especially of his female ward; because of their tender years, and the danger of such female ward's intermarrying with the lord's enemy u. But no tolerable pretence could be assigned why the lord should have the sale, or value, of the marriage. Nor indeed is this claim of strictly feudal original; the most probable account of it seeming to be this: that by the custom of Normandy the lord's consent was necessary to the marriage of his female-wards w; which was introduced into England, together with the rest of the Norman doctrine of feuds: and it is likely that the lords usually took money for such their consent, since in the often-cited charter of Henry the first, he engages for the future to take
nothing for his consent; which also he promises in general to give, provided such

rLitt. 110.
uLitt. 110.
uBract. 1.2. c. 37. 6.
wGr.Cuft. 55.

female ward were not married to his enemy. But this, among other beneficial parts of that charter, being disregarded, and guardians still continuing to dispose of their wards in a very arbitrary unequal manner, it was provided by king John's great charter, that heirs should be married without disparagement, the next of kin having previous notice of the contract; or, as it was expressed in the first draught of that charter, ita maritentur ne dif-paragentur, et per conilum propinquorum de confanguinitate sua. But these clauses in behalf of the relations were omitted in the charter of Henry III; wherein the clauses stands merely thus, heredes maritentur absque discharge trom. meaning certainly, by found of the lord's claiming the marriage of heirs male; and as Glanvil expressly confines it to heirs female. But the king and his great lords thenceforward took a handle from the ambiguity of this expression to claim them both, five fit mafculus five foe mina, as Bracton more than once expresses it; and also, as nothing but disparagement was restrained by magna carta, they thought themselves at liberty to make all other advantages that they could. And afterwards this right, of selling the ward in marriage or else receiving the price or value of it, was expressly declared by the statute of Merton; which is the first direct mention of it that I have met with, in our own or in any other law.

6. ANOTHER attendant or consequence of tenure by knight-service was that of fines due to the lord for every alienation, whenever the tenant had occasion to make over his land to another. This depended on the nature of the feodal connexion; it not being reasonable nor allowed, as we have before seen, that a feudatory should transfer his lord's gift to another, and substitute a new tenant to do the service in his own stead, without the consent of the lord: and, as the feodal obligation was considered as

x cap. 6.edit.Oxon.
reciprocal, the lord also could not alienate his feignory without the consent of his tenant, which consent of his was called an attornment. This restraint upon the lords soon wore away; that upon the tenants continued longer. For, when every thing came in process of time to be bought and sold, the lords would not grant a licence to their tenants to aliene, without a fine being paid, apprehending that, if it was reasonable for the heir to pay a fine or relief on the renovation of his paternal estate, it was much more reasonable that a stranger should make the same acknowledgement on his admission to a newly purchased feud. With us in England, these fines seem only to have been exacted from the king's tenants in capite, who were never able to aliene without a licence: but, as to common persons, they were at liberty, by magna carta e, and the statute of quia emptores f, (if not earlier) to aliene the whole of their estate, to be holden of the same lord, as they themselves held it of before. But the king's tenants in capite, not being included under the general words of these statutes, could not alienate without a licence: for if they did, it was in ancient strictness an absolute forfeiture of the lands g; though some have imagined otherwise. But this severity was mitigated by the statute I Edw. III.c.12. which ordained, that in such case the lands should not be forfeited, but a reasonable fine be paid to the king. Upon which statute it was settled, that one third of the yearly value should be paid for a licence of alienation; but, if the tenant presumed to aliene without a licence, a full year's value should be paid h.

7. THE last consequence of tenure in chivalry was escheat; which is the determination of the tenure, or dissolution of the mutual bond between the lord and tenant, from the extinction of the blood of the latter by either natural or civil means: if he died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony; whereby every inheritable quality was entirely blotted out and abolished. In such
cases the land escheated, or fell back, to the lord of the see i; that is, the
tenure was determined by breach of the original condition, expressed or
implied in the feodial donation. In the one case, there no heirs subsisting of
the blood of the first feudatory or purchaser, to which heirs alone the grant
of the feud extended: in the other, the tenant, by perpetrating an atrocious
crime, shewed that he was no longer to be trusted as a vasal, having
forgotten his duty as a subject; and therefore forfeited his feud, which he
held under the implied condition that he should not be traitor or a felon.
The consequence of which in both cases was, that the gift, being
determined, resulted back to the lord who gave it k.

THESE were the principal qualities, fruits, and consequences of the tenure
by knight-service: a tenure, by which the greatest part of the lands in this
kingdom were holden, and that principally of the king in capite, till the
middle of he last century; and which was created, as sir Edward Coke
expressly testifies l, for a military purpose; viz. for defence of he realm by
the king's own principal subjects. Which was judged to be much better
than to trust to hirelings or foreigners. The description here given is that of
knight-service proper; which was to attend the king in his wars. There
were also some other species of knight-service; of called, though
improperly, because the service or render was of a free and honourable
nature, and equally uncertain as to the time of rendering as that of knight-
service proper, and because they were attended with similar fruits and
consequences. Such was the tenure by grand serjeanty, per magnum
servitium, whereby the tenant was bound, instead of serving t he king
generally in wars, to do some special honorary service to the king in
person; as to carry his banner, his sword, or the like; or to be his butler,
champion, or other officer at his coronation m. It was in most other
respects like knight-service n; only he was

l Co. Litt.13.
k Feud.1.2.t.86.
l 4 Inst.192.
m Litt. 153.
n Ibid. 158.
not bound to pay aid o, or escuage p; and, when tenant by knight-service
paid five pounds for a relief on every knight's fee, tenant by grand
serjeanty paid one year's value of his land, were it much or little q. Tenure
by cornage, which was, to wind a horn when the Scots or other enemies
entered the land, in order to warn the king's subjects, was (like other
services of the same nature) a species of grand serjeanty r.

THESE services, both of chivalry and grand serjeanty, were all personal,
and uncertain as to their quantity or duration. But the personal attendance
in knight-service growing troublesome and inconvenient in many respects,
the tenants found means of compounding for it; by first fending others in
their stead, and in process of time making a pecuniary satisfaction to the
lords in lieu of it. This pecuniary satisfaction at last came to be levied by
assessments, at so much for every knight's fee; and therefore this king of
tenure was called cutagium in Latin, or servitium cuti; cutum being
then a well-known denomination of money: and, in like manner it was
called, in our Norman French, escuage; being indeed a pecuniary, instead
of a military, service. The first time this appears to have been taken was in
the 5 Hen. II. on account of his expedition to Toulouse; but it soon came
to be so universal, that personal attendance fell quite into disuse. Hence
we find in our ancient histories that, from this period, when our kings
gave to war, they levied cutages on their tenants, that is, on all the
Indholders of the kingdom, to defray their expenses, and to hire troops:
and these assessments, in the time of Henry II, seem to have been made
arbitrarily and at the king's pleasure. Which prerogative being greatly
abused by his successors, it became matter of national clamour, and king
John was obliged to consent, by his magna carta, that no cutage should be
imposed without consent of parliament s. But this clause was omitted in
his son Henry II's charter; where we only find t, that

o 2 Inst.233.
p Litt..158.
q Litt. 154.
r Ibid. 156.
s Nullum cutagium ponatur in regno nostrorum, nifs per commune confilium
regni nostrorum. Cap.12.
t cap.37.

escutages or escuage should be taken as they were used to be taken tin the
time of Henry II; that is, in a reasonable and moderate manner. Yet
afterwards by statute 25 Edw.I.c.5&6. and many subsequent statutes u it was enacted, that the king should take no aids or tasks but by the common assent of the realm. Hence it is held in our old books, that efcuage or fcutage could not be levied but by consent of parliament w; such fcutages being indeed the groundwork of all succeeding subsidies, and the land- tax of later times.

SINCE therefore efcuage differed from knight-service in nothing, but as compensation differs from actual service, knight service is frequently confounded with it. And thus Littleton/x must be understood, when he tell us, that tenant by homage, fealty, and efcuage was tenant by knight-service : that is, that this tenure (being subservient to the military policy of the nation) was respected/y as a tenure in chivalry z. But as the actual service was uncertain, and depended upon emergences, so it was necessary that this pecuniary compensation should be equally uncertain, and depend on the assessments of the legislature suited to those emergences. For had the efcuage been a settled invariable sum, payable at certain times, it had been neither more nor less that a mere pecuniary rent; and the tenure, instead of knight service, would have then been of another kind, called focage a, of which we shall speak in the next chapter.

FOR the present, I have only to observe, that by the degenerating of knight-service, or personal military duty, into efcuage, or pecuniary assessments, all the advantages (either promised or real) of the feodal constitution were destroyed, and nothing but the hardships remained. Instead of forming a national militia composed of barons, knights, and gentlemen, bound by their interest, their honour, and their oaths, to defend their king and

w Old Ten. Tit. Efcuage.
x 103.
y Wrighy.122.
z Pro feodo militari reputatur. Flet.1.2.
c.14. 7.
a Litt. 97.120.

country, the whole of this system of tenures now tended to nothing else, but wretched means of raising money to pay an army of occasional
mercenaries. In the mean time the families of all our nobility and gentry groaned under the intolerable burdens, which (in consequence of the fiction adopted after the conquest) were introduced and laid upon them by the subtlety and finesse of the Norman lawyers. For, besides the feetages they were assessed by themselves in parliament, they might be called upon by the king or lord paramount for aids, whenever his eldest son was to be knighted, or his eldest daughter married; not to forget the ransom of his own person. The heir, on the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance, by way of relief and primer seisin; and, if under age, of the whole of his estate during infancy. And then, as sir Thomas Smith very feelingly complains, when he came to his own, after he was out of wardship, his woods decayed, houses fallen down, stock wasted and gone, lands let forth and ploughed to be barren, to make amend he was yet to pay half a year's profits as a fine for suing out his livery; and also the price or value of his marriage, if he refused such wife as his lord and guardian had bartered for, and imposed upon him; or twice that value, if he married another woman. Add to this, the untimely and expensive honour of knighthood, to make his poverty more completely splendid. And when by these deductions his fortune was so shattered and ruined, that poor privilege allowed him, without paying an exorbitant fine for a licence of alienation.

ASLAVERY so complicated, and so extensive as this, called aloud for a remedy in a nation that boasted of her freedom. Palliatives were from time to time applied by successive acts of parliament, which asswaged some temporary grievances. Till at length the humanity of king James I consented for a proper equivalent to abolish them all; though the plan then proceeded not to effect: in like manner as he had formed a scheme, and began to put it in execution, for removing the feudal grievance of heritable jurisdictions in Scotland, which has since been pursued and effected by the statute 20 Geo.II.c.43. e King James's plan for exchanging our military tenures seems to have been nearly the same as that which has been since pursued; only with this difference, that, by way of compensation for the loss which the crown and other lords would sustain, an annual fee farm rent should be settled and inseparably annexed to the crown, and assured to the inferior
lords, payable out of every knight's within their respective signories. An expedient, seemingly much better than the hereditary excise, which was afterwards made the principal equivalent for these concessions. For at length the military tenures, with all their heavy appendages, were destroyed at one blow by the statute 12 Car. II. c. 24. which enacts, that the court ofwards and liveries, and all wardships, liveries, primer seisins, and ousterlemains, values and forfeitures of marriages, by rea-\textsuperscript{?} son of any tenure of the king or others, be totally taken away. And that all fines for alienations, tenures by homage, knights-service, and ecuage, and also aids for marrying the daughter or knighting the son, and all tenures of the king in capite, belike likewise taken away. And that all sorts of tenures, held of the king or others, be turned into free and common focage; save only tenures in frankalmoign, copyholds, and the honorary ser-vices (without the slavish part) of grand serjeanty. A statute, which was a greater acquisition to the civil property of this kingdom than even magna carta itself: since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigor; but the statute of king Charles extirpated the whole, and demolished both root and branches.

d Dalrymp of feuds. 292.

CHAPTER THE SIXTH.
OF THE MODERN ENGLISH TENURES.

ALTHOUGH, by the means that were mentioned in the preceding chapter, the oppressive or military part of the feodal constitution was happily done away, yet we are not to imagine that the constitution itself was utterly laid aside, and a new one introduced in its room; since by the statute 123 Car. II. the tenures of focage and frankalmoign, the honorary services of grand serjeanty, and the tenure by copy of court roll were reserved; nay all tenures in general, except frankalmoign, grand serjeanty, and copyhold, were reduced to one general species of tenure, then well known and subsisting, called free and common focage. And this, being sprung from the same feodal original as the rest, demonstrates the necessity of fully contemplating that ancient system; since it is that alone, to which we can recur to explain any seeming, or real, difficulties, that may arise in our present mode of tenure.
THE military tenure, or that by knight-service, consisted of what were reputed the most free and honourable services; but which in their nature were unavoidably uncertain in respect to the time of their performance. The fecund species of tenure, or free-focage, consisted also of free alnd honourable services; but such as were liquidated and reduced to an absolute certainty. And this tenure not only subsists to this day, but has in manner absorbed and swallowed up (since the statute of Charles the fecund) almost every other species of tenure. And to this we are next to proceed.

II. SICAGE, in its most general and extensive signification, seems to denote a tenure by any certain and determinte service. And in this sense it is by our ancient writers constantly put in opposition to chivalry, or knight-service, where the render was precarious and uncertain. Thus Bracton a; if a man holds by a rent in money, without anry efcuage or serjeanty, id tenementum dicipoteft focagium :? but if you add thereto any royal service, or efcuage to any, the smallest, amount, illud dici poterit feudum militare. So too the author of Fleta b; ex donationibus fer-vitia militaria vel magnae ferjantiae non continentibus, oritur no-his quoddam nomen geerale, quod eft focagium. Littleton also c defines it to be, where the tenant holds his tenement of the lord by any certain service, in lieu of all other services; so that they be not services of chivalry, or knight-service. And therefore afterwardsd he tells us, that whatsoever is not tenure in chivalry is tenure in focage: in like manner as it is defined by Finch e, a tenure to be done out of war. The servie must therefore be certain, in order to denominate it focage; as to hold by fealty and 20 s. rent; or, by homage, fealty, and 20 s. rent; or, by homage and fealty without rent ; or, by fealty and certain corporal service, as ploughing the lord's land for three days; or, by fealty only without any other service: for all these are tenures in focage.

BUT focage, as was hinted in the last chpter, is of two sorts: free-focage, where the services are not only certain, but honourable; and villein-focage, where the services, though certain, are of a baser nature. Such as hold by the former tenure are called in Glanvil g, and other subsequent authors, by the name of liberi fokemanni, or tenants in free-focage. Of this tenure we are first

a 1.2.c.16. 9.
to speak; and this, both in the nature of its service, and the fruits and consequences appertaining thereto, was always by much the most free and independent species of any. And therefore I cannot but assent to Mr Somner's etymology of he word h; who derives it from the Saxon appellation, foe, which signifies liberty or privilege, and, being joined to a usual termination, is called focage, in Latin focagium; signifying thereby a free or privileged tenure i. This etymology seems to be much more just than that of our common lawyers in general, who derive it from foca, an old Latin word denoting (as they tell us) a plough: for that in ancient time this focage tenure consisted in nothing else but services of husbandry, which the tenant was bound to do to his lord, as to plough, sow, or reap for him; but that, in process of time, this service was changed into an annual rent by consent of all parties, and that, in memory of its original, it still retains the name of focage or plough-service k. But this by no means agrees with what Littleton himself tells us l, that to hold by fealty only, without paying any rent, in tenure in focage; for here is plainly no commutation for plough-service. Besides, even services, confessedly of a military nature and original, (as focage itself, which while it remained uncertain was equivalent of knight-service) the instant they were reduced to a certainty changed both their name and nature, and were called focage m. It was the certainty therefore that denominated it a focage tenure; and nothing sure could be a greater liberty or privilege, than to have the service ascertained, and not left to the arbitrary calls of the lord, as in the tenures of chivalry. Wherefore also Britton, who describes focage tenure under the name of fraunke fermen, tells us, that they are lands and tenements, whereof the nature of the see is changed by feoffment out of chivalry for certain yearly services, and in respect whereof neither homage, ward, marriage, nor relief can be demanded. Which leads us also to another observation,

h Gavelk.138.
that, if focage tenures were of such base and servile original, it is hard to account for the very great immunities which the tenants of them always enjoued; of highly superior to those of the tenants by chivalry, that it was thought, in the reigns of both Edward I and Charles II, a point of the utmost importance and value to the tenants, to reduce the tenure by knight-service to fraunk ferme or tenure by focage. We may therefore, I think, fairly conclude in favour of Somner's etymology, and the liberal extraction of the tenure in free focage, against the authority even of Littleton himself.

TAKING this then to be the meaning of the word, it seems probable that the focage tenures were the relics of Saxon liberty, retained by such persons, as had neither forfeited them to the king, nor been obliged to exchange their tenure for the more honourable, as it was called, but at the same time more burden-some, tenure of knight-service. This is peculiarly remarkable in the tenure which prevails in kent, called gavelkind, which is generally acknowledged to be a species of focage tenure; the preservation whereof inviolate from the innovations of the Norman conqueror is a fact universally known. And those who thus preserved their liberties were said to hold in free and common focage.

A 3 therefore the grand criterion and distinguishing mark of this species of tenure are the having its renders or services ascertained, it will include under it all other methods of holding free lands, by certain and invariable rents and duties: and, in particular, petit serjeanty, tenure in burgage, and gavelkind.

WE may remember, that by the statute 12 Car.II. grand serjeanty is not itself totally abolighed, but only the slavish appendages belonging to it; for the honorary services (such as carrying the king's sword or banner, officiating as his butler, carver, & c, at the coronation) are still reserved.
Now petit serjeanty bears a great resemblance to grand serjeanty; for as
the one is personal

-o Wright. 211.

service, so the other is a rent or render, both tending to some purpose
relative to the king's person. Petit serjeanty, as defined by Littleton p,
consists in holding lands of the king by the service of rendering to him
annually some small implement of war, as a bow, a sword, a lance, an
arrow, or the like. This, he says q, is but focage in effect; for it is no
personal service, but a certain rent: and, we may add, it is clearly no
predial service, or service of the plough, but in all respects liberum et
commune focagium; only, being held of the king, it is by way of eminence
dignified with the title of parvum servitium Regis, or petit serjeanty. And
magna carta respects it in this light, when it enacts r, that no wardship of
the lands or body shall be claimed by the king in virtue of a tenure by petit
serjeanty.

TENURE in burgage is described by Glanvil s, and is expressly said by
Littleton t, to be but tenure in focage; and it is where the king or other
person is lord of an ancient borough, in which the tenements are held by a
rent certain u. It is indeed only a king o town focage; as common focage,
by which other lands are holden, is usually of a rural nature. A borough, as
we have formerly seen, is distinguished from other towns by the right of
sending members to parliament; and, where the right of election is by
burgage tenure, that alone is a proof of the antiquity of the borough.
Tenure in burgage therefore, or burgage tenure, is where houses, or lands
which were formerly the feite of houses, in an ancient borough, are held of
some lord in common focage, by a certain established rent. And these
seem to have withstood the shock of the Norman encroachments
principally on account of their insignificance, which made it not worth
while to compel them to an alteration of tenure; as an hundred of them put
together would scarce have amounted to a knight's fee. Besides, the
owners of them, being chiefly artificers and persons engaged in trade,
could not with any tolerable propriety be put on such a

p.159.
q 160.
r cap.27.
s lib.7.cap.3.
military establishment, as the tenure in chivalry was. And here also we have again an instance, where a tenure is confessedly in focage, and yet is impossible ever to have been held by plough-service; since the tenants must have been citizens or burghers, the situation frequently a walled town, the tenement a single house; so that none of the owners was probably master of a plough, or was able to use one, if he had it. The free focage therefore, in which these tenements are held, seems to be plainly a remnant of Saxon liberty; which may also account for the great variety of customs, affecting these tenements so held in ancient burgage: the principal and most remarkable of which is that called Borough-English, so named in contrazdistinction as it were to the Norman customs, and which is taken notice of by Glanvil w, and by Littleton x; viz. that the youngest son, and not the eldest, succeeds to the brugage tenement on the death of his father. For which Littleton/ ygives this reason; because the youngest son, by reason of his tender age, is not so capable as the rest of his brethren to help himself. Other authors/zhave indeed given a much stranger reason for this custom, as if the lord of the see had anciently a right to break the seventh commandment with his tenant's wife on her wedding-night; and that therefore the tenement descended not to the eldest, but the youngest, son, who was more certainly the offspring of the tenant. But I cannot learn that ever this custom prevailed in England, though it certainly did in Scotland, under the name of mercheta or marcheta) till abolished by Malcolm IIIa. And perhaps a more rational account than either may be fetched (though at a sufficient distance) from the practice of the Tartars; among whom, according to father Duhalde, this custom of descent of the youngest son also prevails. That nation is composed totally of shepherds and herdsmen; and the elder sons, as soon as they are capable of leading a pastoral life, migrate from their father with a certain allotment of cattle; and go to seek a new habitation. The youngest son

w ubi fupra.
x 165.
y 211.
z 3 Mod.Pref.
a Seld.tit.of hon.2.1.47. Reg.Mag. 1.4.c.31.
therefore, who continues latest with the father, is naturally the heir of his 
house, the rest being already provided for. And thus we find that, among 
many other northern nations, it was the custom for all the sons but one to 
migrate from the father, which one became his heir b. So that possibly this 
custom, wherever it prevails, may be the remnant of that pastoral state of 
our British and German ancestors, which Caefar and Tacitus describe. 
Other special customs there are in burgage tenures; as that the wife shall 
be endowed of all her husband's tenements c, and not of the third part 
only, as at the common law: and that a man might dispose of his 
tenements by will d, which, in genera, was not permitted after the 
conquest till the reign of Henry the eighth; though in the Saxon times it 
was allowable e. A pregnant proof that these liberties of focage tenure were 
fragments of Saxon liberty.

THE nature of the tenure in gavelkind affords us a still stronger argument. 
It is universally known what struggles the kentishmen made to preserve 
their ancient liberties; and with how much success those struggles were 
attended. And as it is principally here that we meet with the custom so 
gavelkind, (though it was and is to be found in some other parts of the 
kingdom f) we may fairly conclude that this was a part of those liberties; 
agreeably to Mr Selden's opinion, that gavelkind before the Norman 
conquest was the general custom of the realm g. The distinguishing 
properties of this tenure are various: some of the principal are these: 1. 
The tenant is of age sufficient to alien his estate by feoffment at the age of 
fifteen h. 2. The estate does not escheat in case of an attainder and 
execution for felony; their maxim being, the father to the bouth, the son to 
the plough i. 3. In most places

b Pater cunctos filius adulti a fe pelhbat, peacter unum quem beredem 
fui juris relinquebat,(Walfing'o. Upodgn. Neuftr.c.1.)
c Litt. 166.
d 167.
e Wright.172.
f Stat.32. Hen.VIII.c.29. Kitch. of

g In toto regno, ante ducis adventum, ftrquens et ufitata suit: poftea 
caeteris adempta, fed privates quorundam locorum consuetudinisibus alibi 
poftea regerminans: Cantianis folum integra et inviolate remanfit. ( 
Analect.1.2.c.7.)
h Lamb. Peramb.614.
Ilamb .634.
he had a power of devising land by will, before the statute for that purpose was made k. 4. The lands descend, not to the eldest, youngest, or any one son only, but to all the sons together l; which was indeed anciently the most usual course of descent all over England m, though in particular places particular customs prevailed. These, among other properties, distinguished this tenure in a most remarkable manner: and yet it is held to be only a species of a focage tenure, modified by the custom of the country; being held by suit of court and fealty, which is a service in its nature certain n. Wherefore, by a charter of king John o, Hubert archbishop of Canterbury was authorized to exchange the gavelkind tenures held of the see of Canterbury into tenures by knight-service; and by statute 31 Hen.VIII.c.3. for difgavelling the lands of divers lords and gentlemen in the county of Kent, they are directed to be descendible for the future like other lands, which were never holden by service of focage. Now the immunities which the tenants in gavelking enjoyed were such, as we cannot conceive should be conferred upon mere ploughmen, or peasants: from all which I think it sufficiently clear, that tenures in free focage are in general of a nobler original than is assigned by Littleton, and after him by the bulk of our common lawyers.

HAVING thus distributed and distinguished the several species of tenure in free focage, I proceed next to shew that this also partakes very strongly of the feodal nature. Which may probably arise from its ancient Saxon original; since (as was before observed p) feuds were not unknown among the Saxons, though they did not form a part of their military policy, nor were drawn out into such arbitrary consequences as among the Normans. It seems therefore reasonable to imagine, that focage tenure existed in much the same state before the conquest as after; that in Kent it was preserved with a high hand, as our histories inform us it was,

m Glanv.1.7.6.3.
nwright. 211.
o Spelm.cea vet. Leg. 355.
p pag.48.

and that the rest of the focage tenures differed through England escaped the general state of other property, partly out of favour and affection to
their particular owners, and partly from their own insignificancy; since I do not apprehend the number of focage tenures soon after the conquest to have been very considerable, nor their value by any means large; till by successive charters of enfranchisement granted to the tenants, which are particularly mentioned by Britton q, their number and value began to swell so far, as to make a distinct, and justly envied, part of our English system of tenures.

HOWEVER this may be, the tokens of their feodal original will evidently appear from a short comparison of the incidents and consequences of focage tenure with those of tenure in chivalry; remarking their agreement or difference as we go along.

1. IN the first place, then both were held of superior lords; of the king as lord paramount, and sometimes of a subject or mesne lord between the king and the tenant.

2. BOTH were subject to the feodal return, render, rent, or service, of some sort or other, which arose from a supposition of an original grant from the lord to the tenant. In the military tenure, or more proper feud, this was from its nature uncertain; in focage, which was a feud of the improper kind, it was certain, fixed, and determinate, (though perhaps nothing more than bare fealty) and so continues to this day.

3. BOTH were, from their constitution, universally subject (over and above all other render) to the oath of fealty, or mutual bond of obligation between the lord and tenant r. Which oath of fealty usually draws after it suit to the lord’s court. And this oath every lord, of whom tenements are holden at this day, may and ought to call upon his tenants to take in his court baron; if it be only for the reason given by Littleton s, that if it be ne-

q c.66.
r Litt. 117.131.
s130.

neglected, it will by long continuance of time grow out of memory (as doubtless it frequently has) whether the land be holden of the lord or not; and so he may lose his seignory, and the profit which may accrue to him by escheats and other contingencest.
4. THE tenure in focage was subjects, of common right, to aids for knighting the son and marrying the eldest daughter u: which were fixed by the statute Westm 1.c.36. at 20 s. for every 20 l. per annum so held; as in knight-service. These aids, as in tenure by chivalry, were originally mere benevolences, though afterwards claimed as matter of right; but were all abolished by the statute 12. Car.II.

5. RELIEF is due upon focage tenure, as well as upon tenure in chivalry: but the manner of taking it is very different. The relief on a knight's fee was 5l. or one quarter of the supposed value of the land; but a focage relief is one year's rent or render, payable by the tenant to the lord, be the same either great or small w: and therefore Bracton/xwill not allow this to be properly a relief, but quaedam praetatio loco relevii in recognitionem domini. So too the statute 28 Edw.I.c.1. declares, that a free foceman shall give no relief, but shall double his rent after the death of his ancestor, according to that which he hath used to pay his lord, and shall not be grieved above measure. Reliefs in knight-service were only payable, if the heir at the death of his ancestor was of full age: but in focage they were due, even though the heir was under age, because the lord has no wardship over him y. The statute of Charles II reserves the reliefs incident to focage tenures; and therefore, wherever lands in fee simple are helden by a rent, relief is still due of common right upon the death of the tenant z.

6. PRIMER seisin was incident to the king's focage tenants in capite, as well as to those by knight-service a. But tenancy in capite as well as primer seins, are also, among the other feodal burdens, entirely abolished by the statute.

7. WARDSHIP is also incident to tenure in focage; but of a nature very different from that incident to knight-service. For if the inheritance descend to an infant under fourteen, the wardship of him shall not belong to the lord of the fee; because, in this tenure no military or other personal
service being required, in this tenure no military or other personal service being required, there is no occasion for the lord to take the profits, in order to provide a proper substitute for his infant tenant: but his nearest relation (to whom the inheritance cannot descend) shall be his guardian in focage, and have the custody of his land and body till he arrives at the age of fourteen. The guardian must be such a one, to whom the inheritance by no possibility can descend; as was fully explained, together with the reasons for it, in the former book of these commentaries. At fourteen this wardship in focage ceases, and the heir may oust the guardian, and call him to account for the rents and profits: for at this age the law supposes him capable of chusing a guardian for himself. It was in this particular, of wardship, as also in that of marriage, and in the certainty of the render or service, that the focage tenures had of much the advantage of the military ones. But as the wardship ceased at fourteen, there was this disadvantage attending it; that young heirs, being left at so tender an age to choose their own guardians till twenty one, they might make an improvident choice. Therefore, when almost all the lands of the kingdom were turned into focage tenures, the same statute 12 Car.II.c.24. enacted, that it should be in the power of any father by will to appoint a guardian, till his child should attain the age of twenty one. And, if no such appointment be made, the court of chancery will frequently interpose, to prevent an infant heir form improvidently exposing himself to ruin.

a Co.Litt.77.
b page 449.
c Litt. 123. Co. Litt. 89.

8. MARRIAGE, or the valor maritaggii, was not in focage tenure any perquisite or advantage to the guardian, but rather the reverse. For, if the guardian married his ward under the age of fourteen, he was bound to account to the ward for the value of the marriage, even though he took nothing for it, unless he married him to advantage. For the law, in favour of infants, is always jealous of guardians, and therefore in this case it made them account, not only for what they did, but also for what they might, receive on the infants;s behalf; lest by some collusion the guardian should have received the value, and not brought it to account: but, the statute having destroyed all values of marriages, this doctrine of course is ceased with them. At fourteen years of out any consent of his guardian, till the late act for preventing clandestine marriages. These doctrines of wardship and marriage in focage tenure were so diametrically opposite to those in
knight-service, and so entirely agree with those parts king Edward's laws, that were restored by Henry the first's charter, as might alone convince us that focage was of a higher original than the Norman conquest.

9. FINES for alienations were, I apprehend, due for lands holden of the king in capite by focage tenure, as well as in case of tenure by knight-service: for the statutes that relate to this point, and sir Edward Coke's comment on them c, speack generally of all tenants in capite, without making any distincation; though now all fines for alienation are demolished by the statute of charles the second,

10. ESCHEATS are equally incident to tenure in focage, as they were to tenure by knight-service; except only in gavelkind lands, which are ( as is before-mentioned ) subject to no escheats for felony, though they are to escheats for want so heirs f.

d Litt.123.
e 1 Inst. 43. 2 Inst. 65, 66, 67.
f Wright. 210

THUS much for the two grand species so tenure, under which almost all the free lands of lands of the kingdom were holden till the restoration in 1660, when the former was abolished and sunk into the latter: so that lands of both sorts are now holden by the one universal tenure of free and common focage.

THE other grand division of tenure, mentioned by Bracton as cited in the preceding chapter, is that of villenage, as contradis- tinguished from liberum tenementum, or frank tenure. And this (we may remember) he subdivides into two classes, pure, and privileged, villenage : from whence have arisen two other species of our modern tenures.

III. FROM the tenure of pure villenage have sprung our present copyhold tenures, or tenure by copy of court roll at the will of the lordl in order to obtain a clear idea of which, it will be previously necessary to take a short view of the original and nature of manors.

MANORS are in substance as ancient as the Saxon constitution, though perhaps differing a little, in some immaterial circumstances, from those that exist at this day g : just as we observed of feuds, that they were partly
known to our ancestors, even before the Norman conquest. A manor, manerium, a manendo, because the usual residence of the owner, seems to have been a district of ground, held by lords or great personages who kept in their own hands so much land as was necessary for the use of their families, which were called terrae dominicales, or demesne lands; being occupied by the lord, or dominus manerii, and his servants. The other tenemental lands they distributed among their tenants; which from the different modes of tenure were called and distinguished by two different names. First, book-land, or charter-land, which was held by deed under certain rents and free services, and in effect differed nothing from free focage lands h; and from

g Co.Cop. 2. & 10
h Co.Cop. 3.

hence have arisen all the freehold which hold of particular manors, and owe suit and service to the same. The other species was called folk-land, which was held by no assurance in writing, but distributed among the common folk or people at the pleasure of the lord, and resumed at his discretion; being indeed land held in villenage, which we shall presently describe more at large. The residue of the manor, being uncultivated, was termed the lord's waste, and served for public roads, and for common of pasture to the lord and his tenants. Manors were formerly called baronies, as they still are lordships: and each lord or baron was empowered to hold a domestic court, called the court-baron, and for settling disputes of property among the tenants. This court is an inseparable ingredient of every manor; and if the number of suitors should so fail, as not to leave sufficient to make a jury or homage, that is, two tenants at the least, the manor itself is lost.

BEFORE the statute of quia emptores, 18 Edw.I. the king's greater barons, who had a large extent of territory held under the crown, granted out frequently smaller manors to inferior persons to be held of themselves; which do therefore now continue to be held under a superior lord, who is called in such cases the lord paramount over all these manors: and his seignory is frequently termed an honour, not a manor, especially if it hath been longed to an ancient feodal baron, or hath been at any time in the hands of the crown. In imitation whereof, these inferior lords began to carve out and grant to other still more minute states, to be held as of themselves, and were so proceeding downwards in infinitum; till the superior lords
observed, that by this method of subinfeudation they lost all their feodal
profits, of wardships, marriages, and escheats, which fell into the hands of
these mesne or middle lords, who were the immediate superiors of the
terre-tenant, or him who occupied the land. This occasioned the statute of
Westm.3.3 or quia emptores, 18 Edw. I. to be made; which directs, that
upon all sales or feoffments of land, the feoffee shall hold the same, not of
his immediate feoffor, but of the chief lord of he fee, of whom such feoffor
himself held it. And from hence it is held, that all manor existing at this
day, must have existed by immemorial prescription; or at least ever
since the 18 Edw.I. when the statute of quia emptores was made. For no new
manor can have been created since that statute : because it is essential to a
manor, that there be tenants who hold of the lord, and that statute enacts,
that for the future no subject shall create any new tenants to hold of
himself.

NOW with regard to the sold-
land, or estates held in villenage, this was a
species of tenure neither strictly feodal, Norman, or Saxon; but mixed and
compounded of them all I : and which also, no account of the heriots that
usually attend it, may seem to have somewhat Danish in its composition.
Under the Saxon government there were, as sir William Temple speaks k,
a sort of people in a condition of downright servitude, used and employed
in the most servile works, and belonging, both they, their children, and
effects, to the lord of the soil, like the rest of the cattle or stock upon it.
These seem to have been those who held what was called the folk-land,
from which they were removeable at the lord's pleasure. On the arrival of
the Normans here, it seems not improbable, that they, who were strangers
to any other than a feodal state, might give some sparks of
enfranchisement to such wretched persons as fell to their share, by
admitting them, as well as others, to the oathe of ealty; which confereed a
right of protection, and raised the tenant to a kind of estate superior to
downright slavery, but inferior to every other condition l . This they called
villenage, and the tenants villains, either from the word vilis, or else, as sir
Edward Coke tells us m,a villa; because they lived chiefly in villages, and
were employed in rustic works of the most sordid kind : like the Spartan
belotes, to whom alone the culture of the lands was consigned; their
rugged masters, kike our northern ancestors, esteeming war the only
honourable employment of mankind.

I Wright .215.
k Introd. Hist.Encl.co.
THESE villains, belonging principally to lords of manors, were either 
villains regardant, that is, annexed to the manor or land; or else they were 
in gross, or at large, that is, annexed to the person of the lord, and 
transferable by deed from one owner to another n. They could not leave 
their lord without his permission; but, if they ran away, or were purloined 
from him, might be claimed and recovered by action, like beasts or other 
chattels. They held indeed small portions of land by way of sustaining 
themselves and families; but it was at the mere will of the lord, who might 
dispossess them whenever he pleased: and it was upon villein services, 
that is, to carry out dung, to hedge and ditch the lord’s demesnes, and any 
other the meanest offices o: and these services were not only base, but 
uncertain both as to their time and quantity p. A villein, in short, was in 
much the same state with us, as lord Molefworth q describes to be that of 
the boors in Denmark, and Stiernhook r attributes also to the traals or 
slaves in Sweden; which confirms the probability of their being in some 
degree monuments of the Danish tyranny. A villein could acquire no 
property either in lands or goods; but, if he purchased either, the lord 
might enter upon them, oust the villein, and seise them to his own use, 
unless he contrived to dispose of them again before the lord had seised 
them; for the lord had then lost his opportunity s.

IN many places also a fine was payable to the lord, if the villein presumed 
to marry his daughter to any one without leave from the lord t: and, by the 
common law, the lord might also bring an action against the husband for 
damages in thus purloining his property u. For the children of villains 
were also in the same state of donage with their parents; whence they 
were

n Litt. 
o Ibid.172.
p Ille quit tenet in villenagio facie: quicquid si praecptam suerit, nee fcire 
debet fero quid facere denet in craftino, et femper tenebitur ad incerta. ( 
Bracton.1.4.tr.1.c.28.)
q c.8.
r de jure Sueonum.l.2.co.4.
s Litt. 177.
t Co. Litt. 40.
of customs that prevail in different manors, with regard both to the
descent of the estates, and the privileges belonging to the tenants. And
these encroachments grew to be so universal, that when tenure in villenge
was abolished, (though copyholds were reserved) by the statute of Charles
II, there was hardly a pure villein left in the nation. For sir Thomas Smith f
testifies, that in all his time (and he was secretary to Edward VI) he never
knew any villein in gross throughout the realm; and the few villains
regardant that were then remaining were such only as had belonged to
bishops, monasteries, or other ecclesiastical corporations, in the preceding
times of popery. For he tells us, that the holy fathers, monks, and friars,
had in their confessions, and specially in their extreme and deadly
sickness, convinced the laity how dangerous a practice it was, for one
Christian man to hold another in bondage: so that temporal men, by little
and little, by reason of that terror in their consciences, were glad to
manumit all their villains. But the said holy fathers, with the abbots and
priors, did not in like sort by theirs; for they also had a scruple in
conscience to impoverish and despoil the church so much, as to manumit
such as were bond to their churches, or to the manors which the church
had gotten; and so kept their villains still. By these several means the
generality of villains in the kingdom have long ago sprouted up into
copyholders: their persons being enfranchised by manumission or long
acquiescence; but their estates, in strictness, remaining subject to the same
servile conditions and forfeitures as before; though, in general, the villein
services are usually commuted for a small pecuniary quit-rent g.

f Commonwealth. B.3.c.10
g In some manors the copyholders were bound to perform the most servile
office, as to hedge and ditch the lord's grounds, to lop his trees, to reap his
corn, and the like; the lord usually finding them meat and drink, and
sometimes (as is still the use in the highlands of Scotland) a minstrell or
piper for their diversion. (Rot. Maner. De Edg ware Com. Midd.) As in the
kingdom of Whidah, on the slave coast of Africa, the people are bound to
cut and carry in the king's corn from off his demesne lands, and are
attended by music during all the time of their labour. (Mod. Un. Hist.xvi.
429.)

As a farther consequence of what has been premised, we may collect these
two main principles, which are held to be the supporters of a copyhold
tenure, and without which it cannot exist; 1. That the lands be parcel of, and situate within, that manor, under which it is held. 2. That they have been demised, or demisable, by copy of court roll immemorially. For immemorial custom is the life of all tenures by copy; so that no new copyhold can, strictly speaking, be granted at this day.

IN some manors, where the custom hath been to permit the heir to succeed the ancestor in his tenure, the estates are styled copyholds of inheritance; in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life only: for the custom of the manor has in both cases so far superseded the will of the lord, that, provided the services be performed or stipulated for by fealty, he cannot, in the first instance, refuse to admit the heir of his tenant upon his death; nor, in the second, can he remove his present tenant so long as he lives, though he holds nominally be the precarious tenure of his lord's will.

THE fruits and appendages of a copyhold tenure, that it hath in common with free tenures, are healty, are fealty, services (as well in rents as otherwise reliefs, and escheats. The two latter belong only to copyholds of inheritance; the former to those life also. But, besides these, copyholds have also heriots, wardship, and fines. Heriots, which I think are agreed to be a Danish custom, and of which we shall say more hereafter, are a render of the best beast or other good (as the custom may be) to the lord on the death of the tenant. This is plainly a relic of villein tenure; there being originally less hardship in it, when all the goods and chattels belonged to the lord, and he might have seised them even in the villein's lifetime. These are incident to both species of copyhold; but wardship and fines to those of inheritance only.

h Co. Litt.58.

Wardship, in copyhold estates, partakes both of that in chivalry and that in focage. Like that in chivalry, the lord is the legal guardian, who usually assigns some relation of he infant tenant to act in his stead: and he, like guardian in focage, is accountable to his ward for the profits. Of fines, some are in the nature of primerfeifins, due on the death of each tenant, others are mere fines for alienation of the lands; in some manors only one of these sorts can be demanded, in some both, and in others neither. They are sometimes arbitrary and at the will of the lord, sometimes fixed by
custom: but, even when arbitrary, the courts of law, in favour of the liberty of copyholders, have tied them down to be reasonable in their extent; otherwise they might amount to a disherison of the estate. No fine therefore is allowed to be taken upon descents and alienation, (unless in particular circumstances) of more than two years improved value of the estate I. From this instance we Mary judge of the favourable disposition, that the law of England (which is a law of liberty) hath always shewn to this species of tenants; by removing, as far as possible, every real badge of slavery from them, however some nominal ones may continue. It suffered custom very early to get the better of the express terms upon which they held their lands; by declaring, that the will of the lord was to be interpreted by the custom of the manor; whereon custom has been suffered to grow up to the prejudice of the lord, as in this case of arbitrary fines, the law itself interposes in an equitable method, and will not suffer the lord to extend his power so far, as to disinherit the tenant.

THUS much for the ancient tenure of pure villenage, and the modern one of copyhold at the will of the lord, which is lineally descended from it.

IV. THERE is yet a fourth species of tenure, described by Bracton under the name sometimes of privileged villenage, and sometimes of villein-jocage. This, he tells us k, is such as has been held of the kings of England from the conquest downward; that the tenants hereinvillana faciunt servitia, sed cerata et determinata;? that they cannot alien or transfer their tenements by grant or feoffment, any more than pur villains can; but must surrender them to the lord or his steward, to be again granted out and held in villenage. And from these circumstances we may collect, that what he here describes is no other than exalted species of copy hold, subfifffing at this day, viz, the tenure in ancient demesne: to which, as partaking of the baseness of villenage in the nature of its services, and the freedom of focage in their certainty, he has therefore given a name compounded out of both, and calls it villanum focagium.

ANCIENT demesne consists of those lands or manors, which, though now perhaps granted out to private subjects, were actually in the hands of the crown in the time of Edward the confessor, or William the conqueror; and
so appear to have been by the great survey in the exchequer called domesday book l. The tenants of these lands, under the crown, were not all of the same order or degree. Some of them, as Britton testifies m, continued for a long time pure and absolute villains, dependent on the will of the lord: and those who have succeeded them in their tenures now differ from common copyholders in only a few points n. Others were in great measure enfranchised by the royal favour: being only bound in respect of heir lands to perform some of the better sort of villein services, but those determinate and certain; as, to plough the king's land, to supply his court with provisions, and the like; all of which are now changed into pecuniary rents: and in consideration hereof they had many immunities and privileges granted to them o; as, to try the right of their property in a peculiar court of their own, called a court of ancient demesne, by a peculiar process denominated a writ of right close p; not to pay toll or taxes; not to contribute to the expenses o knights of the shire; not to be put on juries, and the like q.

l F.N.B. 14.16.
m C. 66.
n F. N. B. 228.
o 5. Inst. 269.
p F. N. B. II.
q Ibid. 14.

THOSE tenanats therefore, though their tenure be absolutely copyhold, yet have an interest equivalent to a freehold: for, though their services were of a base and villenus original r, yet the tenants were esteemed in all other respects to be highly privileged villeims; and especially in this, that their services were fixed and determinate, and that they could not be compelled (like pure villains) to relinquish these tenements at the lord's will, or to hold them against their own: et ideo, say Bracton, dicuntur liberi. Britton also, from such their freedom, calls them absolutely fokemans, and their tenure fokemanries; which he describes s to be by grand serjeanty, nor by Petit, but by simple service, beingfrom their ancient demesne. And the same name is also given them in Fletat. Hence Fitzherbert observes u, that no lands are ancient demenfne, but lands holden in focage: that is, not in free and common focage, but in this amphibious, subordinate class, of villein-focage. And it is possible, that as this species of focage tenure is plainly founded upon predial services, or services of the plough, it Mary have given cause to imagine that all focage tenures arose from the same
original; for want of distinguishing, with Bracton, between free-focage or focage of frank-tenure, and villan-focage or focage of ancient demesne.

LANDS held by this tenure are therefore a species of copyhold, and as such preserved and exempted from the operation of the statute of Charles II. yet they differ from common copyholds, principally in the privileges before-mentioned: as also they differ from freeholders by one especial mark and tincture of villenage, noted by Bracton and remaining to this day; viz. that they cannot be conveyed from man to man by the general common law conveyances of feoffment, and the rest; but must pass by surrender to the lord or his steward, in the manner of common copyholds: yet with this difference w, that, in these surrenders of lands in ancient demefine of frank tenure, it is not used to saytohold at the will of the lord? in their copies, but only to hold according to the custom of the manner.

THUS have we taken a compendious view of the principal and fundamental points of the doctrine of tenures, both ancient and moderin, in which we cannot but remark the mutual connexion and dependence that all of them have upon each other. And upon the whole it appears, that, whatever changes and alterations these tenures have in process of time undergone, from the Saxon era to the 12 Car.II, all lay tenures are now in effect reduced to two species; free tenure in common focage; and base tenure by copy of court roll.

I MENTIONED lay tenures only; because there is still behind one other species of tenure, reserved by the statute of Charles II, which is of a spiritual nature, and called the tenure in frankalmoign.

V.TENURE in frankalmoign, in libera eleemofyna, or free alms, is that, whereby a religious corporation, aggregate or sole, holdeth lands of the donor to them and their successors for ever. The service, which they were bound to render for these lands was not certainly defined; but only in general to pray for the souls of the donor and his heirs, dead or alive; and
therefore they did no fealty, (which is incident to all other services but this/y) because this divine service was of a higher and more exalted nature z. this is the tenure, by which almost all the ancient monasteries and religious houses held their lands; and by which the parochial clergy, and very many ecclesiastical and eleemosynary foundations, hold them at this day a ; the nature of the service being upon the reformation altered, and made conformable to the purer doctrines

w Kitchen on courts.194.
x Litt.133.
y Ibid. 131.
z Ibid.135.
a Bradcton. l .4. tr. 1. c. 28. 1.

of the church of England. It was an old Saxon tenure; and continued under the Norman revolution, through the great respect that was shewn to religion and religious men in ancient times. Which is also the reason that tenants in frankalmoing were discharged of all other services, except the trinodaz necessitas, of repairing the highway, among the ancient Britons, had omnium rerum immunitatem c. And, even at present, this is a tenure of a nature very distinct from all others; being not in the least feodal, but merely spiritual. For if the service be neglected, the law gives no remedy by distress or otherwise to the lord of whom the lands are holden; but merely a complaint to the ordinary or visitor to correct itd. Wherein it materially differed from what was called tenure by divine service : in which the tenants were obliged to do some special divine services in certain; as to sing so many masses, to distribute such a sum in alms, and the like; which, being expressly defined and prescribed, could with no kind of propriety be called free alms; especially as for this, if unperformed, the lord might distress, without any complaint to the visitor e. All such donations are indeed now out of use: for, since the statute of quia emjptores, 18 Edw. I, none but the king can give lands to be holden by this tenure f. So that I only mention them, because frankalmoign is excepted by name in the statute of Charles II, and therefore subsists in many instances at this day. Which is all that shall be remarked concerning it; herewith concluding our observations on the nature of tenures.

b Seld. Jan.1.42.
c Caesar de bell.Gall.l.6.c.13.
d Litt.136.
CHAPTER THE SEVENTH.
OF FREEHOLD ESTATES, OF INHERITANCE.

THE next objects of our disquisitions are the nature and properties of estates. An estate in lands, tenements, and hereditaments, signifies such interest as the tenant hath therein: so that if a man grants all his estate to another, every thing that he can possibly grant shall pass thereby a. It is called in Latin, status; it signifying the condition, or circumstance, in which the owner stands, with regard to his property. And, to ascertain this with proper precision and accuracy, estates may be considered in a threefold view: first, with regard to the quantity of interest which the tenant has in the tenement: secondly, with regard to the time at which that quantity of interest is to be enjoyed: and, thirdly, with regard to the number and connexions of the tenants.

FIRST, with regard to the quantity of interest which the tenant has in the tenement, this is measured by its duration and extent. Thus, either his right of possession is to subsist for an uncertain period, during his own life, or the life of another man; to determine at his own decease, or to remain to his descendants after him: or it is circumscribed within a certain number of years, month, or days: or, lastly, it is infinite and unlimited, being vested in him and his representatives for ever. And this occasions the primary division of estates, into such as are free hold, and such as are less than freehold.

AN estate of freehold, liberum tenementum, or franktenement, is defined by Britton b to be? the possession of the soil by a free-man. And St.Germyn c tells us, that the possession of the land is called in the law of England the franktenement or free- hold. Such estate therefore, and no other, as requires actual possession of the land, is legally speaking freehold: which actual possession can, by the course of the common law, be only given by the ceremony called livery of seisin, which is the same as the feodal investiture. And from these principles we may extract this
description of a freehold; that it is such an estate in lands as is conveyed by
livery of seisin; or, in tenements of an incorporeal nature, by what is
equivalent thereto. And accordingly it is laid down by Littleton d, that
where a freehold shall pass, it behoveth to have to have livery of seisin. As
therefore estates of inheritance and estates for life could not by common
law be conveyed without livery of seisin, these are properly estates of
freehold; and, as no other estates were conveyed with the same solemnity,
therefore no others are properly freehold estates.

ESTATES of freehold then are divisible into estates of inheritance, and
estates not of inheritance. The former are again divided into inheritances
absolute or fee-simple; and inheritances limited, one species of which we
usually call fee-tail.

1. TENANT in fee-simple (or, as he is frequently styled, tenant in fee) is he
that hath lands, tenements, or hereditaments, to hold to him and his heirs
for ever c; generally, absolutely, and simply; without mentioning what
heirs, but referring that to his own pleasure, or to the disposition of the
law. The true meaning of the word fee (feudum) is the same with that of
feud or fief, and in its original sense it is taken in contradistinction to

b c.32.
c Dr & Stud. b.2.d.22.
d 59.
e Litt. 1.

allodium f; which latter the writers on this subject define to be every
man's own land, which he possesseth merely in his own right, without
owing any rent or service to any superior. This is property in its highest
degree; and the owner thereof hath absolutum et directum dominium, and
therefore it is said to be seised thereof absolutely in dominico fuo, in his
own demesne. But feudum, or fee, is that which is held of some superior,
on condition or rendering him service; in which superior the ultimate
property of the land resides. And therefore sir Henry Spelman g defines a
feud or fee to be the right which the vasal or tenant hath in lands, to use
the same, and take the profits thereof to him and his heirs, rendering to
the lord his due services; the mere allodial propriety of the soil always
remaining in the lord. This allodial property no subject in England has h;
it being a received, and now undeniable, principle in the law, that all the
lands in England are holden mediately or immediately of the king. The
king therefore only hath absolutum et directum dominium i; but all
subject's lands are in the nature of feudum or fee; whether derived to them
by descent from their ancestors, or purchased for a valuable consideration;
for they cannot come to any man by either of those ways, unless
accompanied with those feodal clogs, which were laid upon the first
feudatory when it was originally granted. A subject therefore hath only the
usufruct, and not he absolute property of the soil; or, as sir Edward Coke
experffes it k, he hath dominium utile, but not dominium directum. And
hence it is that, in the most solemn acts of law, we express the strongest
and highest estate, that any subject can have, by these words; he is
seisedthereof in his demesne, as of fee. It is a man's demenfne,
dominicum, or property, since it belongs to him and his heirs for ever: yet
this dominicum, property, or demesne, is strictly not absolute or alodial,
but qualified or feodal: it is his demesne, as of fee; that is, it is not purely
and simply his own, since it is held of a superior lord, in whom the
ultimate property resides.

f See pag. 45, 47.
g of feuds, c.1.
h Co. Litt. 1.
i Praedium domini Regis eft directum dominium, cujus nullus eft author
nisi Deus. Ibid.
j Ibid.

THIS is the primary sense and acceptation of the word fee. But (as sir
Martin Wright very justly observes l) the doctrine, that all lands are
holden, having been for so many ages a fixed and undeniable axiom, our
English lawyers do very rarely (of late years especially) use the word fee in
this its primary original sense, in contradistinction to alodial or absolute
property, with which they have no concern; but generally use it to express
the continuance or quantity of estate. A fee therefore, in general, signifies
an estate of inheritance; being the highest and most extensive interest that
a man can have in a feud: and, when the term is used simply, without any
other adjunct, or has the adjunct of simple annexed to it, (as, a fee, or, a
fee-simple) it is used in contradistinction to a fee conditional at the
common law, or a fee-tail by the statute; importing an absolute
inheritance, clear of any condition, limitation, or restrictions to particular
heirs, but descendible to the heirs general, whether male or female, lineal
or collateral. And in no other sense than this is the king said to be seised in fee, he being the feudatory of no man m.

TAKING therefore fee for the future, unless where otherwise explained, in this its secondary sense, as a state of inheritance, it is applicable to, and may be had in, any kind of hereditaments either corporeal or incorporeal n. But there is this distinction between the two species of hereditaments; that, of a corporeal inheritance a man shall be said to be seised in his demesne, as of fee; of an incorporeal one he shall only be said to be seised as of fee, and not in his demesne o. For, as incorporeal hereditaments are in their nature collateral to, and issue out of, lands and houses p, their owner hath no property, dominicum, or demesne, in the thing itself, but hath only something derived out of it; resembling the servitutes, or services, of the civil law q. The dominicum or pro-

l pag.148.
m Co. Litt. 1.
n Feodum eft quod quis tenet fibi et beredibus fuis, five fit tenementum, five reditus, & c.
Ltet. l. 5. c. 5 . . 7.
o Litt. 10.
p See pag. 20.
q Servitus eft jus, que res mea alterius rei vel personae servit. Ff.8.1.1.

perty is frequently in one man, while the appendage or service is in another. Thus Gaius may be seised as of fee, of a way going over the land, of which Titius is seised in his demesne as of fee. The fee-simple or inheritance of lands and tenements is generally vested and resides in some person or other; though divers inferior estates may be carved out of it. 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 those years or lives, the land reverts to the grantor or his heirs, who shall hold it again in fee-simple. Yet sometimes the fee may be in abeyance, that is (as the word signifies) in expectation, remembrance, and contemplation of law; there being no person in effe, in whom it can vest and abide; though the law considers it as always potentially existing, and ready to vest whenever a proper owner appears. 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 eft baeres viventis: it remains therefore
in waiting, or abeyance, during the life of Richard r. 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 s. And not only the fee, but the freehold also, may be in abeyance: as, when a parson dies, the freehold of his glebe is in abeyance, until a successor be named, and then it vests in the successor t.

The word, heirs, is necessary in the grant or donation in order to make a fee, or inheritance. 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 u. This very great nicety about the insertion of the word heirs in all feoffments and grants, in order to vest a fee, is plainly a relic of the feudal strictness: by which we may remember w it was required, that the form of the donation should

be punctually pursued; or that, as Crag \textit{expresses it,} in the words of Baldus, \textit{donations sint stricti juris, ne quis plus donasse praesumatur quam in donatione expresserit.} And therefore, as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted no longer than his life; unless the donor, by an express provision in the grant, gave it a longer continuance, and extended it also to his heirs. But this rule is now softened by exceptions y.

For, 1. It does not extend to devises by will; in which, as they were introduced at the time when the feudal rigor was apace wearing out, a more liberal construction is allowed: and therefore by a devise to a man for ever, or to one and his assigns for ever, or to one in fee-simple, the devisee hath an estate of inheritance; for the intention of the devisor is sufficiently plain from the words of perpetuity annexed, though he hath omitted the legal words of inheritance. But if the devise be to a man and his assigns, without annexing words of perpetuity, there the devisee shall take only an estate for life; for it does not appear that the devisor intended any more. 2. Neither does this rule extend to fines or recoveries, considered as a species of conveyance; for thereby an estate in fee passes by act and operation of law without the word heirs: as it does also, for particular reasons, by certain other methods of conveyance, which have relation to a
former grant or estate, wherein the wordheirs? was expressed z.3. In creations of nobility by writ, the peer so created hath an inheritance in his title, without expressing the word,heirs;? for they are implied in the creation, unless it be otherwise specially provided: but in creations by patent, which are stricti juris, the wordheirs? must be inserted, otherwise there is no inheritance.4. In grants of lands to sole corporations and their successors, the wordsuccessors? supplies the place of 'heirs';? for as heirs take from the ancestor, so doth the successor from

xl. 1. t. 9. 17.
yCo. Litt. 9, 10.
zIbid. 9.

the predecessors. Nay, in a grant to a bishop, or other sole spiritual corporation, frankalmoign, the wordfrankalmoign? supplies the place of bothheirs? andsuccessors,? ex vi termini; and in all these cases a fee-simple vests in such sole corporation. But, in a grant of lands to a corporation aggregate, the wordsuccessors? is not necessary, though usually inserted: for, albeit such simple grant be strictly only an estate for life, yet, as that corporation never dies, such estate for life is perpetual, or equivalent to a fee-simple, and therefore the law allows it to be one a. Lastly, in the case of the king, a fee-simple will vest in him, without the wordsheirs? orsuccessors? in the grant; partly from prerogative royal, and partly from a reason similar to the last, because the king in judgment of law never dies b. But the general rule is, that the wordheirs? is necessary to create an estate of inheritance.

II. We are next to consider limited fees, or such estates of inheritance as are clogged and confined with conditions, or qualifications, of any fort. And these we may divide into two sorts: 1. Qualified, or base fees; and 2. Fees conditional, so called at the common law; and afterwards fees-tail, in consequence of the statute de donis.

I. A base, or qualified, fee is such a one as has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As, in the case of a grant to A and his heirs, tenants of the manor of Dale; in this instance, whenever the heirs a A cease to be tenants to be tenants of that manor, the grant is entirely defeated. So, when Henry VI granted to John Talbot, lord of the manor of Kingston-Lifle in Berks, that he and his heirs, lords of the said manor, should be peers of the realm, by the title of barons of Lifle; here John
Talbot had a base or qualified fee in that dignity c; and the instant he or his heirs quitted the seignory of this manor, the dignity was at an end. This estate is fee, because by possibility it may endure for ever in a man and his heirs; yet as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee.

2. A conditional fee, at the common law, was a fee restrained to some particular heirs, exclusive of others: donatiostricta et coarctata d; ficut certis haeredibus, quibusdam a successioneexclufis: as, to the heirs of a man's body, by which only his lineal descendants were admitted, in exclusion of collateral heirs; or, to the heirs male off his body, in exclusion both of collaterals, and lineal females also. It was called a conditional fee, by reason of the condition expressed or implied in the donation of it, that if the donee died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatsoever; that on failure of the heirs specified in the grant, the grant should be at an end, and the land return to its ancient proprietor e. Such conditional fees were strictly agreeable to the nature of feuds, when they first ceased to be mere estates for life, and were not yet arrived to be absolute estates in fee-simple. And we find strong traces off these limited, conditional fees, which could n to be alienated from the lineage of the first purchaser, in our earliest Saxon laws f.

Now, with regard to the condition annexed to these fees by the common law, our ancestors held, that such a gift (to a man and the heirs of his body) was a gift upon condition, that it should revert to the donor, if the donee had no heirs of his body; but, if he had, it should then remain to the donee. They therefore called it a fee-simple, on condition that he had issue. Now we must observe, that, when any condition is performed, it is thenceforth entirely gone; and the thing, to which it was before

dFlet. l. 3. c. 5.
ePlowd. 241.
fSi quis terram baereditarium babeat, cam non vendat a cognatis baeredibus fuis, fi illi viro prohibitum fit, qui cam ab initio acqquifivit, ut ita facere nequeat. LL. Aelfred. C. 37.
annexed, becomes absolute, and wholly unconditional. So that, as soon as
the grantee had any issue born, his estate was supposed to become
absolute, by the performance of the condition; at least, for these three
purposes: 1. To enable the tenant to alienate the land, and thereby to bar not
only his own issue, but also the donor of his interest in the reversion
g.2. To subject him to forfeit it for treason: which he could not do, till issue
born, longer than for his own life; lest thereby the inheritance of the issue,
and reversion of the donor, might have been defeated h.3. To empower him
to charge the land with rents, commons, and certain other incumbrances,
so as to bind his issue i. And this was thought the more reasonable,
because, by the birth of issue, the possibility of the donor's reversion was
rendered more distant and precarious: and his interest seems to have
been the only one which the law, as it then stood, was solicitous to protect;
without much regard to the right of succession intended to be vested in the
issue. However, if the tenant did not in fact alienate the land, the course of
descent was not altered by this performance of the condition: for if the
issue had afterwards died, and then the tenant, or original grantee, had
died, without making any alienation; the land, by the terms of the
donation, could descend to none but the heirs of his body, and therefore,
in default of them, must have reverted to the donor. For which reason, in
order to subject the lands to the ordinary course of descent, the donees of
these conditional fee-simple took care to alienate as soon as they had
performed the condition by having issue; and afterwards re-purchased the
lands, which gave them a fee-simple absolute, that would descend to the
heirs general, according to the course of the common law. And thus stood
the old law with regard to conditional fees: which things, says sir Edward
Coke k, though they seem ancient, are yet necessary to be known; as well
for the declaring how the common law stood in such cases, as for the sake
of annuities, and such like inheritances, as are not within the statutes of
entail, and therefore remain as at the common law.

gCo. Litt. 19. 2 Inst. 233.
hCo. Litt. Ibid. 2 Inst. 234.
ICo. Litt. 19.
k1 Inst. 19.

The inconvenience, which attended these limited and fettered
inheritances, were probably what induced the judges to give way to this
subtle finesse, (for such it undoubtedly was) in order to shorten the duration of these conditional estates. But, on the other hand, the nobility, who were willing to perpetuate their possessions in their own families, to put a stop to this practice, procured the statute of Westminster the second I (commonly called the statute de donis conditionalibus) to be made; which pays a greater regard to the private will and intentions of the donor, than to the propriety of such intentions, or any public considerations whatsoever. This statute revives in some sort the ancient feudal restraints which were originally laid on alienations, by enacting, that from thenceforth the will of the donor be observed; and that the tenements so given (to a man and the heirs of his body) should at all events go to the issue, if there were any; or, if none, should revert to the donor.

Upon the construction of this act of parliament, the judges determined that the donee had no longer a conditional fee-simple, which became absolute and at his own disposal, the instant any issue was born; but the divided the estate, which they denominated a fee-tail m; and vesting in the donor the ultimate fee-simple of the land, expectant on the failure of issue; which expectant estate is what we now call a reversion n. And hence it is that Littleton tells us o, that tenant in fee-tail is by virtue of the statute of Westminster the second.

Having thus shewn the original of estates-tail, I now proceed to consider, what things may, or may not, be entailed under

l13 Edw. I. C. i.
mThe expression fee-tail, or feudum talliatum, was borrowed from the feudists; (See Crag. L. t. 10. 24, 25.) among whom it signified any mutilated or truncated inheritance, from which the heirs general were cut off; being derived from the barbarous verb taliare, to cut; from which the French tailler and the Italian tagliare are formed. (Spelm. Gloff. 531.)

n2 Inst. 335.
o 13.

the statute de donis. Tenements is the only word used in the statute: and this sir Edward Coke p expounds to comprehend all corporeal hereditaments whatsoever; and also all incorporeal hereditaments which favour of the realty, that is, which issue out of corporeal ones, or which concern, or are annexed to, or may be exercised within the same; as, rents, estovers, commons, and the like. Also offices and dignities, which concern lands, or have relation to fixed and certain places, may be entailed q. But
mere personal chattels, which favour not at all of the realty, cannot be entailed. Neither can an office, which merely relates to such personal chattels; nor an annuity, which charges only the person, and not the lands, of the grantor. But in them, if granted to a man and the heirs of his body, the grantee hath still a fee conditional at common law, as before the statute; and by his alienation may bar the heir or reversioner r. An estate to a man and his heirs for another’s life cannot be entailed s; for this is strictly no estate oh inheritance (as will appear hereafter) and therefore not within the statute de donis. Neither can a copyhold estate be entailed by virtue of the statute; for that would tend to encroach upon and restrain the will of the lord: but, by the special custom of the manor, a copyhold may be limited to the heirs of the body t; for here the custom ascertains and interprets the lord’s will.

Next, as to the several species of estates-tail, and how they are respectively created. Estates-tail are either general, or special. Tail-general is where lands and tenements are given to one, and the heirs of his body begotten: which is called tail-general, because, how often soever such donee in tail be married, his issue in general by all and every such marriage is, in successive order, capable of inheriting the estate-tail, per formam doni u. 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

pInst. 19, 20.
q7 Rep. 33.
rCo. Litt. 19, 20.
s2 Vern. 225.
t3 Rep. 8.
uLitt. 14, 15.

may happen several ways w. I shall instance in only one: as where lands and tenements are given to a man and the heirs of his body, on Mary his now wife to be begotten; here no issue can inherit, but such special issue as is engendered between them two; not such as the husband may have by another wife: and therefore it is called special tail. And here we may observe, that the words of inheritance (to him and his heirs) give him an estate in fee; but they being heirs to be by him begotten, this makes it a fee-tail; and the person being also limited, on whom such heirs shall be begotten, (viz. Mary his present wife) this makes it a fee-tail special.
Estates, in general and special tail, are farther diversified by the distinction of sexes in such entails; for both of them may either be in tail male or tail female. As if hands be given to a man, and his heirs male of his body begotten, this is an estate in tail male general; but if to a man and the heirs female of his body on his present wife begotten, this is an estate in tail female special. And, in case of an entail male, the heirs female shall never inherit, nor any derived from them; nor, e converso, the heirs male, in case of a gift in tail female x. Thus, if the donee in tail male hath a daughter, who dies leaving a son, such grandson in this case cannot inherit the estate-tail; for he cannot deduce his descent wholly by heirs male y. And as the heir male must convey his descent wholly by males, so must the heir female wholly by females. And therefore if a man hath two estates—tail, the one in tail male, the other in tail female; and he hath issue a daughter, which daughter hath issue a son; this grandson can succeed to neither of the estates: for he cannot convey his descent wholly either in the male or female line x.

As the word heirs is necessary to create a fee, so, in farther imitation of the strictness of the feodal donation, the word body, or some other words of procreation, are necessary to make it a fee-tail, and ascertain to what heirs in particular the fee is limited. If therefore either the words of inheritance or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate-tail. As, if the grant be to a man and his children, or offspring; all these are only estates for life, there wanting the words of inheritance, his heirs a. So, on the other hand, a gift to man, and his heirs male, or female, is an estate in fee-simple, and not in fee-tail; for there are no words to ascertain the body out of which they shall issue b. Indeed, in last wills and testaments, wherein greater indulgence is allowed, an estate-tail may be created by a devise to a man and his feed, or to a man and his heirs male; or by other irregular modes of expression c. There is still another species of entailed estates, now indeed grown out of use, yet still capable of subsisting in law; which are estates in libero maritagio, or frankmarriage. These are defined d to be, where tenements are given by one man to another, together with a wife, who is the daughter

wLitt. 16, 26, 27, 28, 29.
xIbid. 21, 22.
yIbid. 24.
zCo. Litt. 25.
or cousin of the donor, to hold in frankmarriage. Now by such gift, though nothing but the word frankmarriage is expressed, the donees shall have the tenements to them, and the heirs of their two bodies begotten; that is, they are tenants in special tail. For this one word, frankmarriage, does ex vi termini not only create an inheritance, like the word frankalmoign, but likewise limits that inheritance; supplying not only words of descent, but of procreation also. Such donees in frankmarriage are liable to no service but fealty; for a rent reserved thereon is void, until the fourth degree of consanguinity be past between the issues of the donor and donee. The incidents to a tenancy in tail, under the statute Westm. 2. are chiefly these. 1. That a tenant in tail may commit waste on the estate-tail, by feeling timber, pulling down houses, or the

aCo. Litt. 20.
bLitt. 31. Co. Litt. 27.
cCo. Litt. 9. 27.
dLitt. 17.
eIbid. 19, 20.
fCo. Litt. 224.

like, without being impeached, or called to account, for the same. 2. That the wife of the tenant in tail shall have her dower, or thirds, of the estate-tail. 3. That the husband of a female tenant in tail may be tenant by the curtesy of the estate-tail. 4. That an estate-tail may be barred, or destroyed, by a fine, by a common recovery, or by lineal warranty descending with assets to the heir. All which will hereafter be explained at large. Thus much for the nature of estates-tail: the establishment of which family law (as it is properly styled by Pigott) occasioned infinite difficulties and disputes. Children grew disobedient when they knew they could not be set aside: farmers were ousted of their leases made by tenants in tail; for, if such leases had been valid, then under colour of long leases the issue might have been virtually disinherited: creditors were defrauded of their debts; for, if tenant in tail could have charged his estate with their payments, he might also have defeated his issue, by mortgaging it for as much as it was worth: innumerable latent books are full: and treasons were encouraged: as estates-tail were not liable to forfeiture, longer than for the tenant's life. So that they were justly branded, as the source of new contentions, and mischiefs unknown to the common law; and almost universally considered as the common grievance of the realm. But, as the nobility were always fond of this statute, because it preserved
their family estates from forfeiture, there was little hope of procuring a 
repeal by the legislature; and therefore, by the connivance of an active and 
politic prince, a method was devised to evade it. 
About two hundred years intervened between the making of the statute de 
donis, and the application of common recoveries to this intent, in the 
twelfth year of Edward IV: which were then openly declared by the judges 
to be a sufficient bar of an estate.

Com. Recov. 5. 
1 Rep. 131. 
ICo. Litt. 19. Moor. 156. 10 Rep. 38.

tail k. For though the courts had, so long before as the reign of Edward III, 
very frequently hinted their opinion that a bar might be effected upon 
these principles l, yet it never was carried into execution; till Edward IV 
observing m (in the disputes between the houses of York and Lancaster) 
how little effect attainders for treason had no families, whose estates were 
protected by the sanctuary of entails, gave his countenance to this 
proceeding, and suffered Taltarum’s case to be brought before the court n: 
wherein, in consequence of the principles then laid down, it was in effect 
determined, that a common recovery suffered by tenant in tail should be 
an effectual destruction thereof. What common recoveries are, both in 
their nature and consequences, and why they are allowed to be a bar to the 
estate-tail, must be reserved to a subsequent enquiry. At present I shall 
only say, that they are fictitious proceedings, introduced by a kind of pia 
fraus, to elude the statute de donis, which was found so intolerably 
mischievous, and which yet one branch of the legislature would not then 
consent to repeal: and, that these recoveries, however clandestinely 
begun, are now become by long use and acquiescence a most common 
assurance of lands; and are looked upon as the legal mode of conveyance, 
by which tenant in tail may dispose of his lands and tenements: so that no 
court will suffer them to be shaken or reflected on, and even acts of 
parliament o have by a sidewind countenanced and established them.
This expedient having greatly abridged estates-tail with regard to their 
duration, others were soon invented to strip them of other privileges. The 
next that was attacked was their freedom from forfeitures for treason. For, 
notwithstanding the large advances made by recoveries, in the compass of 
about threescore years, towards unfettering these inheritance, and thereby 
subjecting the lands to forfeiture, the rapacious prince then reigning,
finding them frequently re-settled in a similar manner to suit the convenience of families, had address enough to procure a statute, whereby all estates of inheritance (under which general words estates-tail were covertly included) are declared to be forfeited to the king upon any conviction of high treason.

The next attack which they suffered, in order of time, was by the statute 32 Hen. VIII. c. 28, whereby certain leases made by tenants in tail, which do not tend to the prejudice of the issue, were allowed to be good in law, and to bind the issue in tail. But they received a more violent blow, in the same session of parliament, by the construction put upon the statute of fines, by the statute 32 Hen. VIII. c. 36, which declares a fine duly levied by tenant in tail to be a complete bar to him and his heirs, and all other persons claiming under such entail. This was evidently agreeable to the intention of Henry VII, whose policy it was (before common recoveries had obtained their full strength and authority) to lay the road as open as possible to the alienation of landed property, in order to weaken the overgrown power of his nobles. But as they, from the opposite reasons, were not easily brought to consent to such a provision, it was therefore couched, in his act, under covert and obscure expressions. And the judges, thought willing to construe that statute as favourably as possible for the defeating of entailed estates, yet hesitated at giving fines so extensive a power by mere implication, when the statute de donis had expressly declared, that they should not be a bar to estates-tail. But the statute of Henry VIII, when the doctrine of alienation was better received, and the will of the prince more implicitly obeyed than before, avowed and established that intention. Yet, in order to preserve the property of the crown from any danger of infringement, all estates-tail created by the crown, and of which the crown has the reversion, are excepted out of this statute. And the same was done with regard to common recoveries, by the statute 34 & 35 Hen. VIII. c. 20, which enacts, that no feigned recovery had against tenants.
in tail, where the estate was created by the crown r, and the remainder or reversion continues still in the crown, shall be of any force or effect. Which is allowing, indirectly and collaterally, their full force and effect with respect to ordinary estates-tail, where the royal prerogative is not concerned.
Lastly, by a statute of the succeeding year s, all estates-tail are rendered liable to be charged for payment of debts due to the king by record or special contract; as, since, by the bankrupt laws t, they are also subjected to be sold for the debts contracted by a bankrupt. And, by the construction put on the statute 43 Eliz. c. 4. an appointment u by tenant in tail of the lands entailed, to a charitable use, is good without fine or recovery. Estates-tail, being thus by degrees unfettered, are now reduced again to almost the same state, even before issue born, as conditional fees were in at common law, after the condition was performed, by the birth of issue. For, first, the tenant in tail is now enabled to alien his lands and tenements by fine, by recovery, or by certain other means; and thereby to defeat the interest as well of his own issue, though unborn, as also of the reversioner, except in the case of the crown: secondly, he is now liable to forfeit them for high treason: and, lastly, he may charge them with reasonable leases, and also with such of his debts as are due to the crown on specialties, or have been contracted with his fellow-subjects in a course of extensive commerce.

rCo. Litt. 372.
s33 Hen. VIII. c. 39. 75.

Chapter the Eighth.
f FREEHOLDS, NOT of INHERITANCE.

We are next to discourse of such estates of freehold, as are not of inheritance, but for life only. And, of these estates for life, some are conventional, or expressly created by the act of the parties; others merely legal, or created by construction and operation of law a. We will consider them both in their order.
I. Estates for life, expressly created by deed or grant, (which alone are properly conventional) are where a lease is made of lands or tenements to a man, to hold for more lives than one: in any of which cases he is styled tenant for life; only, when he holds the estate by the life of another, he is usually called tenant pur auter vie b. These estates for life are, like inheritances, of a feodal nature; and were, for some time, the highest estate that any man could have in a feud, which (as we have before seen c) was not in its original hereditary. They are given or conferred by the same feodal rites and solemnities, the same investiture or livery of seisin, as fees themselves are; and they are held by fealty, if demanded, and such conventional rents and services as the lord or lessor, and his tenant or lessee, have agreed on.

aWright. 190.
bLitt. 56.
cpag. 55.

Estates for life may be created, not only by the express word before-mentioned, but also by a general grant, without defining or limiting any specific state. As, if one grants to A. B. the manor of Dale, this makes him tenant for life d. For though, as there are no words of inheritance, or heirs, mentioned in the grant, it cannot be construed to be a fee, it shall however be construed to be as large an estate as the words of the donation will bear, and therefore an estate for life. also such a grant at large, or a grant for term of life generally, shall be construed to be an estate for the life of the grantee; in case the grantor hath authority to make such a grant: for an estate for a man's own life is more beneficial and of a higher nature than for any other life; and the rule of law is, that all grants are to be taken most strongly against the grantor f, unless in the case of the king. Such estates for life will, generally speaking, endure as long as the life for which they are granted: but there are some estates for life, which may determine upon future contingencies, before the life, for which they are created, expires. As, if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these, and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone g. Yet, while they subsist, they are reckoned estates for life; because, the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen. And, moreover,
in case an estate be granted to a man for his life, generally, it may also
determine by his civil death; as if he enters into a monastery, whereby he
is dead in law h: for which reason in conveyances the grant is usually
made for the term of a man’s natural life;? which can only determine by his
natural death i.

dCo. Litt. 42.
eIbid.
fIbid. 36.
gCo. Litt. 42.3 Rep. 20.
h2 Rep. 48.
iSee Vol. I. Pag. 129.

The incidents to an estate for life, are principally the following; which are
applicable not only to that species of tenants for life, which are expressly
created by deed; but also to those, which are created by act and operation
of law.

1. Every tenant for life, unless restrained by covenant or agreement, may of
common right take upon the land demised to him reasonable estovers k or
botes l. For he hath a right to the full enjoyment and use of the land, and
all its profits, during his estate therein. But he is not permitted to cut down
timber or do other waste upon the premises m: for the destruction of such
things, as are not the temporary profits of the tenement, is not necessary
for the tenant’s complete enjoyment of his estate; but tends to the
permanent and lasting loss of the person entitled to the inheritance.

2. Tenant for life, or his representatives, shall not be prejudiced by any
sudden determination of his estate, because such determination is
contingent and uncertain n. Therefore if a tenant for his own life sows the
lands, and dies before harvest, his executors shall have the emblements, or
profits of the crop: for the estate was determined by the act of God; and it
is a maxim in the law, that actus Dei nemini facit injuriam. The
representatives therefore of the tenant for life shall have the emblements,
to compensate for the labour and expense of tilling, manuring, and
sowing, the lands; and also for the encouragement of husbandry, which
being a public benefit, tending to the increase and plenty of provisions,
ought to have the utmost security and privilege that the law can give it.
wherefore, by the feodal law, if a tenant for life died between the beginning
of September and the end of February, the lord, who was entitled to the
reversion, was also entitled to the profits of the whole year; but, if he died
between the beginning of March and the end of August, the
heirs of the tenant received the whole o. From hence our law of emblements seems to have been derived, but with very considerable improvements. So it is also, if a man be tenant for the life of another, and cestui que vie, or he on whose life the land is held, dies after the corn fown, the tenant pur auter vie shall have the emblements. The same is also the rule, if a life-estate be determined by the act of law. Therefore, if a lease be made to husband and wife during coverture, (which gives them a determinable estate for life) and the husband sows the land, and afterwards they are divorced a vinculo matrimonii, the husband shall have the emblements in this case ; for the sentence of divorce is the act of law p. But if an estate for life be determined by the tenant’s own act, (as, by forfeiture for waste committed ; or, if a tenant during widowhood thinks proper to marry) in these, and similar cases, the tenants, having thus determined the estate by their own acts, shall not be entitled to take the emblements q. The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit : but it is otherwise of fruit-trees, grass, and the like ; which are not planted annually at the expense and labour of the tenant, but are either the permanent, or natural, profit of the earth r. For even when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit ; but merely with a prospect of its being useful to future successions of tenants. The advantages also of emblements are particularly extended to the parochial clergy by the statute 28 Hen. VIII. c. 11. For all persons, who are presented to any ecclesiastical benefice, or to any civil office, are considered as tenants for their own lives, unless the contrary be expressed in the form of donation.

3. A third incident to estates for life relates to the under-tenants or lessees. For they have the same, nay greater indulgences, than their lessors, the original tenants for life. the same ; for the law of estovers and emblements, with regard to the tenant

oFeud. l. 2. t. 28.
qCo. Litt. 55.
for life, is also law with regard to his under-tenant, who represents him and stands in his place s; and greater; for in those cases where tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee who is a third person. as in the case of a woman who holds durante viduitate; her taking husband is her own act, and therefore deprives her of the emblements: but if she leases her estate to an under-tenant, who sows the land, and she then marries, this her act shall not deprive the tenant of his emblements, who is a stranger and could not prevent her t. The lessees of tenants for life had also at the common law another most unreasonable advantage: for, at the death of their lessors the tenants for life, these under-tenants might if they pleased quit the premises, and pay no rent to any body for the occupation of the land since the last quarter day, or other day assigned for payment of rent u. To remedy which it is now enacted v, that the executors or administrators of tenant for life, on whose death any lease determined, shall recover of the lessee a ratable proportion of rent, from the last day of payment to the death of such lessor.

II. The next estate for life is of the legal king, as contradistinguished from conventional; viz. that of tenant in tail after possibility of issue extinct. This happens, where one is tenant in special tail, and a person, from whose body the issue was to spring, dies without issue; or, having left issue, that issue becomes extinct; in either of these cases the surviving tenant in special tail becomes tenant n tail after possibility of issue extinct. As, where one has an estate to him and his heirs on the body of his present wife to be begotten, and the wife dies without issue w; in this case 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. For if it had called him barely tenant in fee-tail special, that would not have distinguished him from others; and besides he has no longer an estate of inheritance, or fee x, for he can have no heirs, capable of taking

sCo. Litt. 55.
tCro. Eliz. 461.1 Roll. Abr. 727.
u10 Rep. 127.
vStat. 11 Geo. II. C. 19. 15.
wLitt. 32.
per formam doni. Had it called him tenant in tail without issue, this had only related to the present fact, and would not have excluded the possibility of future issue. Had he been styled tenant in tail without possibility of issue, this would exclude time past as well as present, and he might under this description never have had any possibility of issue. No definition therefore could so exactly mark him out, as this of tenant in tail after possibility of issue extinct, which (with a precision peculiar to our own law) not only takes in the possibility of issue in tail which he once had, but also states that this possibility is now extinguished and gone. This estate must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring; for no limitation, conveyance, or other human act can make it. For, if land be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced a vinculo matrimonii, they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them. A possibility of issue is always supposed to exist, in law, unless extinguished by the death of the parties; even though the donees be each of them an hundred years old. This estate is of an amphibious nature, partaking partly of an estate-tail, and partly of an estate for life. The tenant is, in truth, only tenant for life, but with many of the privileges of a tenant in tail; as, not to be punishable for waste, &c: or, he is tenant in tail, with many of the restrictions of a tenant for life; as, to forfeit his estate if he alienes it in fee-simple: whereas such alienation by tenant in tail, though voidable by the issue, is no forfeiture of the estate to the reversioner; who is not concerned in interest, till all possibility of issue be extinct. But, in

yCo. Litt. 28.
zLitt. 34. Co. Litt. 28.
aCo. Litt. 27.
bIbid. 28.

general, the law looks upon this estate as equivalent to an estate for life only; and, as such, will permit this tenant to exchange his estate with a tenant for life; which exchange can only be made, as we shall see hereafter, of estates that are equal in their nature.

III. Tenant by the curtesy of England, is where a man marries a woman seised of lands or tenements in fee-simple or fee-tail; that is, of any estate of inheritance; and has by her issue, born alive, which was capable of
inheriting her estate. In this case, he shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England c.

This estate, according to Littleton, has its denomination, because if is used within the realm of England only; and it is said in the mirrour d to have been introduced by king Henry the first: but it appears also to have been the established law of Scotland, wherein it was called curialitas e: so that probably our word curtesy was understood to signify rather an attendance upon the lord's court or curtis, (that is, being his vasal or tenant) than to denote any peculiar favour belonging to this island. And therefore it is laid down f that, by having issue, the husband shall be intitled to do homage to the lord, for the wife's lands, alone. It is likewise used in Ireland, by virtue of an ordinance of king Henry III g. It also appears h to have obtained in Normandy; and was likewise used among the ancient Almains or Germans i. And yet it is not generally apprehended to have been a consequence of feudal tenure k, though I think some substantial feudal reasons may be given for its introduction. For, if a woman seised of lands hath issue by her husband, and dies, the husband is the natural guardian of the child, and as such is in reason entitled to the profits of the lands in order to maintain it: and therefore the

heir apparent of a tenant by the curtesy could not be in ward to the lord of the fee, during the life of such tenant l. As soon therefore as any child was born, the father began to have a permanent interest in the lands, he became one of the pares curtis, and was called tenant by the curtesy initiate; and this estate being once vested in him by the birth of the child, was not liable to be determined by the subsequent death or coming of age of the infant.

There are four requisites necessary to make a tenancy by the curtesy; marriage, seisin of the wife, issue, and death of the wife m.1. The marriage must be canonical, and legal.2. The seisin of the wife must be an actual seisin, or possession of the lands; not a bare right to possess, which is a
seisin in law, but an actual possession, which is a seisin in deed. And therefore a man shall not be tenant by the curtesy of a remainder or reversion. But of some incorporeal hereditaments a man may be tenant by the curtesy, though there have been no actual seisin of the wife; as in case of an advowson, where the church has not become void in the life time of the wife, which a man may hold by the curtesy, because it is impossible to have had actual seisin of it; and impotentia excusat legem n. If the wife be an idiot, the husband shall not be tenant by the curtesy of her lands; for the king by prerogative is entitled to them, the instant she herself has any title: and since she could never be rightfully seised of these lands, and the husband’s title depends entirely upon her seisin, the husband can have no title as tenant by the curtesy o. The issue must be born alive. Some have had a notion that it must be heard to cry; but that is a mistake. Crying indeed is the strongest evidence of its being born alive; but it is not the only evidence p. The issue also must be born during the life of the mother; for, if the mother dies in labour, and the Caesarean operation is performed, the husband in this case shall not be tenant by the cur-

def. N. B. 143.
mCo. Litt. 30.
nlbid. 29.
oCo. Litt. 30. Plowd. 263.
pDyer. 25.8 Rep. 34.

tesy: because, at the instant of the mother’s death, he was clearly not entitled, as having had no issue born, but the land descended to the child, while he was yet in his mother’s womb; and the estate, being once vested, shall not afterwards be taken from him q. In gavelkind lands, a husband may be tenant by the curtesy without having any issue r. Therefore if a woman be tenant in tail male, and hath only a daughter born, the husband is not thereby entitled to be tenant by the curtesy; because such issue female can never inherit the estate in tail male t. And this seems to be the true reason, why the husband cannot be tenant by the curtesy of any lands of which the wife was not actually seised: because, in order to intitle himself to such estate, he must have begotten issue that may be heir to the ancestor of any land, whereof the ancestor was not actually seised; and therefore, as the husband hath never begotten any issue that curtesy u. And hence we may observe, with how much nicety and consideration the old rules of law were framed; and how closely they are connected and interwoven together, supporting, illustrating, and
demonstrating one another. The time when the issue was born is immaterial, provided it were during the coverture: for, whether it were born before or after the wife's seisin of the lands, whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy. The husband by the birth of the child becomes (as was before observed) tenant by the curtesy initiate x, and may do many acts to charge the lands; but his estate is not consummate till the death of the wife; which is the fourth and last requisite to make a complete tenant by the curtesy y.

qCo. Litt. 29.
rIbid. 30.
sLitt. 56.
tCo. Litt. 29.
uIbid. 40.
wIbid. 29.
xIbid. 30.
yIbid.

IV. Tenant in dower is where the husband of a woman is seised of an estate of inheritance, and dies; in this case, the wife shall have the third part of all the lands and tenements whereof he was seised during the coverture, to hold to herself for the term of her natural life z.

Dower is called in Latin by the foreign jurists doarium, but by Bracton and our English writers dos; which among the Romans signified the marriage portion, which the wife brought to her husband; but with us is applied to signify this kind of estate, to which the civil law, in its original state, had nothing that bore a resemblance: nor indeed is there any thing in general more different, than the regulation of landed property according to the English, and roman laws. Dower out of lands seems also to have been unknown in the early part of our Saxon constitution; for, in the laws of Edmond a, the wife is directed to be supported wholly out of the personal estate. Afterwards, as may be seen in gavelkind tenure, the widow became entitled to a conditional estate in one half of the lands, with a proviso that she remained chaste and unmarried b; as is usual also in copyhold dowers, or free bench. Yet some chafe ascribed the introduction of dower to the Normans, as a branch of their local tenures; though we cannot expect any feodal reason for its invention, since it was not a part of the pure, primitive, simple law of feuds, but was first of all introduced into
that system (wherein it was called triens, tertia d, and dotalitium) by the emperor Frederick the second e; who was contemporary with our king Henry III. It is possible therefore that it might be with us the relic of a Danish ladies, who sold all their

jewels to ransom him when taken prisoner by the Vandals f. However this be, the reason, which our law gives for adopting it, is a very plain and a sensible one; for the sustenance of the wife, and the nurture and education of the younger children g.

In treating of this estate, let us, first, consider, who may be endowed; secondly, of what she may be endowed; thirdly, the manner how she shall be endowed; and, fourthly, how dower may be barred or prevented.

1. Who may be endowed. She must be the actual wife of the party at the time of his decease. If she be divorced a vinculo matrimonii, she shall not be endowed; for ubi nullum matrimonium, ibi nulla dos h. But a divorce a mensa et thoro only doth not destroy the dower i; no, not even for adultery itself, by the common law k. Yet now by the statute Westm.2. l if a woman elopes from her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her. It was formerly held, that the wife of an idiot might be endowed, though the husband of an idiot could not be tenant by the curtesy m: but as it seems to be at present agreed, upon principles of sound sense and reason, that an idiot cannot marry, being incapable of consenting to any contract, this doctrine cannot now take place. By the ancient law the wife of a person attainted of treason or felony could not be endowed; to the intent, says Staunforde n, that, if the love of a man's own life cannot restrain him from such atrocious acts, the love of his wife and children may: though Britton o gives it another turn; viz. that it is presumed the wife was privy to her husband's crime. However, the statute I Edw. VI. c. 12. abated the rigor of the common law in.

fMod. Un. Hist. xxxii. 91.
this particular, and allowed the wife her dower. But a subsequent statute p revived this severity against the widows of traitors, who are now barred of their dower, but not the widows of felons. An alien also cannot be endowed, unless she be queen consort; for no alien is capable of holding lands q. The wife must be above nine years old at her husband's death, otherwise she shall not be endowed r: though in Bracton's time the age was indefinite, and dower was then only due, fi uxor poffit dotem promereti, et virum fuftinere s.

2. We are next to enquire, of what a wife may be endowed. And she is now by law entitled to be endowed of all lands and tenements, of which her husband was seised in fee-simple or fee-tail at any time during the coverture; and of which any issue, which she might have had, might by possibility have been heir t. Therefore if a man, seised in fee-simple, hath a son by his first wife, and after marries a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir, on the death of the son by the former wife. But, if there be a donee in special tail, who holds lands to him and the heirs of his body begotten on Jane his wife; though Jane may be endowed of these lands, yet if Jane dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed; for no issue, that she could have, could by any possibility inherit them u. A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands: which is one reason why he shall not be tenant by the curtesy, but of such lands whereof the wife, or he himself in her right, was actually seised in deed w. The seisin of the husband, for a tranfitory instant only, when the same act which gives

p5 & 6 Edw. VI. c. II.
qCo. Litt. 31.
him the estate conveys it also out of him again, (as where by a fine land is
granted to a man, and he immediately renders it back by the same fine)
such a seisin will not intitle the wife to dower: for the land was merely in
transitu, and never rested in the husband. But, if the land abides in him for
a single moment, it seems that the wife shall be endowed thereof. And, in
short, a widow may be endowed of all her husband's lands, tenements, and
hereditaments, corporeal or incorporeal, under the restrictions before-
mentioned; unless there be some special reason to the contrary. Thus, a
woman shall not be endowed of a castle, built for defence of the realm:
nor of a common without stint; for, as the heir would then have one
portion of this common, and the widow another, and both without stint;
the common would be doubly stocked. Copyhold estates also are not
liable to dower, being only estates at the lord's will; unless by the special
custom of the manor, in which case it is usually called the widow's free-
bench. But, where dower is allowable, it matters not, though the
husband alienes the lands during the coverture; for he alienes them liable
to dower.

3. Next. As to the manner in which a woman is to be endowed. There are
now subsisting four species of dower; the fifth, mentioned by Littleton,
de la plus belle, having been abolished together with the military tenures,
of which it was a consequence. 1. Dower by the common law; or that which
is before described. 2. Dower by particular custom; as that the wife shall
have half the husband's lands, or in some places the whole, and in some
only a quarter. 3. Dower ad ostium ecclesiae: which is

This doctrine was extended very far by a jury in Wales, where the father
and son were both hanged in one cart, but the son was supposed to have
survived the father, by appearing to struggle longest; whereby he became
seised of an estate by survivorship, in consequence of which seisin his
widow had a verdict for her dower. (Cro. Eliz. 503.)

z Co. Litt. 31. 3 Lev. 401.
a Co. Litt. 32. 1 Jon. 315.
b 4 Rep. 22.
c Co. Litt. 32.
where tenant in fee-simple of full age, openly at the church door, where all marriages were formerly celebrated, after affiance made and (sir Edward Coke in his translation adds) troth plighted between them, doth endow his wife with the whole, or such quantity as he shall please, of his lands; at the same time specifying and ascertaining the same: on which the wife, after her husband's death, may enter without further ceremony.4. Dower ex affenfu patris g; which is only a species of dower ad oftium ecclesiae, made when the husband's father is alive, and the son by his consent, expressly given, endows his wife with parcel of his father's lands. In either of these cases, they must (to prevent frauds) be made h in facie ecclesiae et ad oftium ecclesiae; non enim valent facta in lecto mortali, nec in camera, aut alibi ubi clandestina suere conjugia.

It is curious to observe the several revolutions which the doctrine of dower has undergone, since its introduction into England. It seems first to have been of the nature of the dower in gavelkind, before-mentioned; viz. a moiety of the husband's lands, but forfeitable by incontinency or a second marriage. By the famous charter of Henry I, this condition, of widowhood and chastity, was only required in case the husband left any issue I: and afterwards we hear no more of it. Under Henry the second, according to Glanvil k, the dower ad oftium ecclesiae was the most usual species of dower; and here, as well as in Normandy l, it was binding upon the wife, if by her consented to at the time of marriage. Neither, in those days of feodal rigor, was the husband allowed to endow her ad oftium ecclesiae with more than the third part of the lands whereof he then was seised, though he might endow her with less; lest by such liberal endowments the lord should be defrauded of his wardships and other feodal profits m. But if no

gIbid. 40.
hBracton. l. 2. c. 39. 4.
kl. 6. c. 1. & 2.
specific dotation was made at the church porch, then she was endowed by
the common law of the third part (which was called her dos rationabilis) of
such lands and tenements, as the husband was seised of at the time of the
espousals, and no other; unless he specially engaged before the priest to
downder of his future acquisitions n: and, if the husband had no lands,
an endowment in goods, chattels, or money, at the time of espousals, was a
bar of any dower o in lands which he afterwards acquired p. In king John's
magna carta, and the first charter of Henry III. q, no mention is made of
any alteration of the common law, in respect of the lands subject to dower :
but in those of 1217, and 1224, it is particularly provided, that a widow
shall be intitled for her dower to the third part of all such lands as the
husband had held in his life time r: yet, in case of a specific endowment of
less ad olim ecclesiæ, the widow had still no power to waive it after her
husband's death. And this continued to be law, during the reigns of Henry
III. and Edward I s. In Henry IV's time it was denied to be law, that a
woman can be endowed of her husband's goods and chattels t: and, under
Edward IV, Littleton lays it down ex-

n De queftu suo. (Glanv. Ibid.) de terries acquisitis et acquirendis. (Bract.
ibid.)
o Glanv. C. 2.
p When special endowments were made ad olim ecclesiæ, the husband,
after affiance made, and troth plighted, used to declare with what specific
lands he meant to endow his wife, (quod dotat eam de tali manerio cum
pertinentiis, &c. bract. ibid) and therefore in the old York ritual (Seld. Ux.
Hebr. L. 2. c. 27) there is, at this part of the matrimonial service, the
following rubric ; facerdos interroget dotem mulieris ; et, fi terraei in
dotem detur, tunc dicatur pfalmus ifte,&c. When the wife was endowed
generally (ubi quis uxorem fuam dotaverit in generali, de omnibus terries
et tenementis ; Bract. ibid.) the husband seems to have said, with all my
lands and tenements I thee endow ;) and then they all became liable to her
dower. When he endowed her with personalty only, he used to say, with all
my worldly goods (or, as the Salisbury ritual has it, with all my worldly
cbate) I thee endow ;) which intitled the wife to her thirds, or pars
rationabilis, of his personal estate, which is provided for by magna carta,
cap. 26. and will be farther treated of in the concluding chapter of this
book: though the retaining this last expression in our modern liturgy, if of
any meaning at all, can now refer only to the right of maintenance, which she acquires during coverture, out of her husband's personalty.

d. 1216. c. 7. edit. Oxon.

Assignetur autem ei pro dote fua tertia pars totius terrae mariti fui quae fua suit in vita fua, nisi de minori dotafa suerit ad oftium ecclefliae. C. 7. (Ibid.)


pressly, that a woman may be endowed ad oftium ecclefliae with more than a third part u; and shall have her election, after her husband's death, to accept such dower, or refuse it and betake herself to her dower at common law w. Which state of uncertainty was probably the reason, that these specific dowers, ad oftium ecclefliae and ex affenfu patris, have since fallen into total disuse.

I proceed therefore to consider the method of endowment, or assigning dower, by the common law, which is now the only usual species. By the old law, grounded on the feodial exactions, a woman could not be endowed without a fine paid to the lord: neither could she marry again without his licence; lest she should contract herself, and so convey part of the feud, to the lord's enemy x. This licence the lords took care to be well paid for; and, as it seems, would sometimes force the dowager to a second marriage, in order to gain the fine. But, to remedy these oppressions, it was provided, first by the charter of Henry I y, and afterwards by magna carta z, that the widow shall pay nothing for her marriage, nor shall be distreined to marry afresh, if she chooses to live without a husband; but shall not however marry against the consent of the lord: and farther, that nothing shall remain in her husband's capital mansion-house for forty days after his death, during which time her dower shall be assigned. These forty days are called the widow's quarantine; a term made use of in law to signify the number of forty days, whether applied to this occasion, or any other a. The particular lands to be held in dower, must be assigned b by the heir of the husband, or his guardian; not only for the sake of notoriety, but also to entitle the lord of the fee to demand his services of the heir, in respect of the lands so held. For the heir by this entry becomes tenant

u 39.F. N. B. 150.
w 41.
xMirr. C. i. 3.
yubi supra.
It signifies, in particular, the forty days, which persons coming from infected countries are obliged to wait, before they are permitted to land in England.

Co. Litt. 34, 35.

thereof to the lord, and the widow is immediate tenant to the heir, by a kind of subinfeudation or under-tenancy, completed by this investiture or assignment: which tenure may still be created, notwithstanding the statute of quia emptores, because the heir parts not with the fee-simple, but only with an estate for life. If the heir or his guardian do not assign her dower within the term of quarantine, or do assign it unfairly, she has her remedy at law, and the sheriff is appointed to assign it c. If the thing of which she is endowed be divisible, her dower must be set out by metes and bounds; but, if it be indivisible, she must be endowed specially; as, of the third part of the profits of an office, the third sheaf of tithe, and the like d. Upon preconcerted marriages, and in estates of considerable consequence, tenancy in dower happens very seldom: for, the claim of the wife to her dower happens very seldom: for, the claim of the wife to her dower at the common law diffusing itself so extensively, it became a great clog to alienations, and was otherwise inconvenient to families. Wherefore, since the alteration of the ancient law respecting dower ad obtium ecclefiæ, which hath occasioned the entire disuse of that species of dower, jointures have been introduced in their stead, as a bar to the claim at common law. Which leads me to enquire, lastly,

4. How dower may be barred or prevented. A widow may be barred of her dower not only by elopement, divorce, being an alien, the treason of her husband, and other disabilities before-mentioned, but also by detaining the title deeds, or evidences of the estate from the heir; until she restores them e: and, by the statute of Glocester f, if a dowager alienes the land assigned her for dower, she forfeits it ipso facto, and the heir may recover it by action. A woman also may be barred of her dower, by levying a fine or suffering a recovery of the lands, during her cover-

cCo. Litt. 34. 35.
dIbid. 32.
eIbid. 39.
ture g. But the most usual method of barring dowers is by jointures, as regulated by the statute 27 he. VIII. c. 10.
A jointure, which strictly speaking signifies a joint estate, limited to both husband and wife, but in common acceptation extends also to a sole estate, limited to the wife only, is thus defined by sir Edward Coke h; a competent livelihood of freehold for the wife, of lands and tenements; to take effect, in profit or possession, presently after the death of the husband; for the life of the wife at least. This description is framed from the purview of the statute 27 Hen. VIII. c. 10. before-mentioned; commonly called the statute of uses, of which we shall speak fully hereafter. At present I have only to observe, that, before the making of that statute, the greatest part of the land of England was conveyed to uses; the property or possession of the soil being vested in one man, and the use, or profits thereof, in another; whose directions, with regard to the disposition thereof, the former was in conscience obliged to follow, and might be compelled by a court of equity to observe. Now, though a husband had the use of lands in absolute fee-simple, yet the wife was not entitled to any dower therein; he not being seised thereof: wherefore it became usual, on marriage, to settle by express deed some special estate to the use of the husband and his wife, for their lives, in joint-tenancy or jointure; which settlement would be a provision for the wife in case she survived her husband. At length the statute of uses ordained, that such as had the use of lands, should, to all intents and purposes, be reputed and taken to be absolutely seised and possessed of the soil itself. In consequence of which legal seisin, all wives would have become dowlable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be settled in jointure; had not the same statute provided, that upon making such an estate in jointure to the wife before marriage, she shall be for ever precluded from her dower i. But then these

four requisites must be punctually observed. 1. The jointure must take effect immediately on the death of the husband. 2. It must be for her own life at least, and not pur auter vie, or for any term of years, or other smaller estate. 3. It must be made to herself, and no other in trust for her. 4. It must be made, and so in the deed particularly expressed to be, in satisfaction of her whole dower, and not of any particular part of it. If the jointure be

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gPig. Of recov. 66.
H1 Inst. 36.
I4 Rep. 1, 2.
made to her after marriage, she has her election after her husband's death, as in dower ad optium eccleiae, and may either accept it, or refuse it and betake herself to her dower at common law; for she was not capable of consenting to it during coverture. And if, by any fraud or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession, she shall then (by the provisions of the same statute) have her dower pro tanto at the common law k.

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; and here is almost the only estate on which, when derived from the king's debtor, the king cannot distrain for his debt; if contracted during the coverture l. But, on the other hand, a widow may enter at once, without any formal process, on her jointure land; as she also might have done on dower ad optium eccleiae, which a

kThese settlements, previous to marriage, seem to have been in use among the ancient Germans, and their kindred nation the Gauls. Of the former Tacitus gives us this account: Dotem non uxor marito, feduxori maritus affert: interfunt parentes etpropinqui, et muncre probant. (de mor-erm. C. 18.) And Caefar, (de bello. Balico, l. 6. c. 18.) has given us the terms of a marriage settlement among the Gauls, as nicely calculated as any modern jointure. Viri, quantas pecunias ab uxoribus dotis no-mine acceperunt, tantas ex suis bonis, aefti-matione facta, cum dotibus communicant. hujus onmis pecuniae conjunctim ratio babet-tibus superiorum temporum pervenit. The dauphin's commentator on Caefar supposes that this Gaulish custom was the ground of the new regulations made by justinian (Nov. 97.) with regard to the provision for widows among the Romans: but surely there is as much reason to supposed, that it gave the hint for our statutable jointures.

lCo. Litt. 31. a. F. N. B. 150.

jointure in many points resembles; and the resemblance was still greater, while that species of dower continued in its primitive state: whereas no small trouble and a very tedious method of proceeding, is necessary to compel a legal assignment of dower m. And, what is more, though dower be forfeited by the treason of the husband, yet lands settled in jointure remain unimpeached to the widow n. Wherefore sir Edward Coke very justly gives it the preference, as being more sure and safe to the widow, than even dower ad optium eccleiae, the most eligible species of any.
Chapter the Ninth.
Of ESTATES, LESS than FREEHOLD.

Of estates, that are less than freehold, there are three sorts; 1. Estates for years : 2. Estates at will : 3. Estates by sufferance.

I. An estate for years is a contract for the possession of lands or tenements, for some determinate period: and it happens where a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and the lessee a, and the lessee enters thereon b. If the lease be but for half a year, or a quarter, or any less time, this lessee is respected as a tenant for years, and is styled so in some legal proceedings; a year being the shortest term which the law in this case takes notice of c. And this may, not improperly, lead us into a short explanation of the division and calculation of time by the English law.

The space of a year is a determinate and well-known period, consisting commonly of 365 days: for, though in bissextile or

/a We may here mark, once for all, that the terminations of-or? and-ee" obtain. In law, the one an active, the other a passive signification; the former usually denoting the doer of any act, the latter him to whom it is done the feoffor is he that haketha feoffment; the feoffee is he to whom it is made: the donor is one that giveth lands in tail; the donee is he who receiveth it: he that granteth a lease is denominated the lessor; and he to whom it is granted the lessee. (Litt. 57.)
b Ibid. 58.
c Ibid. 67.

Leap-years it consists properly of 366, yet by the statute 21 Hen. III. the increasing day in the leap-year, together with the preceding day, shall be accounted for one day only. That of a month is more ambiguous: there being, in common use, two ways of calculating months; either as lunar, consisting of twenty-eight days, the supposed revolution of the moon, thirteen of which make a year; or, as calendar months, of unequal lengths, according to the Julian division in our common almanacs, commencing at the calends of each month, whereof in a year there are only twelve. A month in law is a lunar month, or twenty-eight days, unless otherwise
expressed; not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks. Therefore a lease for twelve months in the singular number, it is good for the whole year d. For herein the law recedes from its usual calculation, because the ambiguity between the two methods of computation ceases; it being generally understood that by the space of time called thus, in the singular number, a twelvemonth, is meant the whole year, consisting of one solar revolution. In the space of a day all the twenty four hours are usually reckoned; the law generally rejecting all fractions of a day, in order to avoid disputes e Therefore, if I am bound to pay it before twelve o'clock at night; after which the following day commences. But to return to estates for years.

These estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords; but, in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to receive and account for the profits at a settled price, than as having any property of their own. And therefore they were not allowed to have a freehold estate: but their interest (such as it was) vested after their deaths in their executors, who were to make up the accounts of their estator with the lord, and his other creditors, and were intitled to the stock upon the farm. The lessee's estate might also, by the ancient law, be at any time defeated, by a common recovery suffered by the tenant of the freehold f; which annihilated all leases for years then subsisting, unless afterwards renewed by the recoveror, whose title was supposed superior to his by whom those leases were granted.

While estates for years were thus precarious, it is no wonder that they were usually very short, like our modern leases upon rack rent; and indeed we are told g that by the ancient law no leases for more than forty years were allowable. because any longer possession (especially when given without any livery declaring the nature and duration of the estate) might tend to defeat the inheritance. Yet this law, if it ever existed, was soon antiquated: for we may observe, in Madox's collection of ancient instruments, some
leases for years of a pretty early date, which considerable exceed that period; and long terms, for three hundred years at least, were certainly in use in the time of Edward III. I, and probably of Edward I. But certainly, when by the statute 21 Hen. VIII. c. 15. the tremor (that is, he who is intitled to the term of years) was protected against these fictitious recoveries, and his interest rendered secure and permanent, long terms began to be more frequent than before; and were afterwards extensively introduced, being found extremely convenient for family settlements and mortgages: continuing subject, however, to the same rules of succession, and with the same inferiority to freeholds,

fCo. Litt. 46.
gMirror. C.2. 27. co. Litt. 45, 46.
hMadox Formulare Anglican. no. 239. fol. 140. Demise for eighty years, 21 Ric. II. Ibid. no. 245. fol. 146. : for the like term, A. D. 1429 Ibid. no. 248. fol. 148. for fifty years, 7 Edw. IV.
I32 Aff. Pl. 6.
kStat. Of mortmain, 7 Edw. I.

as when they were little better than tenancies at the will of the landlord. 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, terminus, 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 redid 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 it be pur auter vie, is a freehold; but that an estate for a thousand years is only a chattel, and reckoned part of the personal estate q. Hence it follow, 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

/l Co. Litt. 45.
/m 6 Rep. 35.
/n Co. Litt. 46.
/o Ibid. 45.
/p Ibid.
/q Ibid. 46.

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 seizin, or corporal possession of the land: and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter. /r And, because no livery of seizin is necessary to a lease for years, such lessee is not said to be seised, or to have true legal seizin, 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: /s the possession or seizin 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 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. /t
Tenant for term of years hath incident to, and inseparable from his estate, unless by special agreement, the same estovers, which we formerly observed that tenant for life was entitled to; that is to say, house-bote, fire-bote, plough-bote, and hay-bote w: terms which have been already explained x.

/r 5 Rep. 94.
/s Co. Litt. 46.
/t Ibid. 45.
/u pag. 122.
/w Co. Litt. 45.
/x pag. 35.

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 z. Not so, if it determine 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 a.

II. The second species of estates not freehold are estates at will. 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 lease obtains possession b. Such tenant hath no certain indefeasible estate, nothing that can be assigned by him to any other; for that the lessor may determine his will, and put him out whenever he pleases. But every estate at will is at the will of both parties, landlord and tenant, so that either of them may determine his will, and quit his connexions with the other at his
own pleasure c. Yet this must be understood with some restriction. For, if the tenant at will sows his land,

and the landlord before the corn is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements, and free ingress, egress, and regress, to cut and carry away the profits d. And this for the same reason, upon which all the cases of emblements turn; viz. the point of uncertainty: since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land, which is for the good of the public, upon a reasonable presumption, the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will; for in this case the landlord shall have the profits of the land e.

What act does, or does not, amount to a determination of the will on either side, has formerly been matter of great debate in our courts. But it is now, I think settled, that (besides the express determination of the lessor's will, by declaring that the lessee shall hold no longer; which must either be made upon the land f, or notice must be given to the lessee g) the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber h, taking a distress for rent and impounding them thereon I, or making a feoffment, or lease for years of the land to commence immediately k; any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure l; or, which is in tar omnium, the death or outlawry, of either lessor or lessee m; puts an end to or determines the estate at will. The law is however careful, that no sudden determination of the will by one party shall tend to the manifest and unforeseen prejudice of the other. This appears in the case of emblements
before-mentioned; and, by a parity of reason, the lessee after the determination of the lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils. And, 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, upon the same principle, courts of law have of late years leant as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year so long as both parties please, especially where an annual rent is reserved: in which case they will not suffer either party to determine the tenancy even at the end of the year, without reasonable notice to the other.

There is one species of estates at will, that deserves a more particular regard than any other; and that is, an estate held by copy of court roll; or, as we usually call it, a copyhold estate. This, as was before observed, was in its original and foundation nothing better than a mere estate at will. But, the kindness and indulgence of successive lords of manors having permitted these estates to be enjoyed by the tenants and their heirs, according to particular customs established in their respective districts; therefore, though they still are held at the will of the lord, and so are in general expressed in the court rolls to be, yet that will is qualified, restrained, and limited, to be exerted according to the custom of the manor. This custom, being suffered to grow up by the lord, is looked upon as the evidence and interpreter of his will: his will is no longer arbitrary and precarious; but fixed and ascertained by the custom to be the same, and no other, that has time out of mind been exercised and declared by his ancestors. A copyhold tenant is therefore now full as properly a tenant by the custom, as a tenant at will, the custom having arisen from a series of uniform wills. And therefore it is rightly observed by Calthorpe, that copyholders and customary tenants differ not.
so much in nature as in name: for although some be called copyholders, some customary, some tenants by the virge, some base tenants, some bond tenants, and some by one name and some by another, yet do they all agree in substance and kind of tenure: all the said lands are holden in one general kind, that is, by custom and continuance of time; and the diversity of their names doth not alter the nature of their tenure.

Almost every copyhold tenant being therefore thus tenant at the will of the lord according to the custom of the manor; which customs differ as much as the humour and temper of the respective ancient lords, (from whence we may account for their great variety) such tenant, I say, may have, so far as the custom warrants, any other of the estates or quantities of interest, which we have hitherto considered, or may hereafter consider, to hold united with this customary estate at will. A copyholder may, in many manors, be tenant in fee-simple, in fee-tail, for life, by the curtesy, in dower, for years, at sufferance, or on condition: subject however to be deprived of these estates upon the concurrence of those circumstances which the will of the lord, promulged by immemorial custom, has declared to be a forfeiture or absolute determination of those interests; as in some manors the want of issue male, in others the cutting down timber, the nonpayment of a fine, and the like. Yet none of these interests amount to freehold; for the freehold of the whole manor abides always in the lord only, who hath granted out the use and occupation, but not the corporal seisin or true possession, of certain parts and parcels thereof, to these his customary tenants at will.

The reason of originally granting out this complicated kind of interest, so that the same man shall, with regard to the same land, be at one and the same time tenant in fee-simple and also tenant at the lord's will, seems to have arisen from the nature of villenage tenure; in which a grant of any estate of freehold, or

r Litt. 81. 2 Inst. 325.

even for years absolutely, was an immediate enfranchisement of the villeins. The lords therefore. Though they were willing to enlarge the interest of their villeins, by granting them estates which might endure for their lives, or sometimes by descendible to their issue, by yet did not care to manumit
them entirely; and for that reason it seems to have been contrived, that a power of resumption at the will of the lord, should be annexed to these grants, whereby the tenants were still kept in a state of villenage, and no freehold at all was conveyed to them in their respective lands: and of course, as the freehold of all lands must necessarily rest and abide somewhere, the law supposes it to continue and remain in the lord. Afterwards, when these villeins became modern copyholders, and had acquired by custom a sure and indefeasible estate in their lands, on performing the usual services, but yet continued to be styled in their admissions tenants at the will of the lord, --- the law still supposed it an absurdity to allow, that such at were thus nominally tenants at will could have any freehold interest: and therefore continued, and still continues, to determine, that the freehold of lands so holden abides in the lord of the manor, and not in the tenant: for though he really holds to him and his heirs for ever, yet he is also said to hold at another's will. But, with regard to certain other copyholders of free or privileged tenure, which are derived from the ancient tenants in villein-focage t, and are not said to hold at the will of the lord, but only according to the custom of the manor, there is no such absurdity in allowing them to be capable of enjoying a freehold interest; and therefore the law doth not suppose the freehold of such lands to rest in the lord of whom they are holden, but in the tenants themselves u; who are allowed to have freehold in the rest, though not a freehold tenure.

However, in common cases, copy hold estates are still ranked (for the reasons abovementioned) among tenancies at

s Mirr. c. 2. 28. Litt. 204, 5, 6.
t See page 98, & c.

will; though custom, which is the life of the common law, has established a permanent property in the copyholders, who were formerly nothing better than bondmen, equal to that of the lord himself, in the tenements holden of the manor: nay sometimes even superior; for we may now look upon a copyholder of inheritance, with a fine certain, to be little inferior to an absolute freeholder in point of interest, and in other respects,
particularly in the clearness and security of his title, to be frequently in a better situation.

III. An estate at sufferance, is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all. As if a man takes a lease for a year, and, after the year is expired, continues to hold the premises without any fresh leave from the owner of the estate. Or, if a man maketh a lease at will, and dies, the estate at will is thereby determined; but if the tenant continueth possession, he is tenant at sufferance w. But no man can be tenant at sufferance against the king, to whom no laches, or neglect, in not entering and ousting the tenant, is ever imputed by law: but his tenant, so holding over, is considered as an absolute intruder x. But, in the case of a subject, this estate may be destroyed whenever the true owner shall make an actual entry on the lands and oust the tenant; for, before entry, the cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger/y: and the reason is because the tenant being once in by a lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful; unless the owner of the land by some public and avowed act, such as entry is, will declare his continuance to be tortuous, or, in common language, wrongful.

Thus stands the law, with regard to tenants by sufferance; and landlords are obliged in these cases to make formal entries upon their lands z, and recover possession by the legal process of

w Co. Litt. 57.
x Ibid.
y Ibid.
z 5 Mod. 384.

ejectment: and at the utmost, by the common law, the tenant was bound to account for the profits of the land so by him detained. But now, by statute 4 Geo. II. c.2. in case any tenant for life or years, or other person claiming under or by collusion with such tenant, shall willfully hold over after the determination of the term, and demand made in writing for recovering the possession of the premises, by him to whom the remainder or reversion thereof hall belong; such person, so holding over, shall pay, for the time he continues, at the rate of double the yearly value of the lands
so detained. This has almost put an end to the practice of tenancy by sufferance, unless with the tacit consent of the owner of the tenement.

Chapter the Tenth.

Of ESTATES upon CONDITION.

BESIDES the several divisions of estates, in point of interest, which we have considered in the three preceding chapters, there is also another species still remaining, which is called an estate upon condition; being such whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or finally defeated. And these conditional estates I have chosen to reserve till last, because they are indeed more properly qualifications of other estates, than a distinct species of themselves; seeing that any quantity of interest, a fee, a freehold, or a term of years, may depend upon these provisional restrictions. Estates then upon condition, thus understood, are of two sorts: 1. Estates upon condition implied: 2. Estates upon condition expressed: under which last may be included, 3. Estates held in vadio, gage, or pledge: 4. Estates by statute merchant or statute staple: 5. Estates held by elegit.

1. Estates upon condition implied in law, are where a grant of an estate has a condition annexed to it inseparably, from its essence and constitution, although no condition be expressed in words. As if a grant be made to a man of an office, generally, without adding other words; the law tacitly annexes hereto a secret condition, that the grantee shall duly execute his office, on breach of which condition it is lawful for the grantor, or his heirs, to oust him, and grant it to another person. For an office, either public or private, may be forfeited by mis-user or non-user; both of which are breaches of this implied condition. 1. By mis-user, or abuse; as if a judge takes a bribe, or a park-keeper kills deer without authority. 2. By non-user, or neglect; which in public offices, that concern the administration of

a Co. Litt. 201
b Litt. 378.
justice, or the commonwealth, is of itself a direct and immediate cause of forfeiture: but non-user of a private office is no cause of forfeiture, unless some special damage is proved to be occasioned thereby d. For in the one case delay must necessarily be occasioned in the affairs of the public, which require a constant attention; but, private offices not requiring so regular and unremitted a service, the temporary neglect of them is not necessarily productive of mischief; upon which account some special loss must be proved, in order to vacate these. Franchises also, being regal privileges in the hands of a subject, are held to be granted on the same condition of making a proper use of them; and therefore they may be lost and forfeited, like offices, either by abuse or by neglect c.

Upon the same principle proceed all the forfeitures which are given by law of life estates and others; for any acts done by the tenant himself, that are incompatible with the estate which he holds. As if tenants for life or years enfeoff a stranger in fee-simple: this is, by the common law, a forfeiture of their several estates; being a breach of the condition which the law annexes thereto, viz. that they shall not attempt to create a greater estate than they themselves are entitled to f. So if any tenants for years, for life, or in fee, commit a felony; the king or other lord of the fee is entitled to have their tenements, because their estate is determined by the breach of the condition, that they shall not commit felony, which the law tacitly annexes to every feodal donation.

c Litt. 379.
d Co. Litt. 233.
e 9 Rep. 50.
f Co. Litt. 215.

II. An estate on condition expressed in the grant itself, 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 g. These conditions are therefore 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 nonperformance of which an estate already vested may be defeated. Thus, if an estate for life be limited to A upon his marriage with B, the marriage is a precedent condition, and till that happens no estate h is vested in A. Or, if a man grant to his lessee for years, that upon payment of a hundred
marks within the term he shall have the fee, this also is a condition precedent, and the fee-simple passeth not till the hundred marks be paid. But if a man grant an estate in fee-simple reserving to himself and his heirs a certain rent; and that, if such rent be not paid at the times limited, it shall be lawful for him and his heirs to re-enter, and avoid the estate; in this case the grantee and his heirs have and estate upon condition subsequent, which is defeasible if the condition be not strictly performed.

To this class may also be referred all base fees, and fee-simples conditional at the common law. Thus an estate to a man and his heirs, tenants of the manor of Dale, is an estate on condition that he and his heirs continue tenants of that manor. And so, if a personal annuity be granted at this day to a man and the heirs of his body; as this is no tenement within the statute of Westminster the second, it remains, as at common law, a fee-simple on condition that the grantee has heirs of his body. Upon the same principle depend all the determinable estates of freehold, which we mentioned in the eighth chapter; as durante viduitate, &c: these are estates upon condition that the grantees do not marry, and the like. And, on the breach of any

of these subsequent conditions by the failure of these contingences; by the grantee's not continuing tenant of the manor of Dale, by not having heirs of his body, or by not continuing sole; the estates which were respectively vested in each grantee are wholly determined and void.

A distinction is however made between a condition in deed and a limitation, which Littleton denominates also a condition in law. For when an estate is so expressly confined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a limitation: as when land is granted to a man, so long as he is parson of Bale, or while he continues unmarried, or until out of the rents and profits he shall have made 500 l. and the like. In such cases the estate determines as soon as the contingency happens, (when he ceases to be parson, marries a wife, or has received the 500 l.) and the next subsequent

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g Co. Litt. 201.
h Show. Parl. Caf. 83. &c.
I Co. Litt. 217.
k Litt. 325.
l See pag. 109. 110. 111.
estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, upon condition in deed (as if granted expressly upon condition to be void upon the payment of 40 l. by the grantor, or so that the grantee continues unmarried, or provided he goes to York, &c. o) the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate p. But, though strict words of condition be used in the creation of the estate, yet if on breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives, (as if an estate be granted by A to B, on condition that within two years B intermarry with C, and on failure thereof then to D and his heirs) this the law construes to be a limitation

m 380. 1. Inst. 234.
 n 10 Rep. 41.
o Ibid. 42.
p Litt. 347. Stat. 32 Hen. VIII. c. 34.

and not a condition q: because, if it were a condition, then, upon the breach thereof, only A or his representatives could avoid the estate by entry, and so D's remainder might be defeated by their neglecting to enter; but, when it is a limitation, the estate of B determines, and that of D commences, the instant that the failure happens. So also, if a man by his will devises land to his heir at law, on condition that he pays a sum of money, and for non-payment devises it over, this shall be considered as a limitation; otherwise no advantage could be taken of the non-payment, for none but the heir himself could have entered for a breach of condition r.

In all these instances, of limitations or conditions subsequent, it is to be observed, that so long as the condition, either express or implied, either in deed or in law, remains unbroken, the grantee may have an estate of freehold, provided the estate upon which such condition is annexed be in itself of a freehold nature; as if the original grant express either an estate of inheritance, or for life, or no estate at all, which is constructively an estate for life. For the breach of these conditions being contingent and uncertain, this uncertainty preserves the freehold s; because the estate is
capable to last for ever, or at least for the life of the tenant, supposing the condition to remain unbroken. But where the estate is at the utmost a chattel interest, which must determine at a time certain, and may determine sooner, (as a grant for ninety nine years, provided A, B, and C, and the survivor of them, shall so long live) this still continues a mere chattel, and is not, by its uncertainty, ranked among estates of freehold.

These express conditions, if they be impossible at the time of their creation, or afterwards become impossible by the act of God or the act of the feoffor himself, or if they be contrary to law, or repugnant to the nature of the estate, are void. In any of which cases, if they be conditions subsequent, that is, to be per-

r Cro. Eliz. 205. 1 Roll. Abr. 411.
s Co. Litt. 42.

formed after the estate is vested, the estate shall become absolute in the tenant. As, if a feoffment be made to a man in fee-simple, on condition that unless he goes to Rome in twenty four hours; or unless the marries with Jane S. by such a day; ( within which time the woman dies, or the feoffor marries her himself) or unless the kills another; or in case he alienes in fee; then and in any of such cases the estate shall be vacated and determine: here the condition is void, and the estate made absolute in the feoffee. For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant t. But if the condition be precedent, or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to Rome in a day, he shall have an estate in fee; here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant: for he hath no estate until the condition be performed u.

There are some estates defeasible upon condition subsequent, that require a more peculiar notice. Such are

III. Estates held in vadio, in gage, or pledge; which are of two kinds, vivum vadium, or living pledge; and mortuum vadium, dead pledge, or mortgage.
Vivum vadium, or living pledge, is when a man borrows a sum (suppose 200l.) of another; and grants him an estate, as, of 20 l. per annum, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void, as soon as such sum is raised. And in this case the land or pledge is said to be living: it subsists, and survives the debt; and, immediately on the discharge of that, results back to the borrower w. But mortuum vadium, a dead pledge, or mortgage, (which is much more common than the other) is where a man borrows of another

t Co. Litt. 206.
u Ibid.
w Ibid. 205.

a specific (e.g. 200l.) and grants him an estate in fee, on condition that if he, the mortgagor, shall repay the mortgagee the said sum of 200l. on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge; or, as is now the more usual way, that the mortgagee shall 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 x. But, as it was formerly a doubt y, 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 z) 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.

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

x Litt. 332.
z Hardr. 466.

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 re-call or redeem his estate; paying to the mortgagee his principal, interest, and expenses: 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 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 re-call. And also, in some cases of fraudulent mortgages a, the fraudulent mortgagor forfeits all equity of redemption whatsoever. It is not therefore 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 b. But, by statute 7 Geo. II. c. 20. after payment or tender by the mortgagor of principal, interest, and costs, the mortgagee can maintain no ejectment; but may be compelled to reassign his securities. In Glanvil's time, when the universal me-
A Pigncris appellatione cam proprie rem con** dicimus, quat fimul etiam traditur creditori. At cam, quae fine traditio nuda conventione tenetur, proprie hypotheeae poellat** contineri dicimus. Inst. 1. 4. 1. 6. 7.

thod of conveyance was by livery of seisin or corporal tradition of the lands, no gage or pledge of lands was good unless possession was also delivered to the creditor; fi non sequatur ipsius vadium traditio, curia domini regis hujusmodi privates conventions tuerinon folet: for which the reason given is, to prevent subsequent and fraudulent pledges of the same land; cum in tali cafupoffit eadem res pluribus aliis creditoribus tum prius tum pofteriusinvadiari c. And the frauds which have arisen, since the exchange of these public and notorious conveyances for more private and secret bargains, have well evinced the wisdom of our ancient law.

IV. A fourth species of estates, defeasible on condition subsequent, are those held by statute merchant, and statute staple; which are very nearly related to the vivum vadium before-mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into pursuant to the statute 13 Edw. I. de mercatoribus, and thence called a statute merchant; the other pursuant to the statute 27 Edw. III. c. 9. before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of parliament in certain trading towns d, and thence this security is called a statute staple. They are both, I say, securities for debts, originally permitted only among traders, for the benefit of commerce; whereby the lands of the debtor are conveyed to the creditor, till out of the rents and profits of them his debt may be satisfied; and during such time as the creditor so holds the lands, he is tenant by statute merchant or statute staple. There is also a similar security, the recognizance in the nature of a statute staple, which extends the benefit of this mercantile transaction to all the king's subjects in general, by virtue of the statute 23 Hen. VIII. c. 6.

V. Another similar conditional estate, created by operation of law, for security and satisfaction of debts, is called an estate

c 1. 10. c. 8.
d See Book I. ch. 8.
by elegit. What an elegit is, and why so called, will be explained in the third part of these commentaries. At present I need only mention, that it is the name of a writ, founded on the statute of Westm. 2. by which, after a plaintiff has obtained judgment for his debt at law, the sheriff gives him possession of one half of the defendant's lands and tenements, to be held, occupied, and enjoyed, until his debt and damages are fully paid: and, during the time he so holds them, he is called tenant by elegit. It is easy to observe, that this is also a mere conditional estate, defeasible as soon as the debt is levied. But it is remarkable, that the feodal restraints of alienating lands, and charging them with the debts of the owner, were softened much earlier and much more effectually for the benefit of trade and commerce, than for any other consideration. Before the statute of quia emptores, it is generally thought that the proprietor of lands was enabled to alienate no more than a moiety of them: the statute therefore of Westm. 2. permits only so much of them to be affected by the process of law, as a man was capable of alienating by his own deed. But by the statute de mercatoribus (passed in the same year) the whole of a man's lands was liable to be pledged in a statute merchant, for a debt contracted in trade; though only half of them was liable to be taken in execution for any other debt of the owner.

I shall conclude what I had to remark of these estates, by statute merchant, statute staple, and elegit, with the observation of sir Edward Coke. These tenants have uncertain interests in lands and tenements, and yet they have but chattels and no freeholds; (which makes them an exception to the general rule) because though they may hold an estate of inheritance, or for life, ut liberum tenementum, until their debt be paid; yet it shall go to their executors: for ut is similitudinary; and though, to recover their estates, they shall have the same remedy (by assise) as a tenant of the freehold shall have, yet it is but

e 13 Edw. I. c. 18.
f 18 Edw. I.
g 13 Edw. I.
h 1 Inst. 42. 43.

? the similitude of a freehold, and nullum sime fii et idem. This indeed only proves them to be chattel interests, because they go to the executors, which is inconsistent with the nature of a freehold: but it does not assign the reason why these estates, in contradistinction to other uncertain
interests, shall vest in the executors of the tenant and not the heir; which is probably owing to this: that, being a security and remedy provide for personal debts owing to the deceased, to which debts the executor is intitled, the law has therefore thus directed their succession; as judging it reasonable, from a principle of natural equity, that the security and remedy should be vested in them, to whom the debts if recovered would belong. And, upon the same principle, if lands be devised to a man's executor, until out of their profits the debts due from the testator be discharged, this interest in the lands shall be a chattel interest, and on the death of such executor shall go to his executors I: because they, being liable to pay the original testator's debts, so far as his assets will extend, are in reason intitled to possess that fund, out of which he has directed them to be paid.

Chapter the Eleventh.
Of ESTATES in POSSESSION, REMAINDER, and REVERSION.

HITHERTO we have considered estates solely with regard to their duration, or the quantity of interest which the owners have therein. We are now to consider them in another view; with regard to the time of their enjoyment, when the actual pernancy of the profits (that is, the taking, perception, or receipt, of the rents and other advantages arising therefrom) begins. Estates therefore, with respect to this consideration, may either be in possession, or in expectancy: and of expectancies there are two sorts; one created by act of the parties, called a remainder; the other by act of law, and called a reversion.

I. Of estates in possession, (which are sometimes called estates executed, whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or contingency, as in the case of estates executory) there is little or nothing peculiar to be observed. All the estates we have hitherto spoken of are of this kind; for, in laying down general rules, we usually apply them to such estates as are then actually in the tenant's possession. But the doctrine of estates in expectancy contains some of the nicest and most abstruse learning in the English law. These will therefore require a minute discussion, and demand some degree of attention.

II. An estate then in remainder 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-simple granteth lands to A for twenty years, and, after the determination of the said term, then to B and his heirs for ever: here A is tenant for years, remainder to B in fee. In the first place an estate for years is created or carved out of the fee, and given to A; and the residue or remainder of it is given to B. But both these interests are in fact only one estate; the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee a. They are indeed different parts, but they constitute only one whole: they are carved out of one and the same inheritance: they are both created, and may both subsist, together; the one in possession, the other in expectancy. So if land be granted to A for twenty years, and after the determination of the said term to B for life; and, after the determination of B's estate for life, it be limited to C and his heirs for ever: this makes A tenant for years, with remainder to B for life, remainder over to C in fee. Now here the estate of inheritance undergoes a division into three portions: there is first A's estate for years carved out of it; and after that B's estate for life; and then the whole that remains is limited to C and his heirs. And here also the first estate, and both the remainders, for life and in fee, are one estate only; being nothing but parts or portions of one entire inheritance: and if there were a hundred remainders, it would still be the same thing; upon a principle grounded on mathematical truth, that all the parts are equal, and no more than equal, to the whole. And hence also it is easy to collect, that no remainder can be limited after the grant of an estate in fee-simple b: because a fee-simple is the highest and largest estate, that a subject is capable of enjoying; and he that is tenant in fee hath in him the whole of the estate: a remainder therefore, which is only a portion, or residuary part, of the estate, cannot be reserved after the whole is desposed of. A particular estate, with all the remain

a Co. Litt. 143.
b Plowd. 29.

ders expectant thereon, is only one fee-simple; as 40l. is part of 100 l. and 60 l. is the remainder of it: wherefore, after a fee-simple once vested, there can no more be a remainder limited thereon, than after the whole 100 l. is appropriated there can be any residue subsisting.

Thus much being premised, we shall be the better enabled to comprehend the rules that are laid down by law to be observed in the creation of remainders, and the reasons upon which those rules are founded.
1. And, first, there must necessarily be some particular estate, precedent to the estate in remainder. As, an estate for years to A, remainder to B for life; or, an estate for life to A, remainder to B in tail. This precedent estate is called the particular estate, as being only a small part, or particula, of the inheritance; the residue or remainder of which is granted over to another. The necessity of creating this preceding particular estate, in order to make a good remainder, arises from this plain reason; that remainder is a relative expression, and implies that some part of the thing is previously disposed of: for, where the whole is conveyed at once, there cannot possibly exist a remainder; but the interest granted, whatever it be, will be an estate in possession.

An estate created to commence at a distant period of time, without any intervening estate, is therefore properly no remainder: it is the whole of the gift, and not a residuary part. And such future estates can only be made of chattel interest, which were considered in the light of mere contracts by the ancient law, to be executed either now or hereafter, as the contracting parties should agree: but an estate of freehold must be created to commence immediately. For it is an ancient rule of the common law, that no estate of freehold can be created to commence in futuro; but it ought to take effect presently either in possession or remainder, because at common law no freehold in lands could pass without livery of seisin; which must operate either immediately, or not at all. It would therefore be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate possession. Therefore, though a lease to A for seven years, to commence from next Michaelmas, is good; yet a conveyance to B of lands, to hold to him and his heirs for ever from the end of three years next ensuing, is void. So that when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time it completed; and for the grantor to deliver immediate possession of the land to the tenant of his particular estate, which is construed to be giving possession to him in remainder,
since his estate and that of the particular tenant are one and the same estate in law. As, where one leases to A for three years, with remainder to B in fee, and makes livery of seisin to A; here by the livery the freehold is immediately created, and vested in B, during the continuance of A's term of years. The whole estate passes at one from the grantor to the grantees, and the remainder-man is seised of his remainder at the same time that the tenant is possessed of his term. The enjoyment of it must indeed be deferred till hereafter; but it is to all intents and purposes an estate commencing in praefenti, though to be occupied and enjoyed in futuro.

As no remainder can be created, without such a precedent particular estate, therefore the particular estate is said to support the remainder. But a lease at will is not held to be such a particular estate, as will support a remainder over f. For an estate at will is of a nature so slender and precarious, that it is not looked upon as a portion of the inheritance; and a portion must first be taken out of it, in order to constitute a remainder. Besides, if it be a freehold remainder livery of seisin must be given at the time of its creation; and the entry of the grantor, to do this, determines the estate at will in the very instant in which it is made g: or, if it be a chattel interest, though perhaps it might operate as a future contract, if the tenant for years be a party to the deed of creation, yet it is void by way of remainder: for it is a separate independent contract, distinct from the precedent estate at will; and every remainder must be part of one and the same estate, out of which the preceding particular estate is taken h. And hence it is generally true, that if the particular estate is void in its creation, or by any means is defeated afterwards, the remainder supported thereby shall be defeated also i: as where the particular estate is an estate for the life of a person not in esse; or an estate for life upon condition, on breach of which condition the grantor enters and avoids the estate l; in either of these cases the remainder over is void.

2 A second rule to be observed is this; that the remainder must commence or pass out of the grantor at the time of the creation of the particular estate. As, where there is an estate to A for life, with remainder to B in fee: here B's remainder in fee passes from the grantor at the same time that seisin is delivered to A of his life estate in possession. And it is this,
which induces the necessity at common law of livery of seisin being made on the particular estate, whenever a freehold remainder is created. For, if it be limited even on an estate for years, it is necessary that the lessee for years should have livery of seisin, in order to convey the freehold from and out of the grantor; otherwise the remainder is void. Not that the livery is necessary to strengthen the estate for years; but, as livery of the land is requisite to convey the freehold, and yet cannot be given to him in remainder without infringing the possession of the lessee for years, therefore the law allows such livery, made to the tenant of the particular estate, to relate and enure to him in remainder, as both are but one estate in law.

g Dyer. 18.
hRaym. 151.
iCo. Litt. 298.
j2 Roll. Abr. 415.
k1 Jon. 58.
l1 Jon. 58.
mLitt. 671. Plowd. 25.
nLitt. 60.
oCo. Litt. 49.

2. A third rule respecting remainders is this; that the remainder must vest in the grantee during the continuance of the particular estate, or eo instanti that it determines. As, if A be tenant for life, remainder to B in tail; here B's remainder is vested in him, at the creation of the particular estate to A for life: or, if A and B be tenants for their joint lives, remainder to the survivor in fee; here, though during their joint lives the remainder is vested in neither, yet on the death of either of them, the remainder vests instantly in the survivor: wherefore both these are good remainders. But, if an estate be limited to A for life, remainder to the eldest son of B in tail, and A dies before B hath any son; here the remainder will be void, for it did not vest in any one during the continuance, nor at the determination, of the particular estate: and, even supposing that B should afterwards have a son, he shall not take by this remainder; for, as it did not vest at or before the end of the particular estate, it never can vest at all, but is gone for ever. And this depends upon the principle before laid down, that the precedent particular estate and the remainder are one estate in law; they must therefore subsist and be in esse at one and the same instant of time, either during the continuance of the first estate or at the very instant when that determines, so that no other estate can possibly come between them.
For there can be no intervening estate between the particular estate, and the remainder supported thereby: the thing supported must fall to the ground, if once its support be severed from it.

It is upon these rules, but principally the last; that the doctrine of contingent remainders depends. For remainders are either vested or contingent. Vested remainders (or remainders executed, whereby a present interest passes to the party, though to be enjoyed in futuro) are where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent. As

p Plowd. 25. 1 Rep. 66.
q 1 Rep. 138.
r 3 Rep. 21.

if A be tenant for twenty years, remainder to B in fee; here B's is a vested remainder, which nothing can defeat, or set aside.

Contingent or executory remainders (whereby on present interest passes) are where the estate in remainder is limited to take effect, either to a dubious and uncertain person, or upon a dubious and uncertain event; so that the particular estate may chance to be determined, and the remainder never take effect.

First, they may be limited to a dubious and uncertain person. As if A be tenant for life, with remainder to B's eldest son (then unborn) in tail; this is a contingent remainder, for it is uncertain whether B will have a son or no: but the instant that a son is born, the remainder is no longer contingent, but vested. Though, if A had died before the contingency happened, that is, before B's son was born, the remainder would have been absolutely gone; for the particular estate was determined before the remainder could vest. Nay, by the strict rule of law, if A were tenant for life, remainder to his own eldest son in tail and A died without issue born, but leaving his wife enfeint or big with child, and after his death a posthumous son was born, this son could not take the land, by virtue of this remainder; for the particular estate determined before there was any person in effe, in whom the remainder could vest. But, to remedy this hardship, it is enacted by statute 10 & 11 W III. c. 16. that posthumous children shall be capable of taking in remainder, in the same manner as if
they had been born in their father's lifetime: that is, the remainder is allowed to vest in them, while yet in their mother's womb u

This species of contingent remainders, to a person not in being, must however be limited to some one, that may by common possibility, or potentia propinquaque, be in esse at or before the particular estate determines w. As if an estate be made to A for

s 3 Rep. 20.
t Salk. 228. 4 Mod. 282.
u See Vol. I. pag 126.
w 2 Rep. 1.

life, remainder to the heirs of B: now, if A dies before B, the remainder is at an end; for during B's life he has no heir, nemo eft haeres viventis: but if B dies first, the remainder then immediately vests in his heir, who will be entitled to the land on the death of A. This is a good contingent remainder, for the possibility of B's dying before A is potentia propinquaque, and therefore allowed in law x. But a remainder to the right heirs of B (if there be no such person as B in esse) is void y. For here there must two contingencies happen; first, that such a person as B shall be bord; and, secondly, that he shall also die during the continuance of the particular estate; which make it potentia remotiffima, a most improbable possibility. A remainder to a man's eldest son, who hath none, (we have seen) is good; for by common possibility he may have one; but if it be limited in particular to his son John, or Richard, it is bad, if he have no son of that name; for it is too remote a possibility that he should not only have a son, but a son of a particular name z. A limitation of a remainder to a bastard before it is born, is not good a: for though the law allow the possibility of having bastards, it presumes it to be a very remote and improbable contingency. Thus may a remainder be contingent, on account of the uncertainty of the person who is to take it.

A remainder may also contingent, where the person to whom it is limited is fixed and certain, but the event upon which it is to take effect is vague and uncertain. As, where land is given to A for life, and in case B survives him, then with remainder to B in fee: here B is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving A. During the joint lives of A and B
it is contingent; and if B dies first, it never can vest in his heirs, but is for ever gone; but if A dies first, the remainder to B becomes vested.

x Co. Litt. 378.
y Hob. 33.
z 5 Rep. 51.
a Cro. Eliz. 509.

C intiongentremainders 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, this remainder is void b; 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 vesting 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 tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void.

Contingent remainders may be defeated, by destroying or determining the particular estate upon which they depend, before the contingency happens whereby they become vested c. Therefore when there is tenant for life, with divers remainders in contingency, he may, not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life estate, before any of those remainders vest; the consequence of which is that he utterly defeats them all. As, if there be tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son is born, surrenders his life-estate, he by that means defeats the remainder in tail to his son: for his son not being in effe, when the particular estate determined, the remainder could not then vest; and, as it could not vest then, by the rules before laid down, it never can vest at all. In these cases therefore it is necessary to have trustees appointed to preserve the contingent remainders; in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his determines. If therefore his estate for life determines otherwise than by his death, their estate, for the residue of his natural life, will then take effect, and become a particu-

b 1 Rep. 130.
lar estate in possession, sufficient to support the remainders de pending in contingency. This method is said to have been invented by sir Orlando Bridgman, sir Geffery Palmer, and other eminent council, who betook them selves to conveyancing during the time of the civil wars; in order thereby to secure in family settlements a provision for the future children of an intended marriage, who before were usually left at the mercy of the particular tenant for life d: and when, after the restoration, those gentlemen came to fill the first offices of the law, they supported this invention within reasonable and proper bounds, and introduced it into general use.

Thus the student will observe how much nicety is required in creating and securing a remainder; and I trust he will in some measure see the general reasons, upon which this nicety is founded. It were endless to attempt to enter upon the particular subtilties and refinements, into which this doctrine, by the variety of cases which have occurred in the course of many centuries, has been spun out and subdivided: neither are they consonant to the design of these elementary disquisitions. I must not however omit, that in devises by last will and testament, (which, being often drawn up when the party is inops concilii, are always more favoured in construction than formal deeds, which are presumed to be made with great caution, fore-thought, and advice) in these devises, I say, remainders may be created in some measure contrary to the rules before laid down: though our lawyers will not allow such dispositions to be strictly remainders; but call them by another name, that of executory devises, or devises hereafter to be executed.

An executory devise of lands is such disposition of them by will, that thereby no estate vests at the death of the devisor, but only on some future contingency. It differs from a remainder in three very material points: 1. That it needs not any particular estate to support it. 2. That by it a fee-simple or other less estate, may be limited after a fee-simple. 3. That by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same.

d See Moor. 486. 2 Roll. Abr. 797. pl. 12. 2 Sid. 159. 2 Chan. Rep. 170.
1. The first case happens when a man devises a future estate, to arise upon a contingency; and, till that contingency happens, does not disposed of the fee-simple, but leaves it to descend to his heir at law. As if one devises land to a feme-sole and her heirs, upon her day of marriage: here is in effect a contingent remainder without any particular estate to support it; a freehold commencing in futuro. This limitation, though it would be void in a deed, yet is good in a will, by way of executory devise. For, since by a devise a freehold may pass without corporal tradition or livery of seisin. (as it must do, if it passes at all) therefore it may commence in futuro; because the principal reason why it cannot commence in futuro in other cases, is the necessity of actual seisin, which always operates in praefenti. And, since it may thus commence in futuro, there is no need of a particular estate to support it; the only use of which is to make the remainder, by its unity with the particular estate, a present interest. And hence also it follows, that such an executory devise, not being a present interest, cannot be barred by a recovery, suffered before it commences.

2. By executory devise a fee, or other less estate, may be limited after a fee. And this happens where a devisor devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency. As if a man devises land to A and his heirs; but, if he dies before the age of twenty one, then to B and his heirs: this remainder, though void in a deed, is good by way of executory devise. But, in both these species of executory devises, the contingencies ought to be such as may happen within a reasonable time; as within one or more life or in being, or within a moderate term of years; for courts of justice will not indulge even wills, so as to create a perpetuity, which the law abhors: because by perpetuities, (or the settlement of an interest, which shall go in the succession perscribed, without any power of alienation) estates are made incapable of answering those ends, of social commerce, and providing for the sudden contingencies of private life, for which property was at first established. The utmost length that has been hitherto allowed, for the contingency of an executory devise of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards. As when lands

e 1 Sid. 153.
f Cro. Jac. 593.
g 2 Mod. 289.
are devised to such unborn son of a feme-covert, as shall first attain the age of twenty one, and his heirs; the utmost length of time that can happen before the estate can vest, is the life of the mother and the subsequent infancy of her son: and this hath been decreed to be a good executory devise k.

3. By executory devise a term of years may be given to one man for his life, and afterwards limited over in remainder to another, which could not be done by deed: for by law the first grant of it, to a man for life, was a total disposition of the whole term; a life estate being esteemed of a higher and larger nature than any term of years l. And, at first, the courts were tender, even in the case of a will, of restraining the devisee for life from aliening the term; but only held, that in case he died without exerting that act of ownership, the remainder over should then take place m: for the restraint of the power of alienation, especially in very long terms, was introducing a species of perpetuity. But, soon afterwards, it was held n, that the devisee for life hath no power of aliening the term, so as to bar the remainder-man: yet in order to prevent the danger of perpetuities, it was settled o, that, though such remainders may be limited to as many persons successively as the deviser thinks proper, yet they must all be in effe

during the life of the first devisee; for then all the candles are lighted and are consuming together, and the ultimate remainder is in reality only to that remainder-man who happens to survive the rest: or, that such remainder may be limited to take effect upon such contingency only, as must happen (if at all) during the life of the first devisee p.

Thus much for such estates in expectancy, as are created by the express words of the parties themselves; the most intricate title in the law. There is yet another species, which is created by the act and operation of the law itself, and this is called a reversion.

h 12 Mod. 187. 1 Vern. 164.
I Salk 229.
k Forr. 232.
l 8 Rep. 95.
m Bro. tit. chattles. 23. Dyer. 74.
n Dyer. 358. 8 Rep. 96.
o 1 Sid. 451.
III. An estate in reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. Sir Edward Coke describes a reversion to be the returning of land to the grantor or his heirs after the grant is over. As, if there be a gift in tail, the reversion of the fee is, without any special reservation, vested in the donor by act of law: and so also the reversion, after an estate for life, years, or at will, continues in the lessor. For the fee-simple of all lands must abide somewhere; and if he, who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted remains in him. A reversion is therefore 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, being both estates in praefenti, though taking effect in futuro.

The doctrine of reversions is plainly derived from the feodal constitution. For, when a feud was granted to a man for life, or to him and his issue male, rendering either rent, or other services; then, on his death or the failure of issue male, the feud was determined and resulted back to the lord or proprietor, to be again disposed of at his pleasure. And hence the usual incidents to reversions are said to be fealty and rent. When no rent is reserved on the particular estate, fealty however results of course, as an incident quite inseparable, and may be demanded as a badge of tenure, or acknowledgement of superiority; being frequently the only evidence that the lands are holden at all. Where rent is reserved, it is also incident, though not inseparably so, to the reversion.

The rent may be granted away, reserving the reversion; and the reversion may be granted away, reserving the rent; and the reversion may be granted away, reserving the rent; by special words: but by a general grant of the reversion, the rent will pass with it, as incident thereunto; though by the grant of the rent generally, the reversion will not pass. The incident passes by the grant of the principal, but not e converso: for the maxim of law is, accessorium non ducit, fed fequitur, fuum principale t.

These incidental rights of the reversioner, and the respective modes of descent, in which remainders very frequently differ from reversions, have
occasioned the law to be careful in distinguishing the one from the other, however inaccurately the parties themselves may describe them. For if one, seised of a paternal estate in fee, makes a lease for life, with remainder to himself and his heirs, this is properly a mere reversion, to which rent and fealty shall be incident; and which shall only descend to the heirs of his father's blood, and not to his heirs general, as a remainder limited to him by a third person would have done: for it is the old estate, which was originally in him, and never yet was out of him. And so likewise, if a man grants a lease for life to A, reserving rent, with reversion to B and his heirs, B hath a remainder descendible to his heirs general, and not a reversion to which the rent is incident; but the grantor shall be intitled to the rent, during the continuance of A's estate.

s Co. Litt. 143.
t Ibid. 151. 152.
u Cro. Eliz. 321.
w3 Lev. 407.
x1 And. 23.

In order to assist such persons as have any estate in remainder, reversion, or expectancy, after the death of others, against fraudulent concealments of their deaths, it is enacted by the statute 6 Ann. c. 18. that all persons on whose lives any lands or tenements are holden, shall (upon application to the court of chancery and order made thereupon) once in every year, if required, be produced to the court, or its commissioners; or, upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements, till the party shall appear to be living.

Before we conclude the doctrine of remainders and reversions, it may be proper to observe, that whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be merged, that is, sunk or drowned, in the greater. Thus, if there be tenant for years, and the reversion in fee-simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But they must come to one and the same person in one and the same right; else, if the freehold be in his own right, and he has a term in right of another (en auter droit) there is no merger. Therefore, if tenant for years dies, and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he hath
the fee in his own right, and the term of years in the right of the testator, and subject to is debts and legacies. So also, if he who hath the reversion in fee marries the tenant for years, there is no merger ; for he hath the inheritance in his own right, the lease in the right of his wife. An estate-tail is an exception to this rule : for a man may have in his own right both an estate-tail and a reversion in fee ; and the estate-tail, though a less estate, shall not merge in the fee. For estates-tail are protected and preserved from merger by the operation and construction, though not by the express word, of the statute de donis : which operation and construction have probably arisen upon this consideration ; that, in the common cases of merger of estates for life or years by uniting with the inheritance, the particular tenant hath the sole interest in them, and hath full power at any time to defeat, destroy, or surrender them to him that hath the reversion ; therefore, when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of the inferior estate. But, in an estate-tail, the case is otherwise : the tenant for a long time had no power at all over it, so as to bar or to destroy it ; and now can only do it by certain special modes, by a fine, a recovery, and the like : it would therefore have been strangely improvident, to have permitted the tenant in tail, b purchasing the reversion in fee, to merge his particular estate, and defeat the inheritance of his issue : and hence it has become a maxim, that a tenancy in tail, which cannot be surrendered, cannot also be merged in the fee.

b Cro. Eliz. 302.
c

Chapter the Twelfth.
Of ESTATES in SEVERALTY, JOINT-TENANCY, COPARCENARY, and COMMON.

We come now to treat of estate, with respect to the number and connexions of their owners, the tenants who occupy and hold them. And, considered in this view, estates of any quantity or length of duration, and whether they be in actual possession or expectancy, may be held in four
different ways; in severalty, in joint-tenancy, in coparcenary, and in common.

1. He that holds lands or tenements in severalty, or is sole tenant thereof, is he that holds them 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 therefore we may make the same observations here, that we did upon estates in possession, as contradistinguished from those in expectancy, in the preceding chapter: that there is little or nothing peculiar to be remarked concerning it, since all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise; and that, in laying down general rules and doctrines, we usually apply them to such estates as are held in severalty. I shall therefore proceed to consider the other three species of estates, in which there are always a plurality of tenants.

II. An estate in joint-tenancy is where lands of tenements are granted to two or more persons, to hold in fee-simple, fee-tail, for life, for years, or at will. In consequence of such grants the estate is called an estate in joint-tenancy, and sometimes an estate in jointure, which word as well as the other signifies a union or conjunction of interest; though in common speech the term, jointure, is now usually confined to the joint estate, which by virtue of the statute 27 Hen. VIII. c. 10. is frequently vested in the husband and wife before marriage, as a full satisfaction and bar of the woman's dower.

In unfolding this title, and the two remaining ones in the present chapter, we will first enquire, how these estates may be created; next, their properties and respective incidents; and lastly, how they may be severed or destroyed.

I. The creation of an estate in joint-tenancy depends on the wording of the deed or devise, by which the tenants claim title; for this estate can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of law. Now, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A and B and their heirs, this makes them immediately joint-tenants in fee of the lands. For the law interprets the grant so as to make all parts of it take effect, which can only be done by creating an equal
estate in them both. As therefore the grantor has thus united their names, the law gives them a thorough union in all other respects. For,

1. The properties of a joint estate are derived from its unity, which is fourfold; the unity of interest, the unity of title, the unity of time, and the unity of possession: or, in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

   a Litt. 277.
   b See pag. 137.

First, they must have one and the same interest. One joint-tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different: one cannot be tenant for life, and the other for years: one cannot be tenant in fee, and the other in tail c. But, if land be limited to A and B for their lives, this makes them joint-tenants of the freehold; if to A and B and their heirs, it makes them joint-tenants of the inheritance d. If land be granted to A and B for their lives and to the heirs of A; here A and B are joint-tenants of the freehold during their respective lives, and A has the remainder of the fee in severalty: or, if land be given to A and B, and the heirs of the body of A; here both have a joint estate for life, and A hath a several remainder in tail e. Secondly, joint-tenants must also have an unity of title: their estate must be created by one and the same act, whether legal or illegal; as by one and the same grant, or by one and the same disfeifin f. Joint-tenancy cannot arise by descent or act of law; but merely by purchase, or ac-quisition by the act of the party: and, unless that act be one and the same, the two tenants would have different titles; and if they had different titles, one might prove good, and the other bad, which would absolutely destroy the jointure. Thirdly, there must also be an unity of time: their estates must be vested at one and the same period, as well as by one and the same title. As in case of a present estate made to A and B; or a remainder in fee to A and B after a particular estate; in either case A and B are joint-tenants of this present estate, or this vested remainder. But if, after a lease for life, the remainder be limited to the heirs of A and B; and during the continuance of the particular estate A dies, which vests the remainder of one moiety in his heir; and then B dies, whereby the other moiety becomes vested in the heir of B: now A's heir and B's heir are not joint-tenants of this remainder, but tenants in
common; for one moiety vested at one time, and the other moiety vested at another g. Yet, where

c Co. Litt. 188.
d Litt. 277.
e Ibid. 285.
f Ibid. 278.
g Co. Litt. 188.

a feoffment was made to the use of a man, and such wife as he should afterwards marry, for term of their lives, and he afterwards married; in this case it seems to have been held that the husband and wife had a joint estate, though vested at different times h: because the use of the wife's estate was in abeyance and dormant till the intermarriage; and, being then awakened, had relation back, and took effect from the original time of creation. Lastly, in joint-tenancy, there must be an unity of possession. Joint-tenants are said to be seised per my et per tout, by the half or moiety, and by all; that is they each of them have the entire possession, as well of every parcel as of the whole i. They have not, one of them a seisin of one half or moiety, and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety k.

Upon these principles, of a thorough and intimate union of interest and possession, depend many other consequences and incidents to the joint-tenant's estate. If two joint-tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall enure to both, in respect of the joint reversion l. If their lessee surrenders his lease to one of them, it shall also enure to both, because of the privity, or relation of their estate m. One the same reason, livery of seisin, made to one joint-tenant, shall enure to both of them n: and the entry, or re-entry, of one joint-tenant is as effectual in law as if it were the act of both o. In all actions also relating to their joint estate, one joint-tenant cannot sue or be sued without joining the other p. But if two or more joint-tenants be seised of an advowson, and they present different clerks, the bishop may refuse to admit either; because neither joint-tenant hath a several right of patronage, but each is seised of the

Whole: and, if they do not both agree within six months, the right of presentation shall lapse. But the ordinary may, if he pleases, admit a clerk presented by either, for the good of the church, that divine service may be regularly performed; which is no more than he otherwise would be entitled to do, in case their disagreement continued; so as to incur a lapse: and, if the clerk of one joint-tenant be so admitted, this shall keep up the title in both of them; in respect of the privity and union of their estate q.

From the same principle also arises the remaining grand incident of joint estates; viz. the doctrine of survivorship: by which, 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, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance or a common freehold only, or even a less estate w. This is the natural and regular consequence of the union and entirely of their interest. The interest of two joint-
Tenants is not only equal or similar, but also is one and the same. One has not originally a distinct moiety from the other; but, if by any subsequent act (as by alienation or forfeiture of either) the interest become separate and distinct, the joint-tenancy instantly ceases. But, while it continues, each of two joint-tenants has a concurrent interest in the whole; and therefore, on the death of his companion, the sole interest in the whole remains to the survivor. For the interest, which the survivor originally had, is clearly not devested by the death of his companion; and no other person can now claim to have a joint estate with him, for no one can now have an interest in the whole, accruing by the same title, and taking effect at the same time with his own; neither can any one claim a separate interest in any part of tenements; for that would be to deprive the survivor of the right which he has in all, and every part. As therefore the survivor's original interest in the whole still remains; and as no one can now be admitted, either jointly or severally, to any share with him therein; it follows, that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant.

This right of survivorship is called by our ancient authors/xthe jus accrefcendi, 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 accrefcit superftitibus, depersona in personam, ufque ad ultimum superftitem. And this jus accrefcendi ought to be mutual; which I apprehend to be the reason why neither the king y, nor any corporation z, can be a joint-tenant with a private person. For here is no mutuality: the private person has not even the remotest chance of being seised of the entirety, by benefit of survivorship, for the king and the corporation can never die.

x Bracton, 1. 4. ir. 3. c. 9. 3. Fleta. 1. 3. c. 4.
y Co. Litt. 190. Finch L. 83.
z 2 Lev. 12.
3. We are, lastly, to enquire, how an estate in joint-tenancy may be severed and destroyed. And this may be done by destroying any of its constituent unities. 1. That of time, which respects only the original commencement of the joint estate, cannot indeed (being now past) by affected by any subsequent trans-actions. But, 2. the joint-tenants' estate may be destroyed, without any alienation, by merely disuniting their possession. For joint-tenants being seised per may et per tout, every thing that tends to narrow that interest, so that they shall not be seised throughout the whole, and throughout every part, is a severance or destruction of the jointure. And therefore, if two join-tenants agree to part their lands, and hold them in severalty, they are no longer joint-tenants; for they have now no joint interest in the whole, but only a several interest respectively in the several parts. And, for that reason also, the right of survivorship is by such separation destroyed a. By common law all the joint-tenants might agree to make partition of the lands, but one of them could not compel the others so to do b: for, this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent. But now by the statutes 31 Hen. VIII. c. i. and 32 Hen. VIII. c. 32. Joint-tenants, either of inheritances or other less estates, are compellable by writ of partition to divide their lands. 3. The jointure may be destroyed, by destroying the unity of title. As if one joint-tenant aliques and conveys his estate to a third person: here the joint-tenancy is severed, and turned into tenancy in common d; for the grantee and the remaining joint-tenant hold by different titles, (one derived from the original, the other from the subsequent, grantor) though, till partition made, the unity of possession conti-

a Co. Litt. 188. 193.
b 290.
c Thus, by the civil law, nemo invitus compellitur ad communionem. (Ff. 12. 6. 26. 4.) And again: fi non omnes qui rem communem babent, fed certi ex is, dividere defiderant; boc judicium inter eos accipe poteft. (Ff. 10. 3. 8.)
d Litt. 292.

nues. But a devise of one's share by will is no severance of the jointure: for no testament takes effect till after the death of the testator, and by such death the right so the survivor (which accrued at the other e) is already vested f. 4. It may also be destroyed, by destroying the unity of interest.
And therefore, if there by or descends upon either, it is a severance of the jointure g; though, if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure, without merging in the inheritance, they are not separate estates, (which is requisite in order to a merger) but branches of one in-tire estate h. In like manner, if a joint-tenant in fee makes a lease for life of his share, this defeats the jointure i; for it destroys the unity both of title and of interest. And, whenever or by whatever means the jointure ceases or is severed, the right of survivorship or jus accrefcendi the same instant ceases with it w. Yet, if one of threee joint-tenants alienes his share, the two remaining tenants still hold their parts by joint-tenancy and survivorship l; and, if one of three joint-tenants releases his share to one of his companions, though the joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still held in jointure m; for they still preserve their original constituent unities. But when, by any act or event, different interests are created in the several parts of the estate, or they are held by different titles, or if merely the possession is separated; so that the tenants have no longer these four indifpenfable properties, a sameness of interest, an undivided possession, a title vesting at one and the same time, and by one and the same act or grant; the jointure is instantly dissolved.

e Jus accrefcendi prefertur ultimoe voluntati. Co. Litt. 185.
f Litt. 287.
g Cro. Eliz. 470.
h 2 Rep. 60. Co. Litt. 182.
i Litt. 302. 303.
j Nihil de re accrefcit gi, qui nihil in re quando jus accrefceret habet. Co. Litt. 188.
k Ibid. 304.
l Litt. 294.
m Ibid. 304.

In general it is advantageous for the joint-tenants to dissolve the jointure; since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs. Sometimes however it is disadvantageous to dissolve the joint estate: as if there be joint-tenants for life, and they make partition, this dissolves the jointure; and, though before they each of them had an estate in the whole for their own lives and the life of their companion, now they have an estate in a moiety only for their own lives merely; and, on the death of either, the reversioner shall enter on his moiety n. And therefore, if there be two joint-tenants for life,
and one grants away his part for the life of his companion, it is a forfeiture o: for, in the first place, by the severance of the jointure he has given himself in his own moiety only an estate for his own life; and then he grants the same land for the life of another: which grant, by a tenant for his own life merely, is a forfeiture of his estate p; for it is creating an estate which may by possibility last longer than that which he is legally entitled to.

III. An estate held in coparcenary is where lands of inheritance descend from the ancestor to two or more persons. It arises either by common law, or particular custom. By common law: as where a person seised in fee-simple or in fee-tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives; in this case they shall all inherit, as will be more fully shewn, when we treat of descents hereafter: and these co-heirs are then called coparceners; or, for brevity, parceners only q. Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, &c r. And, in either of these cases, all the parceners put together make but one heir; and have but one estate among them s.

n 1 Jones. 55.
o 4 Leon. 237.
p Co. Litt. 252.
q Litt. 241. 242.
r Ibid. 265.
s Co. Litt. 163.

The properties of parceners are in some respects like those of joint-tenants; they having the same unities of interest, title, and possession. They may sue and be sued jointly for matters relating to their own lands t; and the entry of one of them shall in some cases enure as the entry of them all u. They cannot have an action of waste w; for coparceners could at all times put a stop to any waste by a writ of partition, but till the statute of Henry the eighth joint-tenants had no such power. Parceners also differ materially from joint-tenants in four other points:1. They always claim by descent, whereas joint-tenants always claim by purchase. Therefore if two sisters purchase lands, to hold to them and their heirs, they are not parceners, but joint-tenants/x: and hence it likewise follows, that no lands can be held in coparcenary, but for life or years, may be held in joint-tenants.2. There is no unity of time necessary to an estate in coparcenary.
For if a man hath two daughters, to whom his estate descends in coparcenary. For if a man hath two daughters, to whom his estate descends in coparcenary, and one dies before the other; the surviving daughter and the heir of the other, or, when both are dead, their two heirs, are still parceners; the estates vesting in each of them at different times, though it be the same quantity of interest, and held by the same title.

3. Parceners, though they have a unity, have not an entirety, of interest. They are properly intitled each to the whole of a distinct moiety; and of course there is no jus accrefcendi, or survivorship between them: for each part descends severally to their respective heirs, though the unity of possession continues. And as long as the lands continue in a course of descent, and united in possession, so long are the tenants thereof, whether male or female, called parceners. But if the possession be once severed

tCo. Litt. 164.

uIbid. 188.
w2 Inst. 403.
xLitt. 254.
yCo. Litt. 164. 174.
zIbid. 163, 164.

by partition, they are no longer parceners, but tenants in severalty; or if one parcener aliens her share, though no partition be made, then are the lands no longer held in coparcenary, but in common.

Parceners are so called, faith Littleton, because they may be constrained to make partition. And he mentions many methods of making it; four of which are by consent, and one by compulsion. The first is, where they agree to divide the lands into equal parts in severalty, and that each shall have such a determinate part. The second is, when they agree to choose some friend to make partition for them, and then the sisters shall choose each of them her part according to seniority of age; or otherwise, as shall be agreed. But this privilege of seniority is then personal; for if the eldest sister be dead, her issue shall not choose first, but the next sister. But, if an advowson descend in coparcenary, and the sisters cannot agree in the presentation, the eldest and her issue, nay her husband, or her assigns, shall present alone, before the younger. And the reason given is that the former privilege, of priority in choice upon a division, arises from an act of her own, the agreement to make partition; and therefore is merely personal: the latter, of presenting to the living, arises from the act of the law, and is annexed not only to her person, but to her estate also.

A third
method of partition is, where the eldest divides, and then she shall choose last; for the rule of law is, cujus eft division, alterius eft electio. The fourth method is where the sisters agree to cast lots for their shares. And these are the methods by consent. That by compulsion is, where one or more sue out a writ of partition against the others, whereupon the sheriff shall go to the lands, and make partition thereof by the verdict of a jury there impanneled, and assign to each of the parceners her part in severaltye. But there are some things which

are in their nature impartible. The mansion-house, common of estovers, common of piscary uncertain, or any other common without stint, shall not be divided; but the eldest sister, if she pleases, shall have them, and make the others a reasonable satisfaction in other parts of the inheritance; or, if that cannot be, then they shall have the profits of the thing by turns, in the same manner as they take the advowson f.

There is yet another consideration attending the estate in coparcenary; that if one of the daughters has had an estate given with her in frankmarriage by her ancestor (which we may remember was species of estates-tail, freely given by a relation for advancement of his kinswoman in marriage g) in this case, if lands descend from the same ancestor to her and her sisters in fee-simple, she or her heirs shall have no share of them, unless they will agree to divide the lands so given in frankmarriage in equal proportion with the rest of the lands descending h. This general division was known in the law of the Lombards I, which direct the woman so preferred in marriage, and claiming her share of the inheritance, mittere in confusum cum fororibus, quantum pater aut frater ei dederit, quando ambulaverit ad maritum. With us it is denominated bringing those lands into hotchpot k; which term I shall explain in the very words of Littleton l: it seemeth that this word, hotchpot, is in English, a pudding; for in a pudding is not commonly put one thing alone, but onething with other things together. By this housewifely metaphor our ancestors meant to

\[\text{a}\text{Litt. 309.}\\ \text{b 241.}\\ \text{c 243 to 264.}\\ \text{dCo. Litt. 166. 3 Rep. 22.}\\ \text{eBy statute 8 & 9 W. III. c. 3. An easier method of carrying on the proceedings on a writ of partition, of lands held either in joint-tenants, parcenary, or common, than was used at the common law, is chalked out and provided.}\\

inform us m, that the lands, both those given in frankmarriage and those
descending in fee-simple, should be mixed and blended together, and then
divided in equal portions among all the daughters. But this was left to the
choice of the donee in frankmarriage, and if she did not choose to put her
lands in hotchpot, she was presumed to be sufficiently provi-

fCo. Litt. 164, 165.
gSee pag. 115.
hBracton. l. 2. c. 34.Litt. 266 to 273.
Il. 2. t. 14. c. 15.
kBritton. c. 72.
l 267.
mLitt. 268.
ded for, and the rest of the inheritance was divided among her other
sisters. The law of hotchpot took place then only, when the other lands
descending from the ancestor were fee-simple ; for, if they descended in
tail, the donee in frankmarriage was entitled to her share, without bringing
her lands so given into hotchpot n. And the reason is, because lands
descending in fee-simple are distributed by the policy of law, for the
maintenance of all the daughters ; and, if one has a sufficient provision out
of the same inheritance, equal to the rest, it is not reasonable that she
should have more : but lands, descending in tail, are not distributed by the
operation of law, so properly as per formam doni ; it matters not therefore
how unequal this distribution may be. Also no lands, but such as are given
in frankmarriage, shall be brought into hotchpot ; for no others are looked
upon in law as given for the advancement of the woman, or by way of
marriage-portion o. And therefore, as gifts in frankmarriage are fallen into
disuse, I should hardly have mentioned the law of hotchpot, had not this
method of division been revived and copied by the statute for distribution
of personal estates, which we shall hereafter consider at large.
The estate in coparcenary may be dissolved, either by partition ; which
disunites the possession ; by alienation of one parcener, which disunites
the title, and may disunite the interest ; or by the whole at last descending
to and vesting in one single person, which brings it to an estate in
severalty.

IV. Tenants in common are such as hold by several and distinct titles, but
by unity of possession ; because none knoweth his own severalty, and
therefore they all occupy promiscuously p. This tenancy therefore
happens, where there is an unity of possession merely, but perhaps an
entire disunion of interest, of title, and of time. For, if there be two tenants
in common of lands, one may hold is part in fee-simple, the other in tail,
or for life;

nLitt. 274.
oIbid. 275.
pIbid. 292.

so that there is no necessary unity of interest: one may hold by descent,
the other by purchase; or the one by purchase from A, the other by
purchase from B; so that there is no unity of title: one's estate may have
been vested fifty years, the other's but yesterday; so there is no unity of
time. The only unity there is, is that of possession; and for this Littleton
gives the true reason, because no man can certainly tell which part is his
own: otherwise even this would be soon destroyed.

Tenancy in common may be created, either by the destruction of the two
other estates, in joint-tenancy and coparcenary, or by special limitation in
a deed. By the destruction of the two other estates, I mean such
destruction as does not fever the unity of possession, but only the unity of
title or interest. As, if one of two joint-tenants in fee alienes his estate for
the life of the alienee, the alienee and the other joint-tenant are tenants in
common: for they now have several titles, the other joint-tenant by the
original grant, the alienee by the new alienation q; and they also have
several interests, the former joint-tenant in fm fee-simple, the alienee for
his own life only. So, if one joint-tenant give his part to A in tail, and the
other gives is to B in tail, the donees are tenants in common, as holding by
different titles and conveyances r. If one of two parceners alienes, the
alienee and the remaining parcener are tenants in common s; because
they hold by different titles, the parcener by descent, the alienee by
purchase. So likewise, if there be a grant to two men, or two women, and
the heirs of their bodies, here the grantees shall be joint-tenants of the life-
estate, but they shall have several inheritances; because they cannot
possibly have one heir of their two bodies, as might have been the case had
the limitation been to a man and woman, and the heirs of their bodies
begotten t; and in this, and the like cases, their issues shall be tenants in
common; because they must claim by different titles, one as heir of A, and
the other as heir of B; and those too not titles by

qLitt. 293.
rIbid. 295.
purchase, but descent. In short, whenever an estate in joint-tenancy or coparcenary is dissolved, so that there be no partition made, but the unity of possession continues, it is turned into a tenancy in common.

A tenancy in common may also be created by express limitation in a deed: but here care must be taken not to insert words which imply a joint estate; and then if lands be give to two or more, and it be not joint-tenancy, it must be a tenancy in common. But the law is pat in its constructions to favour joint-tenancy rather than tenancy in common; because the divisible services issuing from land (as rent, &c) are not divided, nor the entire services (as fealty) multiplied, by joint-tenancy, as they must necessarily be upon a tenancy in common. Land given to two, to be holden the one, and the other moiety to the other, is an estate in common; and, if one grants to another half his land, the grantor and grantee are also tenants in common: because, as has been before observed, joint-tenants do not take by distinct halves or moieties; and by such grants the division and severalty of the estate is so plainly expressed, that it is impossible they should take a joint interest in the whole of the tenements. But a devise to two persons, to hold jointly and severally, is a joint-tenancy; because that is implied in the word jointly; even though the word severally seems to imply the direct reverse: and an estate given a A and B, equally to be divided between them, though in deeds it hath been said to be a joint-tenancy a, (for it implies no more than the law has annexed to that estate, viz. divisibility b) yet in wills it is certainly a tenancy in common; because the devisor may be presumed to have meant what is most beneficial to both the devisees, though his meaning is imperfectly expressed. And this nicety in the wording of grant makes it the most usual as well as the safest.

uSalk. 392.
wLitt. 298.
xIbid. 299.
ySee pag. 182
zPoph. 52.
b1. P. wms. 17.
c3 Rep. 39.1 Ventr. 32.
way, when a tenancy in common is meant to be created, to add express words of exclusion as well as description, and limit the estate to A and B, to hold as tenants in common, and not as joint-tenants.

As to the incidents attending a tenancy in common: tenants in common (like joint-tenants) are compellable by the statutes of Henry VIII. and William III, before-mentioned d, to make partition of their lands; which they were not at common law. They properly take by distinct moieties, and have no entirety of interest; and therefore there is no survivorship between tenants in common. Their other incidents are such as merely arise from the unity of possession; and are therefore the same as appertain to joint-tenants merely upon the account: such as being liable to reciprocal actions of waste, and of account, by the statutes of Westm. 2. c. 22. and 4 Ann. c. 16. For by the common law no tenant in common was liable to account to his companion for embezzling the profits of the estate e; though, if one actually turns the other out of possession, an action of ejectment will lie against him f. But, as for other incidents of joint-tenants, which arise from the privity of title, or the union and entirety of interest, (such as joining or being joined in actions g, unless in the case where some entire or indivisible thing is to be recovered h) these are not applicable to tenants in common, whose interests are distinct, and whose titles are not joint but several.

Estates in common can only be dissolved two ways: 1. By uniting all the titles and interests in one tenant, by purchase or otherwise; which brings the whole to one severalty: 2. By making partition between the several tenants in common, which gives them all respective severalties. For indeed tenancies in common differ in nothing from sole estates, but merely in the blending and unity of possession. And this finishes our enquiries with respect to the nature of estates.

dpag. 185, & 186.
ECo. Litt. 199.
Flbid. 200.
GLitt 311.
H

Chapter the thirteenth.
Of the TITLE to THINGS REAL, in general.
The foregoing chapters having been principally employed in defining the nature of things real, in describing the tenures by which they may be holden, and in distinguishing the several kinds of estate or interest that may be had therein, I come now to consider, lastly the title to things real, with the manner of acquiring and losing it. A title is thus defined by sir Edward Coke a, titulus eft justa caufa poffidendi id quod noftrum eft ; or, it is the means whereby the owner of lands hath the just possession of his property.

There are several stages or degrees requisite to form a complete title to lands and tenements. We will consider them in a progressive order.

1. The lowest and most imperfect degree of title consists in the mere naked possession, or actual occupation of the estate; without any apparent right, or any shadow or pretence of right, or any shadow or pretence of right, to hold and continue such possession. This may happen, when one man invades the possession of another, and by force or surprize turns him out of the occupation of his lands; which is termed a disfeifin, being a deprivation of that actual seisin, or corporal

freehold of the lands, which the tenant before enjoyed. Or it may happen, that after the death of the ancestor and before the entry of the heir, or after the death of a particular tenant and before the entry of him in remainder or reversion, a stranger may contrive to get possession of the vacant land, and hold out him that had a right to enter. In all which cases, and many others that might be here suggested, the wrongdoer has only a mere naked possession, which the rightful owner may put an end to, by a variety of legal remedies, as will more fully appear in the third book of these commentaries. But in the mean time, till some act be done by the rightful owner to devest this possession and assert his title, such actual possession is, prima facie, evidence of a legal title in the possessor; and it may, by degrees ripen into a perfect and indefeasible title. And, at all events, without such actual possession no title can be completely good.

II. The next step to a good and perfect title is the right of possession, which may reside in one man, while the actual possession is either in himself or in another. For if a man be disseised, or otherwise kept out of possession, by any of the means before-mentioned, though the actual possession be lost, yet he has still remaining in him the right of possession; and may exert it whenever eh thinks proper, by entering upon the disfeifor, and
turning him out of that occupancy which he has so illegally gained. But this right of possession is of two sorts: an apparent right of possession, which may be defeated by proving a better; and an actual right of possession, which will stand the test against all opponents. Thus if the disfeifor, or other wrongdoer, dies possessed of the land whereof he so became seised by his own unlawful act, and the same descends to his heir; now the heir hath obtained an apparent right, though the actual right of possession resides in the person disseised; and it shall not be lawful for the person disseised to devest this apparent right by mere entry or other act of his own, but only by an action at law b. For, until

bLitt. 386.

the contrary be proved by legal demonstration, the law will rather presume the right to reside in the heir, whose ancestor died seised, than in one who has no such presumptive evidence to urge in his own behalf. Which doctrine in some measure arose from the principles of the feodal law, which, after feuds became hereditary, much favoured the right of descent; in order that there might be a person always on the spot to perform the feodal duties and services c: and therefore, when a feudatory died in battle, or otherwise, it presumed always that his children were entitled to the feud, till the right was otherwise determined by his fellow-soldiers and fellow-tenants, the peers of the feodal court. But if he, who has the actual right of possession, puts in his claim and brings his action within a reasonable time, and can prove by what unlawful means the ancestor became seised, he will then by sentence of law recover that possession, to which he hath such actual right. Yet, if he omits to bring this his possessory action within a competent time, his adversary may imperceptibly gain an actual right of possession, in consequence of the other's negligence. And by this, and certain other means, the party kept out of possession may have nothing left in him, but what we are next to speak of; viz.

III. The mere right of property, the jus proprietatis, without either possession or even the right of possession. This is frequently spoken of in our books under the name of the mere right, jus merum; and the estate of the owner is in such cases said to be totally devested, and put to a right d. A person in this situation may have the true ultimate property of the lands in himself: but by the intervention of certain circumstances, either by his own negligence, the solemn act of ancestor, or the determination of a court of justice, the presumptive evidence of that right is strongly in favour of his
antagonist; who has thereby obtained the absolute right of possession. As, in the first place, if a person disseised, or turned out of possession of his estate, neglects to pursue his remedy within the time limited by law; by this means
cGild. Ten. 18.
dCo. Litt. 345.

the disseifor or his heirs gain the actual right of possession: for the law presumes that either he had a good right originally, in virtue of which he entered on the lands on question, or that since such his entry he has procured a sufficient title; and therefore, after so long an acquiescence, the law will not suffer his possession to be disturbed without enquiring into the absolute right of property. Yet, still, if the person disseised or his heir hath the true right of property remaining in himself, his estate is indeed said to be turned into a mere right; but, by proving such his better right, he may at length recover the lands. Again; if a tenant in tail discontinues his estate-tail, by alienating the lands to a stranger in fee, and dies; here the issue in tail hath no right of possession, independent of the right of property: for the law presumes prima facie that the ancestor would not disinherit, or attempt to disinherit, his heir, unless he had power so to do; and therefore, as the ancestor had in himself the right of possession, and has transferred the same to a stranger, the law will not permit that possession now to be disturbed, unless by shewing the absolute right of property to reside in another person. The heir therefore in this case has only a mere right, and must be strictly held to the proof of it, in order to recover the lands. Lastly, if by accident, neglect, or otherwise, judgment is given for either party in any possessory action, (that is, such wherein the right of possession only, and not that of property, is contested) and the other party hath indeed in himself the right of property, this is now turned to a mere right; and upon proof thereof in a subsequent action, denominated a writ of right, he shall recover his seisin of the lands.

Thus, if a disseifor turns me out of possession of my lands, he thereby gains a mere naked possession, and I still retain the right of possession, and right of property. If the disseifor dies, and the lands descend to his son, the son gains an apparent right of possession; but I still retain the actual right both of possession and property. If I acquiesce for thirty years, without bringing any action to recover possession of the lands, the son gains the actual
Right of possession, and I retain nothing but the mere right of property. And even this right of property will fail, or at least it will be without a remedy, unless I pursue it within the space of sixty years. So also if the father be tenant in tail, and alienes the estate-tail to a stranger in fee, the alienee thereby gains the right of possession, and the son hath only the mere right or right of property. And hence it will follow, that one man may have the possession, another the right of possession, and a third the right of possession, and the issue in tail the right of property: A may recover the possession against B; and afterwards the issue in tail may evict A, and unite in himself the possession, the right of possession, and also the right of property. In which union consists,

IV. A complete title to lands, tenements, and hereditaments. For it is an ancient maxim of the law e, that no title is completely good, unless the right of possession be joined with the right of property; which right is then denominated a double right, jus duplicatum, or droit droit f. And when to this double right the actual possession is also united, when there is, according to the expression of Fleta g, juris et seisinae conjunctio, then, and then only, is the title completely legal.

eMrr. l. 2. c. 27.
fCo. Litt. 266. Bract. l. 5. tr. 3. c. 5.
g

Chapter the fourteenth.
Of TITLE by DESCENT.

The several gradations and stages, requisite to form a complete title to lands, tenements, and hereditaments, having been briefly stated in the preceding chapter, we are next to consider the several manners, in which this complete title (and therein principally the right of propriety) may be reciprocally lost and acquired: whereby the dominion of things real is either continued, or transferred from one man to another. And here we must first of all observe, that (as gain and loss are terms of relation, and of a reciprocal nature) by whatever method one man gains an estate, by that same method or its correlative some other man has lost it. As where the heir acquires by descent, the ancestor has first lost or abandoned the estate by his death: where the lord gains land by escheat, the estate of the tenant is first of all lost by the natural or legal extinction of all his hereditary blood: where a man gains an interest by occupancy, the former owner has previously relinquished his right of possession: where one man
claims by prescription or immemorial usage, another man has either parted with his right by an ancient and now forgotten grant, or has forfeited it by the supineness or neglect of himself and his ancestors for ages: and so, in case of forfeiture, the tenant by his own misbehaviour or neglect has renounced his interest in the estate; whereupon it devolves to that person who by law may take advantage of such default: and, in alienation by common assurances, the two considerations of loss and acquisition are so interwoven, and so constantly contemplated together, that we never hear of a conveyance, without at once receiving the idea as well of the grantor as the grantee.

The methods therefore of acquiring on the one hand, and of losing on the other, a title to estates in things real, are reduced by our law to two: descent, where the title is vested in a man by the single operation of law; and purchase, where the title is vested in him by his own act or agreement.

Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law. An heir therefore is he upon whom the law casts the estate immediately on the death of the ancestor: and an estate, so descending to the heir, is in law called the inheritance.

The doctrine of descents, or law of inheritances in fee-simple, is a point of the highest importance; and is indeed the principal object of the laws of real property in England. All the rules relating to purchases, whereby the legal course of descents in broken and altered, perpetually refer to this settled law of inheritance, as a datum or first principle universally known, and upon which their subsequent limitations are to work. Thus a gift in tail, or to a man and the heirs of his body, is a limitation that cannot be perfectly understood without a previous knowledge of the law of descents in fee-simple. One may well perceive, that this in an estate confined in its descent to such heirs only of the donee, as have sprung or shall spring from his body; but who those heirs are, whether all his children both male and female, or the male only, and (among the males) whether the eldest, youngest, or other son alone, or all the sons together, shall be his heir; this is a point, that we must result back to the standing law of descents in fee-simple to be informed of.

aCo. Litt. 18.
In order therefore to treat a matter of this universal consequence the more clearly, I shall endeavour to lay aside such matters as will only tend to breed embarassment and confusion in our enquiries, and shall confine myself entirely to this one object. I shall therefore decline considering at present who are, and who are not, capable of being heirs; reserving that for the chapter of escheats. I shall also pass over the frequent division of descents, into those by custom, statute, and common law: for descents by particular custom, statute, and common law: for descents by particular custom, as to all the sons in gavelkind, and to the youngest in borough-english, have already been often b hinted at, and may also be incidentally touched upon again; but will not make a separate consideration by themselves, in a system so general as the present: and descents by statute, or fee-tail per formam doni, in pursuance of the statute of Westminster the second, have also been already c copiously handled; and it has been seen that the descent in tail is restrained and regulated according to the words of the original donation, and does not entirely pursue the common law doctrine of inheritance; which, and which only, it will now be our business to explain.

And, as this depends not a little on the nature of kindred, and the several degrees of consanguinity, it will be previously necessary so state, as briefly as possible, the true notion of this kindred or alliance in blood d.

Consanguinity, or kindred, is defined by the writers on these subjects to bevinculum personarum ab eodem ftipite defcen-dentium; the connexion or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal, or collateral.

cSee pag. 112, &c.

1. a fuller explanation of the doctrine of consanguinity, and the consequences resulting from a right apprehension of its nature, see an essay on collateral consanguinity, in the first volume of law tracts. Oxon. 1762. 80.

Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other: as between John styles (the propositus in the table of consanguinity) and his father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between John styles is related to him in the first degree, and so likewise is his son; his grandfire and grandson in the second; his great-grandsire, and great-grandson in the third. This is the only natural way of reckoning
the degrees in the direct line, and therefore universally obtains, as well in
the civil e, and canon f, as in the common law g.
The doctrine of lineal consanguinity is sufficiently plain and obvious; but
it is at the first view astonishing to consider the number of lineal ancestors
which every man has, within no very great number of degrees: and so
many different bloods h is a man said to contain in his veins, as he hath
lineal ancestors. Of these he hath two in the first ascending degree, his
own parents; he hath four in the second, the parents of his father and the
parents of his mother; he hath eight in the third, the parents of his two
grandfathers and two grandmothers; and, by the same rule of progression,
he hath an hundred and twenty eight in the seventh; a thousand and
twenty four in the tenth; and at the twentieth degree, or the distance of
twenty generations, every man hath above a million of ancestors, as
common arithmetic will demonstrate i. This lineal consanguinity, we may
observe, falls strictly within the definition of vinculum personarum ab
eodem fittiite def-

eFf. 38. 10. 10.
FDecretal. l. 4. tit. 14.
gCo. Litt. 23.
hIbid. 12.
iThis will seem furprizing to those who are unacquainted with the
encreafing power of progressive numbers; but is palpably evident from
the following table of a geometrical progression, in which the first term is
2, and the denominator also 2: or, to
cendentium; since lineal relations are such as descend one from the other,
and both of course from the same common ancestor.
Collateral kindred answers to the same description: collateral relations
agreeing with the lineal in this, that they descend from the same stock or
ancestor; but differing in this, that they do not descend from each other.
Collateral kinsmen as such then as lineally spring from one and the same
ancestor, who is the stirps, or root, the stipes, trunk, or common stock,
from whence these relations are branched out. As if John styles hath
speak more intelligibly, it is evident, for that each of us has two ancestors
in the first degree; the number of whom is doubled at every remove,
because each of our ancestors has also two immediate ancestors of his
own.
Lineal Degrees.
Number of Ancestors.

1................................................................. 2
2........................................................................ 4
3........................................................................ 8
4........................................................................ 16
5........................................................................ 32
6........................................................................ 64
7........................................................................ 128
8...................................................................... 256
9...................................................................... 512
10................................................................. 1024
11..................................................................... 2048
12..................................................................... 4096
13..................................................................... 8192
14..................................................................... 16384
15..................................................................... 32768
16..................................................................... 65536
17..................................................................... 131072
18..................................................................... 262144
19..................................................................... 524288
20..................................................................... 1048576

A shorter method of finding the number of ancestors at any even degree is
by squaring the number of ancestors at half that number of degree. Thus
16 (the number so ancestors at four degrees) is the square of 4, the number
of ancestors at two; 256 is the square of 16; 65536 of 256; and the
number of ancestors at 40 degrees would be the square of 1048576, or
upwards of a million millions.

two sons, who have each a numerous issue; both these issues are lineally
descended from John styles as their common ancestor; and they are
collateral kinsmen to each other, because they are all descended from this
common ancestor, and all have a portion of his blood in their veins, which
denominates them consanguineos.

We must be careful to remember, that the very being of collateral
consanguinity consists in this descent from one and the same common
ancestor. Thus Titius and his brother are related; why because both
descend from the same grandfather: and his second cousin's claim to
consanguinity is this, that they both are derived from one and the same
great-grandfather. In short, as many ancestors as a man has, so many
common stocks he has, from which collateral kinsmen may be derived.
And as we are taught by holy writ, that there is one couple of ancestors
belonging to us all, from whom the whole race of mankind is descended, 
the obvious and undeniable consequence is, that all men are in some 
degree related to each other. For indeed, if we only only supposed each 
couple of our ancestors to have left, one with another, two children ; and 
each of those children on an average to have left two more ; (and, without 
such a supposition, the human species must be daily diminishing) we shall 
find that all of us have now subsisting near two hundred and seventy 
millions of kindred in the fifteenth degree, at the same distance from the 
several common ancestors as ourselves are ; besides those that are one or 
two descents nearer to or farther from the common stock, who may 
amount to as many more k. And, if this calculation should appear 
incompatible with the number of inhabitants on the earth, it is because, by 
intermarriages among the several descendants from the same ancestor, a 
hundred or a thousand modes of consanguinity may be consolidated in 
one person, or he may be related to us a hundred or a thousand different 
ways.

kThis will swell more considerably than the former calculation : or here, 
though the first term is but1, the denominator is4; that is, there is one 
kinsman (a brother) in the first degree, who makes, together with the 
propostus the two descendants from the first couple of ancestors ; and in 
every other degree the number of kindred must

The method of computing these degrees in the canon law l, which our law 
has adopted m, is as follows. We begin at the common ancestor, and 
reckon downwards ; and in whatsoever degree the two persons, or the 
most remote of them, is distant

be the quadruple of those in the degree which immediately precedes it.
For, since each couple of ancestors has two descendants, who encrease in a 
duplicate ratio, it will follow that the ratio, in which all the descendants 
encrease downwards, must be double to that in which the ancestors 
encrease upwards : but we have seen that the ancestors encrease in a 
duplicate ratio : therefore the descendants must encrease in a double 
duplicate, that is, in a quadruple, ratio.

Lineal Degrees.

<table>
<thead>
<tr>
<th>Number of Ancestors</th>
<th>Number of Descendants</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>3</td>
<td>16</td>
</tr>
<tr>
<td>4</td>
<td>64</td>
</tr>
<tr>
<td>Degree</td>
<td>Number of Kindred</td>
</tr>
<tr>
<td>--------</td>
<td>------------------</td>
</tr>
<tr>
<td>5</td>
<td>256</td>
</tr>
<tr>
<td>6</td>
<td>1024</td>
</tr>
<tr>
<td>7</td>
<td>4096</td>
</tr>
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<td>8</td>
<td>16384</td>
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<td>11</td>
<td>1048576</td>
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<tr>
<td>12</td>
<td>4194304</td>
</tr>
<tr>
<td>13</td>
<td>16777216</td>
</tr>
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<td>15</td>
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</tr>
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<td>18</td>
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<tr>
<td>19</td>
<td>68719476736</td>
</tr>
<tr>
<td>20</td>
<td>274877906944</td>
</tr>
</tbody>
</table>

This calculation may also be formed by a more compendious process, viz. by squaring the couples, or half the number, of ancestors at any given degree; which will furnish us with the number of kindred we have in the same degree, at equal distance with ourselves from the common stock, besides those at unequal distances. Thus, in the tenth lineal degree, the number of ancestors is 1024; its half, or the couples, amount to 512; the number of kindred in the tenth collateral degree amounts therefore to 262144, or the square of 512. And if we will be at the trouble to recollect the state of the several families within our own knowledge, and observe how far they agree with this account; that is, whether, on an average, every man has not one brother or sister, four first cousins, sixteen second confines, and so on; we shall find that the present calculation is very far from being overcharged.

I Decretal. 4. 14. 3 & 9.
mCo. Litt. 23.
from the common ancestor, that is the degree in which they are related to each other. Thus Titius and his brother are related in the first degree; for from the father to each of them is counted only one: Titius and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor; viz. his own grandfather, the father of Titius. Or, (to give a more illustrious instance from our English annals) king Henry the seventh, who slew Richard the third in the battle of Bofworth, was related to that prince in the fifth degree. Let the propositus therefore in the table of consanguinity represent king Richard the third, and the class marked (e) king Henry the seventh. Now their common stock or ancestor was king Edward the third, the abavus in the same table: from him to Edmond duke of York, the proavus, is one degree; to Richard earl of Cambridge, the avus, two; to Richard duke of York, the pater, three; to king Richard the third, the propositus, four: and from king Edward the third to John of Gant (a) is one degree; to John earl of Somerset (b) two; to John duke of Somerset (c) three; to Margaret countess of Richmond (d) four; to king Henry the seventh (e) five. Which last mentioned prince, being the farthest removed from the common stock, gives the denomination to the degree of kindred in the canon and municipal law. Though according to the computation of the civilians, (who count upwards, from either of the persons related, to the common stock, and then downwards again to the other; reckoning a degree for each person both ascending and descending) these two princes were related in the ninth degree: for from king Richard the third to Richard duke of York is one degree; to Richard earl of Cambridge, two; to Edmond duke of York, three; to king Edward the third, the common ancestor, four; to John of Gant, five; to John earl of Somerfet, six; to John duke of Somerset, seven; to Margaret countess of Richmond, eight; to king Henry the seventh, nine n.

nSee the table of consanguinity annexed; wherein all the degrees of collateral kindred to the propositus are computed, so far as the tenth of the civilians and the seventh of the canonists inclusive; the former being distinguished by the numeral letters, the latter by the common ciphers.

The nature and degrees of kindred being thus in some measure explained, I shall next proceed to lay down a series of rules, or canons of inheritance, according to which estates are transmitted from the ancestor to the heir; together with an explanatory comment, remarking their original and
progress, the reasons upon which they are founded, and in some cases their agreement with the laws of other nations.

I. The first rule is, that inheritances shall lineally descend to the issue of the person last actually seised, in infinitum; but shall never lineally ascend. To explain the more clearly both this and the subsequent rules, it must first be observed, that by law no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead. Nemo eft haeres viventis. Before that time the person who is next in the line of succession is called an heir apparent, or heir presumptive. Heirs apparent are such, whose right of inheritance is indefeasible, provided they outlive the ancestor; as the eldest son or his issue, who must by the course of the common law be heirs to the father whenever he happens to die. 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 present hopes may be hereafter cut off by the birth of a son. Nay, even 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 devested and taken away by the birth of a posthumous child; and, in the latter, it shall also be totally devested by the birth of a posthumous son o.

oBro. tit. descent. 58.

We must also remember, that no person can be properly such an ancestor, as that an inheritance in lands or tenements can be derived from him, unless he hath had actual seisin of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or be receiving rent from a lessee of the freehold p: or unless he hath had what is equivalent to corporal seisin in hereditaments that are incorporeal; such as the receipt of rent, a presentation to the church in case of an advowson q, and the like. But he shall not be accounted an ancestor, who hath had only a bare right or title to enter or be otherwise seised. And therefore all the cases, which will be mentioned in the present chapter, are upon the supposition that the deceased (whose inheritance is now claimed) was the last person actually seised thereof. For the law requires this notoriety of possession, as evidence that the ancestor had that property in himself, which is now to be transmitted to his heir. Which notoriety hath succeeded in the place of the ancient feodal investiture,
whereby, while feuds were precarious, the vasal on the descent of lands was formerly admitted in the lord's court (as is still the practice in Scotland) and there received his seisin, in the nature of a renewal of his ancestors grant, in the presence of the feodal peers: till at length, when the right of succession became indefeasible, an entry on any part of the lands within the county (which if disputed was afterwards to be tried by those peers) or other notorious possession, was admitted as equivalent to the formal grant of seisin, and made the tenant capable of transmitting his estate by descent. The seisin therefore of any person, thus understood, makes him the root or stock, from which all future inheritance by right of blood must be derived: which is very briefly expressed in this maxim, seisina facit fitipitem r.

pCo. Litt. 15.
qIbid. 11.
rFlet. l. 6. c. 2. 2.

When therefore a person dies so seised, the inheritance first goes to his issue: as if there be Geoffrey, John, and Matthew, grandfather, father, and son; and John purchases land and dies; his son Matthew shall succeed him as heir, and not the grandfather Geoffrey; to whom the land shall never ascend, but shall rather escheat to the lord s.

This rule, so far as it is affirmative and relates to lineal descents, is almost universally adopted by all nations; and it seems founded on a principle of natural reason, that (whenever a right of property transimissible to representatives is admitted) the possessions of the parents should go, upon their decease, in the first place to their children, as those to whom they have given being, and for whom they are therefore bound to provide. But the negative branch, or total exclusion of parents and all lineal ancestors from succeeding to the inheritance of their offspring, is peculiar to our own laws, and such as have been deduced from the same original. For, by the Jewish law, on failure of issue the father succeeded to the son, in exclusion of brethren, unless one of them married the widow and raised up seed to his brother t. And, by the laws of Rome, in the first place the children or lineal descendants were preferred; and, on failure of these, the father and mother or lineal ascendants succeeded together with the brethren and sisters v; though by the law of the twelve tables the mother was originally, on account of her sex, excluded u. Hence this rule of our laws has been censured and declaimed against, as absurd and derogating from the maxims of equity and natural justice w. Yet that there is nothing
unjust or absurd in it, but that on the contrary it is founded upon very good reason, may appear from considering as well the nature of the rule itself, as the occasion of introducing it into our laws.

sLitt. 3.
vFf. 38. 15. 1. Nov. 118. 127.
uInst. 3. 3. 1.
wCraig. De jur. Feud. l. 2. t. 13. 15. Locke on gov. part. 1. 90.

We are to reflect, in the first place, that all rules of succession to estates are creatures of the civil polity, and juris positiivi merely. The right of property, which is gained by occupancy, extends naturally no farther than the life of the present possessor; after which the land by the law of nature would again become common, and liable to be seised by the next occupant: but society, to prevent the mischiefs that might ensue from a doctrine so productive of contention, has established conveyances, wills, and successions; whereby the property originally gained by possession is continued, and transmitted from one man to another, according to the rules which each state has respectively thought proper to prescribe. There is certainly therefore no injustice done to individuals, whatever be the path of descent marked out by the municipal law.

If we next consider the time and occasion of introducing this rule into our law, we shall find it to have been grounded upon very substantial reasons. I think there is no doubt to be made, but that it was introduced at the same time with, and in consequence of, the feodal tenures. For it was an express rule of the feodal law x, that successionis feudi talis est natura, quod ascendentes non succedunt; and therefore the same maxim obtains also in the French law to this day y. Our Henry the first indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line/z: but this soon fell again into disuse; for so early as Glanvil's time, who wrote under Henry the second, we find it laid down as established law a, that haereditas nunquam ascendit; which has remained an invariable maxim ever since. These circumstances evidently shew this rule to be of feodal original; and, taken in that light, there are some arguments in its favour, besides those which are drawn merely from the reason of the thing. For if the feud, of which the son died

x2 Feud. 50.
seised, was really feudum antiquum, or one descended to him from his ancestors, the father could not possibly succeed to it, because if must have passed him in the course of descent, before it could to the son; unless it were feudum maternum, or one descended from his mother, and then for other reasons (which will appear hereafter) the father could in no wise inherit it. and if it were feudum novum, or one newly acquired by the son, then only the descendants from the body of the feudatory himself could succeed, by the known maxim of the early feodal constitutions b; which was founded as well upon the personal merit of the vasal, which might be transmitted to his children but could not ascend to his progenitors, as also upon this consideration of military policy, that the decrepit grandsire of a vigorous vasal would be but indifferently qualified to succeed him in his feodal services. Nay, even if this feudum novum were held by the son ut feudum antiquum, or with all the qualities annexed of a feud descended from his ancestors, such feud must in all respects have descended as if it had been really an ancient feud; and therefore could not go to the father, because, if it had been an ancient feud, the father must have been dead before it could have come to the son. Thus whether the feud was strictly novum, or strictly antiquum, or whether it was novum held ut antiquum, in none of these cases the father could possibly succeed. These reasons, drawn from the history of the rule itself, seem to be more satisfactory than that quaint one of Bracton c, adopted by sir Edward Coke d, which regulates the descent of lands according to the laws of gravitation.

II. A second general rule or canon is, that the male issue shall be admitted before the female.

b1 Feud. 20.
cDescendit itaque jus, quafi pondero sum quid, cadens deorsum recta linea, et nunquam reascendit. l. 2. c. 29.
d1 Inst. 11.

Thus sons shall be admitted before daughters; or, as our male lawgivers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be preferred e. As if John styles hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; first Matthew, and (in case of his death without issue) then Gilbert, shall be admitted to the succession in preference to both the daughters.
This preference of males to females is entirely agreeable to the law of succession among the Jews, and also among the states of Greece, or at least among the Athenians; but was totally unknown to the laws of Rome, (such of them, I mean, as are at present extant) wherein brethren and sisters were allowed to succeed to equal portions of the inheritance. I shall not here enter into the comparative merit of the roman and the other constitutions in this particular, nor examine into the greater dignity of blood in the male or female sex; but shall only observe, that our present preference of males to females seems to have arisen entirely from the feodal law. For though our British ancestors, the Welsh, appear to have given a preference to males, yet our subsequent Danish predecessors seem to have made no distinction of sexes, but to have admitted all the children at once to the inheritance. But the feodal law of the Saxons on the continent (which was probably brought over hither, and first altered by the law of king Canute) gives an evident preference of the male to the female sex. Pater aut mater, defuncti, filio nonfiliae haereditatem relinquent. Lui defunctus non filios fedfilias reliquerit, ad eas omnis haereditas pertineat. It is possible therefore that this preference might be a branch of that imperfect system of feuds, which of feuds, which obtained here before the conquest; especially as it subsists among the customs of gavelkind, and as, in the charter or laws of king Henry the first, it is not (like many Norman innovations) given up, but rather enforced. The true reason of preferring the males must be deduced from feodal principles: for, by the genuine and original policy of that constitution, no female could ever succeed to a proper feud, inasmuch as they were incapable of performing those military services, for the sake of which that system was established. But our law does not extend to a total exclusion of females, as the Salic law, and others, where feuds were most strictly retained: it only postpones them to males; for, though daughters are excluded by sons, yet they succeed before any collateral relations: our law, like that of the Saxon feudists before-
mentioned, thus steering a middle course, between the absolute rejection of females, and the putting them on a footing with males.

III. A third rule, or canon of descent, is this: that, where there are two or more males in equal degree, the eldest only shall inherit; but the females all together.

As if a man hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; Matthew his eldest son shall alone succeed to his estate, in exclusion of Gilbert the second son and both the daughters: but, if both the sons die without issue before the father, the daughters Margaret and Charlotte shall both inherit the estate as coparceners o.

This right of primogeniture in males seems ancienly to have only obtained among the Jews, in whose constitution the eldest son had a double portion of the inheritance p; in the same manner as with us, by the laws of king Henry the first q, the eldest son had the capital fee or principal feud of his father's possessions,

mc. 70.
n1 Feud. 8.
oLitt. 5. Hale. H. C. L. 238.
pSelden. De fucc. Ebr. c. 5.
qc. 70.

and no other pre-eminence; and as the eldest daughter had afterwards the principal mansion, when the estate descended in coparcenary r. The Greeks, the Romans, the Britons, the Saxons, and even originally the feudists, divided the lands equally; some among all the children at large, some the males only. This is certainly the most obvious and natural way; and has the appearance, at least in the opinion of younger brothers, of the greatest impartiality and justice. But when the emperors began to create honorary feuds, or titles of nobility, it was found necessary (in order to preserve their dignity) to make them impartible s, or (as they styled them) feuda individua, and in consequence descendible to the eldest son alone. This example was farther enforced by the inconveniences that attended the splitting of estates; namely, the division of the military services, the multitude of infant tenants incapable of performing any duty, the consequential weakening of the strength of the kingdom, and the inducing younger sons to take up with the business and idleness of a country life, instead of being serviceable to themselves and the public, by engaging in mercantile, in military, in civil, or in ecclesiastical employments t. These
reasons occasioned an almost total change in the method of feodal
inheritances abroad; so that the eldest male began universally to succeed
to the whole of the lands in all military tenures: and in this condition the
feodal constitution was established in England by William the conqueror.
Yet we find, that focage estates frequently descended to all the sons
equally, so lately as when Glanvil wrote, in the reign of Henry the second;
and it is mentioned in the mirror as a part of our ancient constitution,
that knights' fees should descend to the eldest son, and focage fees should
be partible among the male children. However in Henry the third's time
we find by Bracton that focage lands, in imitation of lands in chivalry,
had

rGlanvil. l. 7. c. 3.
sFeud. 55.
tHale. H. C. I. 221.
ul. 7. c. 3.
wI. 1. 3.
xI. 2. co. 30, 31.

almost entirely fallen into the right of succession by primogeniture, as the
law now stands: except in Kent, where they gloried in the preservation of
their ancient gavelkind tenure, of which a principal branch was the joint
inheritance of all the sons; and except in some particular manors and
townships, where their local customs continued the descent, sometimes to
all, sometimes to the youngest son only, or in other more singular methods
of succession.
As to the females, they are still left as they were by the ancient law: for
they were all equally incapable of performing any personal service; and
therefore, one main reason of preferring the eldest ceasing, such
preference would have been injurious to the rest: and the other principal
purpose, the prevention of the too minute subdivision of estates, was left
to be considered and provided for by the lords, who had the disposal of
these female heiresses in marriage. However, the succession by
primogeniture, even among females, took place as to the inheritance of the
crown; wherein the necessity of a sole and determinate succession is as
great in the one sex as the other. And the right of sole succession, though
not of primogeniture, was also established with respect to female dignities
and titles of honour. For if a man holds an earldom to him and the heirs of
his body, and dies, leaving only daughters; the eldest shall not of course
be countess, but the dignity is in suspense or abeyance till the king shall
declare his pleasure; for he, being the fountain of honour, may confer it on which of them he pleases. In which disposition is preserved a strong trace of the ancient law of feuds, before their descent by primogeniture even among the males was established; namely, that the lord might bestow them on which of the sons he thought proper: 

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progrefsumeft, ut ad filios deveniret, inquem fcilicetdominus boc vellet beneficium confirmare.

Somner. Gavelk. 7.
zc. Litt. 165.
aIbid.
b1 Feud. i.

IV. A fourth rule, or canon of descents, is this; that 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. And these representatives shall take neither more nor less, but just so much as their principals would have done. As if there be two sisters, Margaret and Charlotte; and Margaret dies, leaving six daughters; and then John styles the father of the two sisters dies, without other issue: these six daughters shall take among them exactly the same as their mother Margaret would have done, had she been living; that is, a moiety of the lands of John styles in coparcenary: so that, upon partition made, if the land be divided into twelve parts, thereof Charlotte the surviving sister shall have six, and her six nieces, the daughters of Margaret, one apiece. This taking by representation is called a succession in stirpes, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. And in this manner also was the Jewish succession directed; but the roman somewhat differed from it. In the descending line the right of representation continued in infinitum, and the inheritance still descended in stirpes: as if one of three daughters died, leaving ten children, and then the father died; the two surviving daughters had the remaining third divided between them. And so among collaterals, if any persons of equal degree with the persons represented were still subsisting, (as if the deceased left one brother, and two nephews the sons of another brother) the succession was still guided by the roots:
but, if both the brethren were dead leaving issue, then (I apprehend) their repre-

cHale. H. C. L. 236, 237.
dSelden de fucc. Ebr. c. 1.

sentatives in equal degree became themselves principals, and shared the inheritance per capita, that is, share and share alike; they being themselves now the next in degree to the ancestor, in their own right, and not by right of representation e. So, if the next heirs of Titius be six nieces, three by one sister, two by another, and one by a third; his inheritance by the Roman law was divided into six parts, and one given to each of the nieces: whereas the law of England in this case would still divide it only into three parts, and distribute it per stirpes, thus; one third to the three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother.

This mode of representation is a necessary consequence of the double preference given by our law, first to the male issue, and next to the firstborn among the males, to both which the Roman law is a stranger. For if all the children of three sisters were in England to claim per capita, in their own rights as next of kin to the ancestor, without any respect to the stocks from whence they sprung, and those children were partly male and partly female; then the eldest male among them would exclude not only his own brethren and sisters, but all the issue of the other two daughters; or else the law in this instance must be inconsistent with itself, and depart from the preference which it constantly gives to the males, and the firstborn, among persons in equal degree. Whereas, by dividing the inheritance according to the roots or stirpes, the rule of descent is kept uniform and steady: the issue of the eldest son excludes all other pretenders, as the son himself (if living) would have done; but the issue of two daughters divide the inheritance between them, provided their mothers (if living) would have done the same: and among these several issues, or representatives of the respective roots, the same preference to males and the same right of primogeniture obtain, as would have obtained at the first among the roots themselves, the sons or daughters of the deceased. As if a man hath

oNov. 118. c.3. Inst. 3. 1. 6.
two sons, A and B, and A dies leaving two sons, and then the grandfather
dies; now the eldest son of A shall succeed to the whole of his
grandfather's estate: and if A had left only two daughters, they should
have succeeded also to equal moieties of the whole, in exclusion of B and
his issue. But if a man hath only three daughters, C, D, and E; and C dies
leaving two sons, D leaving two daughters, and E leaving a daughter and a
son who is younger than his sister: here, when the grandfather dies, the
eldest son of C shall succeed to one third, in exclusion of the younger; the
two daughters of D to another third in partnership; and the son of E to the
remaining third, in exclusion of his elder sister. And the same right of
representation, guided and restrained by the same rules of descent,
prevails downwards in infinitum.
Yet this right does not appear to have been thoroughly established in the
time of Henry the second, when Glanvil wrote; and therefore, in the title
to the crown especially, we find frequent contests between the younger
(but surviving) brother, and his nephew (being the son and representative
of the elder deceased) in regard to the inheritance of their common
ancestor: for the uncle is certainly nearer of kin to the common stock, by
one degree, than the nephew; though the nephew, by representing his
father, has in him the right of primogeniture. The uncle also was usually
better able to perform the services of the fief; and besides had frequently
superior interest and strength, to back his pretensions and crush the right
of his nephew. And even to this day, in the lower Saxony, proximity of
blood takes place of representative primogeniture; that is, the younger
surviving brother is admitted to the inheritance before the son of an elder
deceased: which occasioned the disputes between the two houses of
Mecklenburg, Schwerin and Strelitz, in 1692f. Yet Glanvil, with us, even in
the twelfth century, seems g to declare for the right of the nephew by
representation; provided the eldest son had not received a provision in
lands from his father, (or as the

civil law would call it) had not been forisfamiliated, in his life-time. King
John, however, who kept his nephew Arthur from the throne, by disputing
this right of representation, did all in his power to abolish it throughout
the realm h: but in the time of his son, king Henry the third, we find the
rule indisputably settled in the manner we have here laid it down I, and so
it has continued ever since. And thus much for lineal descents.

fMod. Un. Hist. xliii. 334.
gl. 7. c. 3.
V. A fifth rule is, that, on failure of lineal descendants, or issue, of the person last seised, the inheritance shall descend to the blood of the first purchasor; subject to the three preceding rules. Thus if Geoffrey purchases land, and it descends to John styles his son, and John dies seised thereof without issue; whoever succeeds to this inheritance must be of the blood of Geoffrey the first purchasor of this family. The first purchasor, perquisitor, 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 only that of descent.

This is a rule almost peculiar to our own laws, and those of a similar original. For it was entirely unknown among the Jews, Greeks, and Romans: none of whose laws looked any farther than the person himself who died seised of the estate; but assigned him an heir, without considering by what title he gained it, or from what ancestor he derived it. But the law of Normandy agrees with our law in this respect: nor indeed is that agreement to be wondered at, since the law of descents in both is of feodal original; and this rule or canon cannot otherwise be accounted for than by recurring to feodal principles.

When feuds first began to be hereditary, it was made a necessary qualification of the heir, who would succeed to a feud, that he should be of the blood of, that is lineally descended from,

H. C. L. 217, 229.
IBracton. L. 2. c. 30. 2.
kCo. Litt. 12.
lGr. Coustum. 6. 25.

the first feudatory or purchasor. In consequence whereof, if a vasal died possessed of a feud of his own acquiring, or feudum novum, it could not descend to any but his own offspring; no, not even to his brother, because he was not descended, nor derived his blood, from the first acquirer. But if it was feudum antiquum, that is, one descended to the vasal from his ancestors, then his brother, or such other collateral relation as was descended and derived his blood from the first feudatory, might succeed to such inheritance. To this purpose speaks the following rule, frater fratri fine legitimo haerede defuncto, in beneficio quod eorumpatris suit, succedat: fin autem unus e fratribus a domino feudum acceperit, eo defuncto fine legitimo haerede, frater ejus in feudum non succedet m. The true feodal reason for which rule was this; that what was given to a man, for his personal service and personal merit, ought not to descend to any
but the heirs of his person. And therefore, as in estates-tail, (which a proper feud very much resembled) so in the feodal donation, nomen baeredis, in prima inventititura expressum, tantum ad descendentes ex corpore primi vasalli extenditur; et non ad collaterales, nisi ex corpore primi vasalli five stipitis descendant n; the will of the donor, or original lord, (when feuds were turned from life estates into inheritances) not being to make them absolutely hereditary, like the Roman allodium, but hereditary only sub modo; not hereditary to the collateral relations, or lineal ancestors, or husband, or wife of the feudatory, but to the issue descended from his body only.

However, in process of time, when the feodal rigor was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a feudum novum to hold ut feudum antiquum; that is with all the qualities annexed of a feud derived from his ancestors; and then the collateral relations were admitted to succeed even in infinitum, because they might have been of the blood of, that is descended from, the first imaginary purchasor. For since it is not ascertained

m1 Feud. 1. 2.
nCrag. L. 1. t. 9. 36.

in such general grants, whether this feud shall be held ut feudum paternum, or feudum avitum, but ut feudum antiquum merely, as a feud of indefinite antiquity; that is, since it is not ascertained from which of the ancestors of the grantee this feud shall be supposed to have descended; the law will not ascertain it, but will supposed any of his ancestors, pro re nata, to have been the first purchasor; and therefore it admits any of his collateral kindred (who have the other necessary requisites) to the inheritance, because every collateral kinsman must be descended from some one of his lineal ancestors.

Of this nature are all the grants of fee-simple estates of this kingdom; for there is now in the law of England no such thing as a grant of a feudum novum, to be held ut novum; unless in the case of a fee-tail, and there we see that this rule is strictly observed, and none but the lineal descendants of the first donee (or purchasor) are admitted; but every grant of lands in fee-simple is with us a feudum novum to held ut antiquum, as a feud whose antiquity is indefinite; and therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the
lands might have possibly been purchased, are capable of being called to the inheritance.
Yet, when an estate hath really descended in a course of inheritance to the person last seised, the strict rule of the feodal law is still observed; and none are admitted, but the heirs of those through whom the inheritance hath passed: for all others have demonstrably none of the blood of the first purchaser in them, and therefore shall never succeed. As, if lands come to John styles by descent from his mother Lucy Baker, no relation of his father (as such) shall ever be his heir of these lands; and, vice versa, if they descended from his father Geoffrey styles, no relation of his mother (as such) shall ever be admitted thereto; for his father's kindred have none of his mother's blood, nor have his mother's relations any share of his father's blood. And so, if the estate descended from his father's father, George styles; the relations of his father's mother, Cecilia Kempe, shall for the same reason never be admitted, but only those of his father's father. This is also the rule of the French law, which is derived from the same feodal fountain.
Here we may observe, that, so far as the feud is really antiquum, the law traces it back, and will not suffer any to inherit but the blood of those ancestors, from whom the feud was conveyed to the late proprietor. But when, through length of time, it can trace it no farther; as if it be not known whether his grandfather, George styles, inherited it from his father Walter styles, or his mother Christian Smith; or if it appear that his grandfather was the first grantee, and so took it (by the general law) as a feud of indefinite antiquity; in either of these cases the law admits the descendants of any ancestor of George styles, either paternal or maternal, to be in their due order the heirs to John styles of this estate: because in the first case it is really uncertain, and in the second case it is supposed to be uncertain, whether the grandfather derived his title from the part of his father or his mother.
This then is the great and general principle, upon which the law of collateral inheritances depends; that, upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or, that it shall result back to the heirs of the body of that ancestor, from whom it either really ahs, or is supposed by fiction of law to have, originally descended: according to the rule laid down in the yearbooks, Fitzherbert, Brook, and Hale; that he who would have been heir to the father of the deceased? (and, of course, to the mother, or any other purchasing ancestor) shall also be heir to the son.
The remaining rules are only rules of evidence, calculated to investigate who that purchasing ancestor was; which, in feuds

ODomat. Part. 2. pr.
qAbr. T. difcent. 2.
rIbid. 38.
sH. C. L. 243.

vere antiquis, has in process of time been forgotten, and is supposed so to be in feuds that are held ut antiquis.

VI. A sixth rule or canon therefore is, that the collateral heir of the person last seised must be his next collateral kinsman, of the whole blood.

First, he must be his next collateral kinsman, either personally or jure representationis; which proximity is reckoned according to the canonical degrees of consanguinity before-mentioned. Therefore, the brother being in the first degree, he and his descendants shall exclude the uncle and his issue, who is only in the second. And herein consists the true reason of the different methods of computing the degrees of consanguinity, in the civil law on the one hand, and in the canon and common laws on the other. The civil law regards consanguinity principally with respect to successions, and therein very naturally considers only the person deceased, to whom the relation is claimed: it therefore counts the degrees of kindred according to the number of persons through whom the claim must be derived from him; and makes not only his great-nephew but also his first-cousin to be both related to him in the fourth degree; because there are three persons between him and each of them. The canon law regards consanguinity principally with a view to prevent incestuous marriages, between those who have a large portion of the same blood running in their respective veins; and therefore looks up to the author of that blood, or the common ancestor, reckoning the degrees from him: so that the great-nephew is related in the third canonical degree to the person proposed, and the first-cousin in the second; the former being distant three degrees from the common ancestor, and therefore deriving only one fourth of his blood from the same fountain with propositus; the later, and also the propositus, being each of them distant only two degrees from the common ancestor, the therefore having one half of each of their bloods the same. The common law regards consanguinity principally with respect to descents; and, having therein the same object in
view as the civil, it may seem as if it ought to proceed according to the civil computation. But as it also respect the purchasing ancestor, from whom the estate was derived, it therein resembles the canon law, and therefore courts its degrees in the same manner. Indeed the designation of person (in seeking for the next of kin) will come to exactly the same end (though the degrees will be differently numbered) whichever method of computation we supposed the law of England to use; since the right of representation (of the father by the son, &c) is allowed to prevail in infinitum. This allowance was absolutely necessary, else there would have frequently been many claimants in exactly the same degree of kindred, as (for instance) uncles and nephews of the deceased; which multiplicity, though no inconvenience in the Roman law of partible inheritances, yet would have been productive of endless confusion where the right of sole succession, as with us, is established. The issue or descendants therefore of John styles’s brother are all of them in the first degree of kindred with respect so inheritances, as their father also, when living was; those of his uncle in the second; and so on; and are severally called to the succession in right of such their representative proximity.

The right of representation being thus established, the former part of the present rule amounts to this; that, on failure of issue of the person last seised, the inheritance shall descend to the issue of his next immediate ancestor. Thus if John styles dies without issue, his estate shall descend to Francis his brother, who is lineally descended from Geoffrey styles his next immediate ancestor, or father. On failure of brethren, or sisters, and their issue, it shall descend to the uncle of John styles, the lineal descendant of his grandfather George, and so on in infinitum. Very similar to which was the law of inheritance among the ancient Germans, our progenitors: haeredes successorefque fui cuique liberi, et nullumtestamentum: fi liberi non fut, proximus gradus in possessione, fraters, patru, avunculi t.

Tacitus de mor. Germ. 21.

Now here it must be observed, that the lineal ancestors, though (according to the first rule) incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet common stocks from which the next successor must spring. And therefore in the Jewish law, which in this respect entirely correpponds with ours, the father or other lineal ancestor is himself said to be the heir, though long since dead as being represented by the persons of his issue; who are held to succeed not
in their own rights, as brethren, uncles, &c, but in right of representation, as the sons of the father, grandfather, &c, of the deceased. But, though the common ancestor be thus the root of the inheritance, yet with us it is not necessary to name him in making out the pedigree or descent. For the descent between two brothers is held to be an immediate descent; and therefore title may be made by one brother or his representatives to or through another, without mentioning their common father. If Geoffrey styles hath two sons, John and Francis, Francis may claim as heir to John, without naming their father Geoffrey: and so the son of Francis may claim as cousin and heir to Matthew the son of John, without naming the grandfather; viz as son of Francis, who was the brother of John, who was the father Matthew. But through the common ancestors are not named in deducing the pedigree, yet the law still respects them as the fountains of inheritable blood: and therefore in order to ascertain the collateral heir of John styles, it is in the first place necessary to recur to his ancestors in the first degree; and if they have left any other issue besides John, that issue will be his heir. On default of such, we must ascend one step higher to the ancestors in the second degree, and then to those in the third, and fourth, and so upwards in infinitum; till some ancestors be found, who have other issue descending from them besides the deceased, in a parallel or collateral line. From these ancestors the heir of John styles must derive his descent; and in such derivation the same rules must

uNumb. C. 27.
vSelden. de fucc. Ebr. c. 12.
w1 Sid. 193. 1 Lev. 60. 12 Mod. 619.

be observed, with regard to sex, primogeniture, and representation, that have just been laid down with regard to lineal descents from the person of the last proprietor. But, secondly, the heir need not be the nearest kinsman absolutely, but only sub modo; that is, he must be the nearest kinsman of the whole blood; for, if there be a much nearer kinsman of the half blood, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded. A kinsman of the whole blood is he that is derived, not only from the same ancestor, but from the same couple of ancestors. For, as every man's own blood is compounded of the bloods of his respective ancestors, he only is
properly of the whole or entire blood with another, who hath (so far as the distance of degrees will permit) all the same ingredients in the composition of his blood that the other hath. Thus, the blood of John styles being composed of those of Geoffrey styles his father and Lucy Baker his mother, therefore his brother Francis, being descended from both the same parents, hath entirely the same blood with John styles; or, he is his brother of the whole blood. But if, after the death of Geoffrey, Lucy Baker the mother marries a second husband, Lewis Gay, and hath issue by him; the blood of this issue, being compounded of the blood of Lucy Baker (if is true) on the one part, but of that of Lewis Gay (instead of Geoffrey styles) on the other part, it hath therefore only half the same ingredients with that of John styles; so that he is only his brother of the half blood, and for that reason they shall never inherit to each other. So also, if the father has two sons, A and B, by different venters or wives; now these two brethren are not brethren of the whole blood, and therefore shall never inherit to each other, but the estate shall rather escheat to the lord. Nay, even if the father dies, and his lands descend to his eldest son A, who enters thereon, and dies seised without issue; still B shall not be heir to this estate, because he is only of the half blood to A, the person last seised: but, had A died without entry, then B might have inherited; not as heir to A his half-brother, but as heir to their common father, who was the person last actually seised x.

This total exclusion of the half blood from the inheritance, being almost peculiar to our own law, is looked upon as a stranger hardship by such as are unacquainted with the reasons on which it is grounded. But these censures arise from a misapprehension of the rule; which is not so much to be considered in the light of a rule of descent, as of a rule of evidence; an auxiliary rule, to carry a former into execution. And here we must again remember, that the great and most universal principle of collateral inheritances being this, that an heir to a feudum antiquum must be of the blood of the first feudatory or purchaser, that is, derived in a lineal descent from him; it was originally requisite, as upon gifts in tail it still is, to make out the pedigree of the heir from the first donee or purchaser, and to shew that such heir was his lineal representative. But when, by length of time and a long course of descents, it came (in those rude and unlettered ages) to be forgotten who was really the first feudatory or purchaser, and thereby the proof of an actual descent from him became impossible; proof: for it remits the proof of an actual descent from the first purchaser; and only requires, in lieu of it, that the claimant be next of the whole blood to the person last in possession; (or derived from the same couple of
ancestors) which will probably answer the same end as if he could trace his pedigree in a direct line from the first purchasor. For he who is my kinsman of the whole blood can have no ancestors beyond or higher than the common stock, but what are equally my ancestors also; and mine are vice versa his: he therefore is very likely to be derived from that unknown ancestor of mine, from whom the inheritance descended. But a kinsman of the half blood has but one halfof his ancestors above the common stock the same as mine; and therefore there is not the

xHale. H. C. L. 238.
yTenures. 186.

same probability of that standing requisite in the law, that he be derived from the blood of the first purchasor.
To illustrate this by example. Let there be John styles, and Francis, brothers by the same father and mother, and another son of the same mother by Lewis Gay a second husband. Now, if John dies seised of lands, but it is uncertain whether they descended to him from his father or mother; in this case his brother Francis, of the whole blood, is qualified to be his heir; for he is sure to be in the line of descent from the first purchasor, whether it were the line of the father or the mother. But if Francis should die before John, without issue, the mother's son by Lewis Gay (or brother of the half blood) is utterly incapable of being heir; for he cannot prove his descent from the first purchasor, who is unknown, nor has he that fair probability which the law admits as presumptive evidence, since he is to the full as likely not to be descended from the line of the first purchasor, as to be descended: and therefore the inheritance shall go to the nearest relation possessed of this presumptive proof, the whole blood. And, as this is the case in feudis antiquis, where there really did once exist a purchasing ancestor, who is forgotten; it is also the case in feudis novis held ut antiquis, where the purchasing ancestor is merely ideal, and never existed but only in fiction of law. Of this nature are all grants of lands in fee-simple at this day, which are inheritable as if they descended from some uncertain indefinite ancestor, and therefore any of the collateral kindred of the real modern purchasor (and not his own offspring only) may inherit them, provided they be of the whole blood; for all such are, in judgment of law, likely enough to be derived from this indefinite ancestor: but those of the half blood are excluded, for want of the same probability. Nor should this be thought hard, that a brother of the purchasor, though
only of the half blood, must thus be disinherited, and a more remote relation of the whole blood admitted, merely upon a supposition and fiction of law; since it is only upon a like supposition and fiction, that brethren of purchasers (whether of the whole or half blood) are entitled to inherit at all: for we have seen that in feudis strictenovis neither brethren nor any other collaterals were admitted. As therefore in feudis antiquis we have seen the reasonableness of excluding the half blood, if by a fiction of law a feudum novum be made descendible to collaterals as if it was feudum antiquum, it is just and equitable that it should be subject to the same restrictions as well as the same latitude of descent.

Perhaps by this time the exclusion of the half blood does not appear altogether so unreasonable, as at first sight it is apt to do. It is certainly a very fine-spun and subtile nicety: but, considering the principles upon which our law is founded, it is neither an injustice nor a hardship; since even the succession of the whole blood was originally a beneficial indulgence, rather than the strict right of collaterals: and, though that indulgence is not extended to the demi-kindred, yet they are rarely abridged of any right which they could possibly have enjoyed before. The doctrine of whole blood was calculated to supply the frequent impossibility of proving a descent from the first purchaser, without some proof of which (according to our fundamental maxim) there can be no inheritance allowed of. And this purpose it answers, for the most part, effectually enough. I speak with these restrictions, because it does not, neither can any other method, answer this purpose entirely. For though all the ancestors of John styles, above the common stock, are also the ancestors of his collateral kinsmen of the whole flood; yet, unless that common stock be in the first degree, (that is, unless they have the same father and mother) there will be intermediate ancestors below the common stock, that may belong to either of them respectively, from which the other is not descended, and therefore can have none of their blood. Thus, though John styles and his brother of the whole blood can each have no other ancestors, than what are in common to them both; yet with regard to his uncle, where the common stock is removed one degree higher, (that is, the grandfather and grandmother) one half of John's ancestors will not be the ancestors of his uncle: his patruss, or father's brother, derives not his descent from John's maternal ancestors; nor his avunculus, or mother's brother, from those in the paternal line. Here then the supply of proof is deficient, and by no means amounts to a certainty: and, the higher the common stock is removed, the more will even the probability decrease.

But it must be observed, that (upon the same principles of calculation) the
half blood have always a much less chance to be descended from an
unknown indefinite ancestor of the deceased, than the whole blood in the
same degree. As, in the first degree, John's uncle of the whole blood has an
even chance; but the chances are three to one against his uncle of the half
blood, for three fourths of John's ancestors are not his. In like manner, in
the third degree, the chances are only three to one against John's great
uncle of the whole blood, but they are seven to one against his great uncle
of the half blood, for seven eighths so John's ancestors have no connexion
in blood with him. Therefore the much less probability of the half blood's
descent from the first purchaser, compared with that of the whole blood,
in the several degrees, has occasioned a general exclusion of the half blood
in all.
But, while I thus illustrate the reason of excluding the half blood in
general, I must be impartial enough to own, that, in some instances, the
practice is carried farther than the principle upon which it goes will
warrant. Particularly, when a man has two sons by different venters, and
the estate on his death descends from him to the eldest, who enters, and
dies without issue: now the younger son cannot inherit this estate,
because he is not of the whole blood to the last proprietor. This, it must be
owned, carries a hardship with it, even upon feodal principles: for the rule
was introduced only to supply the proof of a descent from the first
purchaser; but here, as this estate notoriously descended from
the father, and as both the brothers confessedly sprung from him, it is
demonstrable that the half brother must be of the blood of the first
purchaser, who was either the father or some of the father's ancestors.
When therefore there is actual demonstration of the thing to be proved, it
is hard to exclude a man by a rule substituted to supply that proof when
deficient. So far as the inheritance can be evidently traced back, there
seems no need of calling in this presumptive proof, this rule of probability,
to investigate what is already certain. Had the elder brother indeed been a
purchaser, there would have been no hardship at all, for the reasons
already given: or had the frater uterinus only, or brother by the mother's
side, been excluded from an inheritance which descended from the father,
it had been highly reasonable.
Indeed it is this very instance, of excluding a frater consanguineus, or
brother by the father's side, from an inheritance which descended a patre,
that Craig has singled out, on which to ground his strictures on the
English law of half blood. And, really, it should seem, as if the custom of
excluding the half blood in Normandy a extended only to exclude a frater
uterinus, when the inheritance descended a patre, and vice versa: as even
with us it remained a doubt, in the time of Bracton, and of Fleta, whether the half blood on the father's side were excluded from the inheritance which originally descended from the common father, or only from such as descended from the respective mothers, and from newly purchased lands. And the rule of law, as laid down by our Fortescue, extends no farther than this; frater fratri uterino non succedet in haereditate paterna. It is moreover worthy of observation, that by our law, as it now stands, the crown (which is the highest inheritance in the nation) may descend to the half blood of the preceding sovereign, so as it be the blood of the first monarch, purchasor, or (in the feodal language) conqueror, of the reigning family. Thus it actually

xl. 2. t. 15. 14.
aGr. Coustum. c. 25.
bl. 2. c. 30. 3.
cl. 6. c. i. 14.
dde laud. LL. Angl. 5.
ePlowd. 245. Co. Litt. 15.

did descend from king Edward the sixth to queen Mary, and from her to queen Elizabeth, who were respectively of the half blood to each other. For, the royal pedigree being always a matter of sufficient notoriety, there is no occasion to call in the aid of this presumptive rule of evidence, to render probable the descent from the royal stock; which was formerly king William the Norman, and is now (by act of parliament) the princess Sophia of Hanover. Hence also it is, that in estates-tail, where the pedigree from the first donee must be strictly proved, half blood is no impediment to the descent: because, when the lineage is clearly made out, there is no need of this auxiliary proof. How far it might be desirable for the legislature to give relief, by amending the law of descents in this single instance, and ordaining that the half blood might inherit, where the estate notoriously descended from its own proper ancestor, but not otherwise; or how far a private inconvenience should be submitted to, rather than a long established rule should be shaken; it is not for me to determine.

The rule then, together with its illustration, amounts to this: that, in order to keep the estate of John styles as nearly as possible in the line of his purchasing ancestor, it must descend to the issue of the nearest couple of ancestors that have left descendants behind them; because the descendants of one ancestor only are not so likely to be in the line of that purchasing ancestor, as those who are descended from two.
But here another difficulty arises. In the second, third, fourth, and every superior degree, every man has many couples of ancestors, increasing to the distances in a geometrical progression upwards h, the descendants of all which respective couples are (representatively) related to him in the same degree. Thus in the second degree, the issue of George and Cecilia styles and of Andrew and Esther Baker, the two grandsires and grand-mothers of John styles, are each in the same degree of propinquity; in the third degree, the respective issues of Walter and Christian styles, of Luke and Frances Kempe, of Herbert and Hannah Baker, and of James and Emma Thorpe, are (upon the extinction of the two inferior degrees) all equally entitled to call themselves the next kindred of the whole blood to John styles. To which therefore of these ancestors must we first resort, in order to find out descendants to be preferably called to the inheritance?

In answer to this, and to avoid the confusion and uncertainty that must arise between the several stocks, wherein the purchasing ancestor may be sought for,

VII. The seventh and last rule or canon is, that 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 from 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 I; and the relations of the father's father, before those of the father's mother; and so on. And in this the English law is not singular, but warranted by the examples of the Hebrew and Athenian laws, as stated by Selden k, and Petit l; though among the Greeks, in the time of Hefiod m, when a man died without wife or children, all his kindred (without any distinction) divided his estate among them. It is likewise warranted by the example of the Roman laws; wherein the agnati, or relations by the father, were preferred to the cognati, or relations by the mother, till the edict of the emperor Justinian n abolished all distinction between them. It is also conformable to the customary law of Normandy o, which indeed in most respects agrees with our law of inheritance.
However, I am inclined to think, that this rule of our laws does not owe its immediate original to any view of conformity to those which I have just now mentioned; but was established in order to effectuate and carry into execution the fifth rule or canon before laid down; that every heir must be of the blood of the first purchasor. For, when such first purchasor was not easily to be discovered after a long course of descents, the lawyers not only endeavoured to investigate him by taking the next relation of the whole blood to the person last in possession; but also, considering that a preference had been given to males (by virtue of the second canon) through the whole course of lineal descent from the first purchasor to the present time, they judged it more likely that the lands should have descended to the last tenant from his male than from his female ancestors; from the father (for instance) rather than from the mother; from the father's father, rather than the father's mother: and therefore they hunted back the inheritance (if I may be allowed the expression) through the male line; and gave it to the next relations on the side of the father, the father's father, and so upwards; imagining with reason that this was the most probable way of continuing it in the line of the first purchasor. A conduct much more rational than the preference of the agnati by the Roman laws: which, as they gave no advantage to the males in the first instance or direct lineal succession, had no reason for preferring them in the transverse collateral one: upon which account this preference was very wisely abolished by Justinian.

That this was the true foundation of the preference of the agnati or male stocks, in our law, will farther appear if we consider, that, whenever the lands have notoriously descended to a man from his mother's side, this rule is totally reversed, and no relation of his by the father's side, as such, can ever be admitted to them; because he cannot possibly be of the blood of the first purchasor. And so, e converso, if the lands descended from the father's side, no relation of the mother, as such, shall ever inherit. So also, if they in fact descended to John styles from his father's mother Cecilia Kempe; here not only the blood of Lucy Baker his mother, but also of George styles his father's father, is perpetually excluded. And,
in like manner, if they be known to have descended from Frances Holland the mother of Cecilia Kempe, the line not only of Lucy Baker, and of George Styles, but also of Luke Kempe the father of Cecilia, is excluded.

Whereas when the side from which they descended is forgotten, or never known, (as in the case of an estate newly purchased to be holden ut feudum antiquum) here the right of inheritance first runs up all the father's side, with preference to the male stocks in every instance; and, if it finds no heirs there, it then, and then only, resorts to the mother's side; leaving no place untried, in order to find heirs that may by possibility be derived from the original purchaser. The greatest probability of finding such was among those descended from the male ancestors; but, upon failure of issue there, they may possibly be found among those derived from the females.

This I take to be the true reason of the constant preference of the agnatic succession, or issue derived from the male ancestors, though all the stages of collateral inheritance; as the ability for personal service was the reason for preferring the males at first in the direct lineal succession. We see clearly, that, if males had been perpetually admitted, in utter exclusion of females, the tracing the inheritance back through the male line of ancestors must at last have inevitably brought us up to the first purchaser: but, as males have not been perpetually admitted, but only generally preferred; as females have not been utterly excluded, but only generally postponed to males; the tracing the inheritance up through the male stocks will not give us absolute demonstration, but only a strong probability, of arriving at the first purchaser; which, joined with the other probability, of the wholeness or entirety of blood, will fall little short of a certainty.

Before we conclude this branch of our enquiries, it may not be amiss to exemplify these rules by a short sketch of the manner in which we must search for the heir of a person, as John Styles, who dies seised of land p.

In the first place succeeds the eldest son, Matthew Styles, or his issue: (no i.) ---- if his line be extinct, then Gilbert Styles and the other sons, respectively, in order of birth, or their issue: (no 2.) ---- in default of these, all the daughters together, Margaret and Charlotte Styles, or their issue. (no 3.) ---- On failure of the descendants of John Styles himself, the issue of Geoffrey and Lucy Styles, his parents, is called in: viz. first, Francis Styles, the eldest brother of the whole blood, or his issue: (no 4.) ---- then Oliver Styles, and the other whole brothers, respectively, in order of birth,
or their issue: (no 5.) ---- then the sisters of the whole blood, all together, Bridget and Alice styles, or their issue. (no 6.) ---- In defect of these, the issue of George and Cecilia styles, his father's parents; respect being fill had to their age and sex: (no 7.) ---- then the issue of Walter and Christian styles the parents of his paternal grandfather: (no 8.) ---- then the issue of Richard and Anne styles, the parents of his paternal grandfather's father: (no 9) ---- and so on in the paternal grandfather's paternal line, or blood of Walter styles, in infinitum. In defect of these, the issue of William and Jane Smith, the parents of his paternal grandfather's mother: (no 10.) ---- and so on in the paternal grandfather's maternal line, or blood of Christian Smith, in infinitum; till both the immediate bloods of George styles, the paternal grandfather, are spent. ---- Then we must resort to the issue of Luke and Frances Kempe, the parents of John styles's paternal grandmother: (no 11.) ---- then to the issue of Thomas and Sarah Kempe, the parents of his paternal grandmother's father: (no 12.) ---- and so on in the paternal grandmother paternal line, or blood of Luke Kempe, in infinitum. ----

See the table of descents annexed.

In default of which, we must call in the issue of Charles and Mary Holland, the parents of his paternal grandmother's mother: (no 13) ---- and so no in the paternal grandmother's maternal line, or blood of Frances Holland, in infinitum; till both the immediate bloods of Cecilia Kempe, the paternal grandmother, are also spent, ---- Whereby the paternal blood of John styles entirely failing, recourse must then, and not before, be had to his maternal relations; or the blood of the Bakers, (no 14, 15, 16.) Willis's, (no 17.) Thorpes, (no 18, 19.) and Whites; (no 20.) in the same regular successive order as in the paternal line.

The student should however be informed, that the class, no 10, would be postponed to no 11, in consequence of the doctrine laid down, arguendo, by justice Manwoode, in the case of Clere and Brooke; from whence it is adopted by lord Bacon, and sir Matthew Hales. And yet, notwithstanding these respectable authorities, the compiler of this table hath ventured to give the preference therein to no 10 before no 11; for the following reasons: 1. Because this point was not the principal question in the case of Clere and Brooke; but the law concerning it is delivered obiter only, and in the course of argument, by justice Manwoode; though afterwards said to be confirmed by the three other justices in separate, extrajudicial, conferences with the reporter. 2. Because the chief-justice, sir James Dyer,
in reporting the resolution of the court in what seems to be the same case, takes no notice of this doctrine.3. Because it appears, from Plowden's report, that very many gentlemen of the law were dissatisfied with this position of justice Manwoode.4. Because the position itself destroys the otherwise entire and regular symmetry of our legal course of descents, as is manifest by inspecting the table; and destroys also that constant preference of the male stocks in the law of inheritance, for which an additional reason is before given, besides the mere dignity of blood.5. Because it introduces all that uncertainty and contradiction, which is pointed out by an ingenious author; and establishes a collateral doctrine, incompatible with the principal point resolved in the case of Clere and Brooke, viz. the preference of no 11 to no 14. And, though that learned writer proposes to rescind the principal point then resolved, in order to clear this difficulty; it is apprehended, that the difficulty may be better cleared, by rejecting the collateral doctrine, which was never yet resolved at all. 6. Because by the reason that is given for this doctrine, in Plowden, Bacon, and Hale, (viz. that in any degree, paramount the first, the law respecteth proximity, and not dignity of blood) no 18 ought also to be preferred to no 16; which is directly contrary to the eighth rule laid down by Hale himself.7. Because this position seems to contradict the allowed doctrine of sir Edward Coke; who lays it down (under different names) that the blood of the Kempes (alias Sandies) shall not inherit till the blood of the style's (alias Fairfields) fail. Now the blood of the style's does certainly not fail, till both no 9 and no 10 are extinct. Wherefore no 11 (being the blood of the Kempes) ought not to inherit till then.8. Because in the case, Mich. 12 Edw. IV. 14y. (much relied on in that of Clere and Brooke) it is laid down as a rule, that cestui, quedoit inheriter al pere, doit inheriter al fits. And so sir Matthew Hale says, that though the law excludes the father from in-heriting, yet it substitutes and directs the descent, as it should have been, had the father inherited. Now it is settled, by the resolution in Clere and Brooke, that no 10 should have inherited to Geoffrey styles, the father, before no 11; and therefore no 10 ought also to be preferred in inheriting to John styles, the son.
In case John styles was not himself the purchaser, but the estate in fact came to him by descent from his father, mother, or any higher ancestor, there is this difference; that the blood of that line of ancestors, from which it did not descend, can never inherit. Thus, if it descended from Geoffrey styles, the father the blood of Lucy Baker, the mother, is perpetually excluded: and so, vice versa, if it descended from Lucy Baker, it cannot descend to the blood of Geoffrey styles. This, in either case, cuts off one half of the table from any possible succession. And farther, if it can be shewn to have descended from George styles, this cuts off three fourths; for now the blood, not only of Lucy Baker, but also of Cecilia Kempe, is excluded. If, lastly, it descended from Walter styles, this narrows the succession still more, and cuts off seven eighths of the table; for now, neither the blood of Lucy Baker, nor of Cecilia Kempe, nor of Christian Smith, can ever succeed to the inhlike rule will hold upon descents from any other ancestors.

The student should bear in mind, that, during this whole process, John styles is the person supposed to have been last actually seised of the estate. For if ever it comes to vest in any other person, as heir to John styles, a new order of succession must be observed upon the death of such heir; since he, by his own seisin, now becomes himself an ancestor, or stipes, and must be put in the place of John styles. The figures therefore denote the order, in which the several classes would succeed to John styles, and not to each other: and, before we search for an heir in any of the higher figures, (as no 8.) we must be first assured that all the lower classes (from no 1 to 7.) were extinct, at John styles's decease.

CHAPTER THE FIFTEENTH.
OF TITLE BY PURCHASE, AND FIRST BY ESCHEAT.

PURCHASE, perquifitio, taken in its largest and most extensive sense, is thus defined by Littletona; the possession of lands and tenements, which a man hath by his own act or agreement; and not by descent from any of his ancestors or kindred. In this sense it is contradistinguished from
acquisition by right of blood, and includes every other method of coming to an estate, but merely that by inheritance; wherein the title is vested in a person, not by his own act or agreement, but by the single operation of law.

PURCHASE, indeed, in its vulgar and confined acceptation, is applied only to such acquisitions of land, as are obtained by way of bargain and sale, for money, or some other valuable consideration. But this falls far short of the legal idea of purchase: for, if I give land freely to another, he is in the eye of the law a purchasor; and falls within Littleton's definition, for he comes to the estate by his own agreement, that is, he consents to the gift. A man who has his father's estate settled upon him in tail, before he is born, is also a purchasor; for he takes quite another estate than the law of descents would have given him. Nay even if the ancestor devises his estate to his heir at law by will, with other limitations or in any other shape than the course of descents would direct, such heir shall take by purchased. But 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 descente, even though it be charged with incumbrances; for the benefit of creditors, and others, who have demands on the estate of the ancestor. If a remainder be limited to the heirs of Sempronius, here Sempronius himself takes nothing; but, if he dies during the continuance of the particular estate, his heirs shall take as purchasors. But, if an estate be made to A for life, remainder to his right heirs in fee, his heirs shall take by descent: for it is an ancient rule of law, that wherever the ancestor takes an estate for life, the heir cannot by the same conveyance take an estate in fee by purchase, but only by descent. And, if A dies before entry, still his heir shall take by descent, and not by purchase; for, where the heir takes any thing that might have vested in the ancestor, he takes by way of descenti. The ancestor, during his life, beareth in himself all his heirsk; and therefore, when once he is or might have been seised of the land, the inheritance to limited to his heirs vests in the ancestor himself: and the wordheirs? in this case is not esteemed a word of purchase, but a word of
limitation, enuring so as to increase the estate of the ancestor from a tenancy for life to a fee-simple. And, had it been otherwise, had the heir (who is uncertain till the death of the ancestor) been allowed to take as a purchasors originally nominated in the deed, as must have been the case if the remainder had been expressly limited to Matthew or Thomas by name; then, in the times of strict feodal tenure, the lord would have been defrauded by such a limitation of the fruits of his signiory, arising from a descent to the heir.

WHAT we call purchase, perquisitio, the feudists call conquest, conquaeftus, or conquifitiol: both denoting any means of acquiring an estate out of the common course of inheritance. And this is still the proper phrase in the law of Scotlandm; as it was, among

e I Roll. Abr. 626.
f Salk. 241. Lord Raym. 728.
g I Roll. Abr. 627.
h I Rep. 104. 2 Lev. 60. Raym. 334.
i I Rep. 98.
j Co. Litt. 23.
k Crag. I. I. t. 10. 18.

the Norman jurists, who styled the first purchasor (that is, he who first brought the estate into the family which at present owns it ) the conqueror or conquereurn. Which seems to be all that was meant by the appellation which was given to William the Norman, when his manner of ascending the throne of England was, in his own and his successors’ charters, and by the historians of the times, entitled conquaeftus, and himself conquaeftor or conquisitoro; signifying, that he was the first of his family who acquired the crown of England, and from whom therefore all future claims by descent must be derived: though now, from our disuse of the feodal sense of the word, together with the reflexion on his forcible method of acquisition, we are apt to annex the idea of victory to this name of conquest or conquisition; a title which, however just with regard to the crown, the conqueror never pretended with regard to the realm of England, nor, in fact, ever hadp.

THE difference in effect, between the acquisition of an estate by descent and by purchase, consists principally in these two points: I. That by
purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not the blood only of some particular ancestor. For, when a man takes an estate by purchase, he takes it not ut feudem paternum or maternum, which would descend only to the heirs by the father's or the mother's side: but he takes it ut feudum antiquum, as a feud of indefinite antiquity; whereby it becomes inheritable to his heirs general, first of the paternal, and then of the maternal line.

2. An estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will. For, if the ancestor by any deed, obligation, covenant, or the like, bindeth himself and his heirs, and dieth; this deed, obligation, or covenant, shall be binding upon the heir, so far forth only as he had any estate of inheritance vested in him (or in some other in trust for him) by descent from that Ancestor, sufficient to answer the charges; whether he remains in possession, or hath aliened it before action brought: which sufficient estate is in law called assets; from the French word, affez, enouthu. Therefore if a man covenants, for himself and his heirs, to keep my house in repair, I can then (and then only) compel his heir to perform this covenant, when he has an estate sufficient for this purpose, or assets, by descent from the covenantor: for though the covenant descends to the heir, whether he inherits any estate or no, it lies dormant, and is not compulsitory, until he has assets by descent.

THIS is the legal signification of the world perquisitio, or purchase; and in this sense it includes the five following methods of acquiring a title to estates: I. Escheat. 2. Occupancy. 3. Prescription. 4. Forfeiture. 5. Alienation. Of all these in their order.

I. ESCEHAT, we may remember, was one of the fruits and consequences of feodal tenure. The word itself is originally French or Norman, in which language it signifies chance or accident; and with us denotes an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency: in which case the land
naturally results back, by a kind of reversion, to the original grantor or lord of the feey.

ESCHEAT therefore being a title frequently vested in the lord by inheritance, as being the fruit of a signiory to which he was intitled by descent, (for which reason the lands escheating shall attend the signiory, and be inheritable by such only of his heirs as are capable of inheriting the otherz) it may seem in such cases to fall more properly under the former general head of acquiring title to estates, viz. by descent, (being vested in him by act of

s I P. Wms. 777.
w See pag. 72.
x Efebet or ecbet, formed from the verb efchoir or echoir, to happen.
y I Feud. 86. Co. Litt. 13.
z Co. Litt. 13.

law, and not by his own act or agreement) than under the present, by purchase. But it must be remembered that in order to complete this title by escheat, it is necessary that the lord perform an act of his own, by entering on the lands and tenements so escheated, or suing out a writ of escheata: on failure of which, or by doing any act that amounts to an implied waiver of his right, as by accepting homage or rent of a stranger who usurps the possession, his title by escheat is barredb. It is therefore in some respect a title acquired by his own act, as well as by act of law. Indeed this may also be said of descents themselves, in which an entry or other seisin is required, in order to make a complete title; and therefore this distribution by our legal writers seems in this respect rather inaccurate: for, as escheats must follow the nature of the signiory to which they belong, they may vest by either purchase or descent, according as the signiory is vested. And, though sir Edward Coke considers the lord by escheat as in some respects the assignee of the last tenantc, and therefore taking by purchase; yet, on the other hand, the lord is more frequently considered as being ultimus haeres, and therefore taking by descent in a kind of caducary succession.
THE law of escheats is founded upon this single principle, that the blood of the person last seised in fee-simple is, by some means or other, utterly extinct and gone: and, since none can inherit his estate but such as are of his blood and consanguinity, it follows as a regular consequence, that when such blood is extinct, the inheritance itself must fail; the land must become what the feodal writers denominate feudum apertum; and must result back again to the lord of the fee, by whom, or by those whose estate he hath, it was given.

ESCHEATS are frequently divided into those propter defectum fanguinis and those propter delicum tenentis: the one fort, if the tenant dies without heirs; the other, if his blood be attainted.

b Ibid. tit. acuptance. 25. Co. Litt. 268.
c I Inst. 215.
d Co. Litt. 13. 92.

But both these species may well be comprehended under the first denomination only; for he that is attainted suffers an extinction of his blood, as well as he that dies without relations. The inheritable quality is expunged in one instance, and expires in the other; or, as the doctrine of escheats is very fully expressed in Fleta, dominus capitalis feodi loco baeredis babetur, quoties pre defectum vel delictum extinguitur fanguis tenentis.

ESCHEATS therefore arising merely upon the deficiency of the blood, whereby the descent is impeded, their doctrine will be better illustrated by considering the several cases wherein hereditary blood may be deficient, than by any other method whatsoever.

I, 2, 3. THE first three cases, wherein inheritable blood is wanting, may be collected from the rules of descent laid down and explained in the preceding chapter, and therefore will need very little illustration or comment. First, when the tenant dies without any relations on the part of any of his ancestors: secondly, when he dies without any relations on the part of those ancestors from whom his estate descended: thirdly, when he dies without any relations of the whole blood. In two of these cases the blood of the first purchaser is certainly, in the other it is probably, at an end; and therefore in all of them the law directs, that the land shall escheat
to the lord of the fee: for the lord would be manifestly prejudiced, if, contrary to the inherent condition tacitly annexed to all feuds, any person should be suffered to succeed to lands, who is not of the blood of the first feudatory, to whom for his personal merit the estate is supposed to have been granted.

4. A MONSTER, which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage: but, although it hath deformity

e l. 6. c. I.

in any part of its body, yet if it hath human shape, it may be heirf. This is a very ancient rule in the law of Englandg; and its reason is too obvious, and too shocking, to bear a minute discussion. The Roman law agrees with our own in excluding such births from successionsh: yet accounts them, however, children in some respects, where the parents, or at least the father, could reap any advantage therebyi; (as the jus trium liberorum, and the like) esteeming them the misfortune, rather than the fault, of that parent. But our law will not admit a birth of this kind to be such an issue, as shall intitle the husband to be tenant by the curtesyk; because it is not capable of inheriting. And therefore, if there appears no other heir than such a prodigious, birth, the land shall escheat to the lord.

5. BASTARDS are incapable of being heirs. Bastards, by our law, are such children as are not born either in lawful wedlock, or within a competent time after its determinationl. Such are held to be nullius filii, the sons of nobody; for the maxim of law is, qui ex damnato coitu nafcuntur, inter liberos non computanturm. Being thus the sons of nobody, they have no blood in them, at least no inheritable blood; consequently, none of the blood of the first purchasor: and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the lordn. The civil law differs from ours in this point, and allows a bastard to succeed to an inheritance, if after its birth the mother was married to the fathero: and also, if the father had no lawful wife or child, then, even if the concubine was never married to the father, yet she and her bastard son were admitted each to one twelfth of the inheritancep, and a bastard was like-

f Co. Litt. 7, 8.
 Qui contra formam humani generis converso more procreantur, ut si mulier monstrosum vel prodigiosum enixa fit, inter liberos non computentur. Partus tamen, cui natura aliquantulum addiderit vel diminueril, ut si sex vel tantum quatuor digitos babuerit, bene debet inter liberos connumerari: et, si member sint inutilia aut tortuofa, non solum est partus monstrofus. Bracton. l. I. c. 6. & l. 5. tr. 5. c. 30.


If. 50. 16. 135. Paul. 4 fent. 9. 63.

Co. Litt. 29.

See Book I. ch, 16.

Co. Litt. 8.

Finch. law. 1147.

Nov. 89. c. 8.

Ibid. c. 52.

wife capable of succeeding to the whole of his mother's estate, although she was never married; the mother being sufficiently certain, though the father is not. But our law, in favour of marriage, is much less indulgent to bastards.

THERE is indeed one instance, in which our law has shewn them some little regard; and that is usually termed the case of bastard eigne and mulier puisue. This happens when a man has a bastard son, and afterwards marries the mother, and by her has a legitimate son, who in the language of the law is called a mulier, or as Glanvilr expresses it in his Latin, filius mulieratus; the woman before marriage being concubina, and afterwards mulier. Now here the eldest son is bastard, or bastard eigne; and the younger son is legitimate, or mulier puisue. If then the father dies, and the bastard eigne enters upon his land, and enjoys it to his death, and dies seised thereof, whereby the inheritance descends to his issue; in this case the mulier puisue, and all other heirs, (though minors, feme-coverts, or under any incapacity whatsoever) are totally barred of their rights. And this, I. As a punishment on the mulier for his negligence, in not entering during the bastard's life, and evicting him. 2. Because the law will not suffer a man to be bastardized after his death, who entered as heir and died seised, and so passed for legitimate in his lifetime. 3. Because the canon law (following the civil) did allow such bastard eigne to be legitimate, on the subsequent marriage of his mother: and therefore the laws of England (though they would not admit either the civil or canon law to rule the inheritances of this kingdom, yet) paid such a regard to a
person thus peculiarly circumstanced, that, after the land had descended to his issue, they would not unravel the matter again, and suffer his estate to be shaken. But this indulgence was shewn to no other king of bastard; for, if the mother was never married to the father, such bastard could have no colourable title at all.

q Cod. 6. 57. 5.
r l. 7. c. I.
s Litt. 399. Co. Litt. 244.
t Litt. 400.

As bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies. For, as all collateral kindred consists in being derived from the same common ancestor, and as a bastard has no legal ancestors, he can have no collateral kindred; and, consequently, can have no legal heirs, but such as claim by a lineal descent from himself. And therefore if a bastard purchases land, and dies seised thereof without issue, and intestate, the land shall escheat to the lord of the feeu.

6. ALIENS also are incapable of taking by descent, or inheritingw: for they are not allowed to have any inheritable blood in them; rather indeed upon a principle of national or civil policy, than upon reasons strictly feodal. Though, if lands had been suffered to fall into their hands who owe no allegiance to the crown of England, the design of introducing our feuds, the defence of the kingdom, would have been defeated. Wherefore if a man leaves no other relations but aliens, his land shall escheat to the lord.

As aliens cannot inherit, so far they are on a level with bastards; but, as they are also disabled to hold by purchasex, they are under still greater disabilities. And, as they can neither hold by purchase, nor by inheritance, it is almost superfluous to say that they can have no heirs, since they can have nothing for an heir to inherit: but so it is expressly holdeny, because they have not in them any inheritable blood.

AND father, if an alien be made a denizen by the king's letters patent, and them purchases lands, (which the law allows such a one to so ) his son, born before his denization, shall not (by the common law) inherit those lands; but a son born afterwards may, even though his elder brother be living; for the father, before denization, had no inheritable blood to communicate
to his eldest son; but by denization it acquires an hereditary quality, which will be transmitted to his subsequent posterity. Yet, if he had been naturalized by act of parliament, such eldest son might then have inherited; for that cancels all defects, and is allowed to have a retrospective energy, which simple denization has not.

SIR Edward Cokea also holds, that if an alien cometh into England, and there hath issue two sons, who are thereby natural born subjects; and one of them purchases land, and dies; yet neither of these brethren can be heir to the other. For the commune vinculum, or common stock of their consanguinity, is the father; and, as he had no inheritable blood in him, he could communicate none to his sons; and, when the sons can by no possibility be heirs to the father, the one of them shall not be heir to the other. And this opinion of his seems founded upon solid principles of the ancient law; not only from the rule before citedb, that cestui, que doit inberiter al pere, doit inheriter al fits; but also because we have seen that the only feodal foundation upon which newly purchased land can possibly descend to a brother, is the supposition and fiction of law, that it descended from some one of his ancestors: but in this case as the immediate ancestor was an alien, from whom it could by no possibility descend, this should destroy the supposition, and impede the descent, and the land should be inherited ut feudum stricte novum; that is, by none but the lineal descendants of the purchasing brother; and, on failure of them, should escheat to the lord of the fee. But this opinion hath been since overruledc: and it is now held for law, that the sons of an alien, born here, may inherit to each other. And reasonably enough upon the whole: for, as (in common purchases) the whole of the supposed descent from indefinite ancestors is but fictitious, the law may as well suppose the requisite ancestor as suppose the requisite descent.

z Co. Litt. 129.
a I Inst. 8.
b See pag. 223 and 239.
IT is also enacted, by the statute II & 12 W III. c. 6. that all persons, being natural-born subjects of the king, may inherit and make their titles by descent from any of their ancestors lineal or collateral; although their father, or mother, or other ancestor, by, from, through, or under whom they derive their pedigrees, were born out of the king's allegiance. But inconveniences were afterwards apprehended, in case persons should thereby gain a future capacity to inherit, who did not exist at the death of the person last seised. As, if Francis the elder brother of John styles be an alien, and Oliver the younger be a natural-born subject, upon John's death without issue his lands will descend to Oliver the younger brother: now, if afterwards Francis hath a child, it was feared that, under the statute of king William, this newborn child might defeat the estate of his uncle Oliver. Wherefore it is provided, by the statute 25 Geo. II. c. 39. that no right of inheritance shall accrue by virtue of the former statute to any persons whatsoever, unless they are in being and capable to take as heirs at the death of the person last seised: --- with an exception however to the case, where lands shall descend to the daughter of an alien; which daughter shall resign such inheritance to her after-born brother, or divide it with her after-born sisters, according to the usual ruled of descents by the common law.

7. BY attainder also, for treason or other felony, the blood of the person attainted is so corrupted, as to be rendered no longer inheritable.

GREAT care must be taken to distinguish between forfeiture of lands to the king, and this species of escheat to the lord; which, by reason of their similitude in some circumstances, and because the crown is very frequently the immediate lord of the fee and therefore entitled to both, have been often confounded together. Forfeiture of lands, and of whatever else the offender possessed, was the doctrine of the old Saxon lawe, as a part of

d See pag. 208 and 214.
e LL. Aelfred. c. 4. LL. Canut. C. 54.

punishment for the offence; and does not at all relate to the feodal system, nor is the consequence of any signiory or lordship paramount: but, being a prerogative vested in the crown, was neither superfeded nor diminished by the introduction if the Norman tenures; a fruit and consequence of
which escheat must undoubtedly be reckoned. Escheat therefore operates in subordination to this more ancient and superior law of forfeiture.

THE doctrine of escheat upon attainder, taken singly, is this: that the blood of the tenant, by the commission of any felony, (under which denomination all treasons were formerly comprized) is corrupted and stained, and the original donation of the feud is thereby determined, it being always granted to the vasal on the implied condition of dum bene gefferit. Upon the thorough demonstration of which guilt, by legal attainder, the feodal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out for ever. In this situation the law of feodal escheat was brought into England at the conquest; and in general superadded to the ancient law of forfeiture. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revest in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage; in case of treason, for ever; in case of other felony, for only a year and a day, after which time it goes to the lord in a regular course of escheath, as it would have done to the heir of the felon in case the feodal tenures had never been introduced. And that this is the true operation and genuine history of escheats will most evidently appear from this incident to gavelkind lands, (which seem to be the old Saxon tenure) that they are in no case subject to escheat for felony, though they are liable to forfeiture for treasoni.

As a consequence of this doctrine of escheat, all lands of inheritance immediately revesting in the lord, the wife of the felon was liable to lose her dower, till the statute I Edw. VI. c. 12. enacted, that albeit any person be attainted of misprison of treason, murder, or felony, yet his wife shall enjoy her dower. But she has not this indulgence where the ancient law of forfeiture operates, for it is expressly provided by the statute 5 & 6 Edw. VI. c. II. that the wife of one attaint of high treason shall not be endowed at all.

f 2 Inst. 64. Salk. 85.
g 3 Inst. 15. Stat. 25 Edw. III. c. 2. 12.
h 2 Inst. 36.
iSomner. 53. Wright. Ten. 118.
HITHERTO we have only spoken of estates vested in the offender, at the
time of his offence, or attainder. And here the law of forfeiture stops; but
the law of escheat pursues the matter still farther. For, the blood of the
tenant being utterly corrupted and extinguished, it follows, not only that
all he now has should escheat from him, but also that he should be
incapable of inheriting any thing for the future. This may farther illustrate
the distinction between forfeiture and escheat. If therefore a father be
seised in fee, and the son commits treason and is attainted, and then the
father dies: here the land shall escheat to the lord; because the son, by the
corruption of his blood, is incapable to be heir, and there can be no other
heir during his life: but nothing shall be forfeited to the king, for the son
never had any interest in the lands to forfeit. In this case the escheat
operates, and not the forfeiture; but in the following instance the forfeiture
works, and not the escheat. As where a new felony is created by act of
parliament, and it is provided (as is frequently the case) that it shall not
extend to corruption of blood: here the lands of the felon shall not escheat
to the lord, but yet the profits of them shall be forfeited to the king so long
as the offender lives.

THERE is yet a farther consequence of the corruption and extinction of
hereditary blood, which is this: that the person

k Co. Litt. 13.
l3 Inst. 47.

attained shall not only be incapable himself of inheriting, or transmitting
his own property by heirship, but shall also obstruct the descent of lands or
tenements to his posterity, in all cases where they are obliged to derive
their title through him from any remoter ancestor. The channel, which
conveyed the hereditary blood from his ancestors to him, is not only
exhausted for the present, but totally dammed up and rendered
impervious for the future. This is a refinement upon the ancient law of
feuds, which allowed that the grandson might be heir to his grandfather,
though the son in the intermediate generation was guilty of felonym. But,
by the law of England, a man's blood is so universally corrupted by
attainder, that his sons can neither inherit to him nor to any other
ancestorn, at least on the part of their attainted father.

THIS corruption of blood cannot be absolutely removed but by authority
of parliament. The king may excuse the public punishment of an offender;
but cannot abolish the private right, which has accrued or may accrue to individuals as a consequence of the criminal's attainder. He may remit a forfeiture, in which the interest of the crown is alone concerned: but he cannot wipe away the corruption of blood; for therein a third person hath an interest, the lord who claims by escheat. If therefore a man hath a son, and is attainted, and afterwards pardoned by the king; this son can never inherit to his father, or father's ancestors; because his paternal blood, being once throughly corrupted by his father's attainder, must continue so: but if the son had been born after the pardon, he might inherit; because by the pardon the father is made a new man, and may convey new inheritable blood to his after-born children.

HEREIN there is however a difference between aliens and persons attainted. Of aliens, who could never by any possibility be heirs, the law takes no notice: and therefore we have seen,

m Van Leeuwen in 2 Feud. 31.
n Co. Litt. 391.
o Ibid. 392.

that an alien elder brother shall not impede the descent to a natural-born younger brother. But in attainders it is otherwise: for if a man hath issue a son, and is attainted, and afterwards pardoned, and then hath issue a second son, and dies; here the corruption of blood is not removed from the eldest, and therefore he cannot be heir: neither can the youngest be heir, for he hath an elder brother living, of whom the law takes notice, as he once had a possibility of being heir; and therefore the younger brother shall not inherit, but the land shall escheat to the lord: though, had the elder died without issue in the life of the father, the younger son born after the pardon might well have inherited, for he hath no corruption of blood. So if a man hath issue two sons, and the elder in the lifetime of the father hath issue, and then is attainted and executed, and afterwards the father dies, the lands of the father shall not descend to the younger son: for the issue of the elder, which had once a possibility to inherit, shall impede the descent to the younger, and the land shall escheat to the lord. Sir Edward Coke in this case allows, that if the ancestor be attainted, his sons born before the attainer may be heirs to each other: and distinguishes it from the case of the sons of an alien, because in this case the blood was inheritable when imparted to them from the father: but he makes a doubt (upon the same principles, which are now overruled) whether sons, born
after the attainder, can inherit to each other; for they never had any inheritable blood in them.

UPON the whole it appears, that a person attainted is neither allowed to retain his former estate, nor to inherit any future one, nor to transmit any inheritance to his issue, either immediately from himself, or mediately through himself from any remoter ancestor; for his inheritable blood, which is necessary either to hold, to take, or to transmit any feodal property, is blotted out, corrupted, and extinguished for ever: the consequence of which is, that estates, thus impeded in their descent, result back and escheat to the lord.

p Co. Litt. 8.
q Dyer. 48.
r Co. Litt. 8.
s I Hal. P. C. 357.

THIS corruption of blood, thus arising from feodal principles, but perhaps extended farther than even those principles will warrant, has been long looked upon as a peculiar hardship: because, the oppressive parts of the feodal tenures being now in general abolished, it seems unreasonable to reserve one of their most inequitable consequences; namely, that the children should not only be reduced to present poverty, (which, however severe, is sufficiently justified upon reasons of public policy) but also be laid under future difficulties of inheritance, on account of the guilt of their ancestors. And therefore in most (if not all) of the new felonies, created by parliament since the reign of Henry the eighth, it is declared that they shall not extend to any corruption of blood: and by the statute 7 Ann. c. 21. (the operation of which is postponed by the statute 17 Geo. II. c. 39.) it is enacted, that, after the death of the pretender, and his sons, no attainder for treason shall extend to the disinheriting any heir, nor the prejudice of any person, other than the offender himself: which provisions have indeed carried the remedy farther, than was required by the hardship above complained of; which is only the future obstruction of descents, where the pedigree happens to be deduced through the blood of an attainted ancestor.

BEFORE I conclude this head, of escheat, I must mention one singular instance in which lands held in fee-simple are not liable to escheat to the lord, even when their owner is no more, and hath left no heirs to inherit
them. And this is the case of a corporation: for if that comes by any accidental to be dissolved, the donor or his heirs shall have the land again in reversion, and not the lord by escheat: which is perhaps the only instance where a reversion can be expectant on a grant in fee-simple absolute. But the law, we are toldt, doth tacitly annex a condition to every such gift or grant, that if the corporation be dissolved, the donor or grantor shall re-enter; for the cause of the gift or grant
t Co. Litt. 13.

faileth. This is indeed founded upon the self-same principle as the law of escheat; the heirs of the donor being only substituted instead of the chief lord of the fee: which was formerly very frequently the case in subinfeudations, or alienations of lands by a vassal to be holden as of himself; till that practice was restrained by the statute of quia emptores, 18 Edw. I. ft. I. to which this very singular instance still in some degree remains an exception.

THERE is one more incapacity of taking by descent, which, not being productive of any escheat, is not properly reducible to this head, and yet must not be passed over in silence. It is enacted by the statute II & 12 Will. III. c. 4. that every papist who shall not abjure the errors of his religion by taking the oaths to the government, and making the declaration against transubstantiation, within six months after he has attained the age of eighteen years, shall be incapable of inheriting, or taking, by descent as well as purchase, any real estates whatsoever; and his next of kin, being a protestant, shall hold them to his own use till such time as he complies with the terms imposed by the act. This incapacity is merely personal; it affects himself only, and does not destroy the inheritable quality of his blood, so as to impede the descent to others of his kindred. In like manner as, even in the times of popery, one who entered into religion and became a monk professed was incapable of inheriting lands, both in our ownu and the feodal law; eo quod defiit esse miles feculi qui factus eft miles chrifi; nec beneficium pertinet ad eum qui non debet gerere officiumw. But yet he was accounted only civiliter mortuus; he did n

THESE are the several deficiencies of hereditary blood, recognized by the law of England; which, so often as they happen, occasion lands to escheat to the original proprietary or lord.
CHAPTER THE SIXTEENTH.
OF TITLE BY OCCUPANCY.

OCCUPANCY is the taking possession of those things, which before belonged to nobody. This, as we have seen, is the true ground and foundation of all property, or of holding those things in severalty, which by the law of nature, unqualified by that of society, were common to all mankind. But, when once it was agreed that every thing capable of ownership should have an owner, natural reason suggested, that he who could first declare his intention of appropriating any thing to his own use, and, in consequence of such intention, actually took it into possession, should thereby gain the absolute property of it; according to that rule of the law of nations, recognized by the laws of Rome, quod nullius est, id ratione naturali oxxupanti conceditur.

THIS right of occupancy, so far as it concerns real property, (for of personal chattels I am not in this place to speak) hath been confined by the laws of England within a very narrow compass; and was extended only to a single instance: namely, where a man was tenant pur auter vie, or had an estate granted to himself only (without mentioning his heirs) for the life of another man, and died during the life of cestui que vie, or him by whose life it was holden: in this case he, that could first enter on the land, might lawfully retain the possession so long as cestui que vie lived, by right of occupancyc.

a See pag. 3 & 8.
b Ff. 41. I. 3.
c Co. Litt. 41.

THIS seems to have been recurring to first principles, and calling in the law of nature to ascertain the property of the land, when left without a legal owner. For it did not revert to the grantor; who had parted with all his interest, so long as cestui que vie lived: it did not escheat to the lord of the fee; for all escheats must be of the absolute entire fee, and not of any particular estate carved out of it; much less of so minute a remnant as this: it did not belong to the grantee; for he was dead: it did not descend to his
heirs; for there were no words of inheritance in the grant: nor could it vest in his executors; for no executors could succeed to a freehold. Belonging therefore to nobody, like the baereditas jacens of the Romans, the law left it open to be seised and appropriated by the first person that could enter upon it, during the life of cestui que vie, under the name of an occupant. But there was no right of occupancy allowed, where the king had the reversion of the lands; for the reversioner hath an equal right with any other man to enter upon the vacant possession, and where the king's title and a subject's concur, the king's shall be always preferred: against the king therefore there could be no prior occupant, because nullu8m tempus occurrit regid. And, even in the case of a subject, had the estate pur auter vie, been granted to a man and his heirs during the life of cestui que vie, there the heir might, and still may, enter and hold possession, and is called in law a special occupant; as having a special exclusive right, by the terms of the original grant, to enter upon and occupy this haereditas jacens, during the residue of the estate granted: though some have thought him so called with no very great proprietye; and that such estate is rather a descendible freehold. But the title of common occupancy is now reduced almost to nothing by two statutes; the one, 29 Car. II. c. 3. which enacts, that where there is no special occupant, in whom the estate may vest, the tenant pur auter vie may devise it by will, or it shall go to the executors and be assets in their hands for payment of debts: the other that of 14 Geo. II. c. 20. which enacts, that it shall vest not only in the

d Ibid.
e Vaugh. 201.

executors, but, in case the tenant dies intestate, in the administrators also; and go in a course of distribution like a chattel interest.

BY these two statutes the title of common occupancy is utterly extinct and abolished: though that of special occupancy, by the heir at law, continues to this day; such heir being held to succeed to the ancestor's estate, not by descent, for then he must take an estate of inheritance, but as an occupant, specially marked out and appointed by the original grant. The doctrine of common occupancy may however be usefully remembered on the following account, among others: that, as by the common law no occupancy could be of incorporeal hereditaments, as ofrents, tithes, advowsons, commons, or the like, (because, with respect to them, there could be no actual entry made, or corporal seisin had; and therefore by the
death of the grantee pur auter vie a grant of such hereditaments was entirely determined) so now, I apprehend, notwithstanding these statutes, such grant would not be devisable, nor vest in the executors, nor go in a course of distribution. For the statutes must not be construed so as to create any new estate, or to keep that alive which by the common law was determined, and thereby to defer the grantor's reversion; but merely to dispose of an interest in being, to which by law there was no owner, and which therefore was left open to the first occupant. When there is a residue left, the statutes give it to the executors, &c, instead of the first occupant; but they will not create a residue, on purpose to give it the executors. They only meant to provide an appointed instead of a casual, a certain instead of an uncertain, owner, of lands which before were nobody's; and thereby to supply this cafus omiffus, and render the disposition of law in all respects entirely uniform: this being the only instance wherein a title to a real estate could ever be acquired by occupancy.

f Co. Litt. 41.
g Vaugh. 201.

THIS, I say, was the only instance; for I think there can be no other case devised, wherein there is not some owner of the land appointed by the law. In the case of a sole corporation, as a parson of a church, when he dies or resigns, though there is no actual owner of the land till a successor be appointed, yet there is a legal, potential ownership, subsisting in contemplation of law; and when the successor is appointed, his appointment shall have a retrospect and relation backwards, so as to entitle him to all the profits from the instant that the vacancy commenced. And, in all other instances, when the tenant dies intestate, and no other owner of the lands is to be found in the common course of descents, there the law vests an ownership in the king, or in the subordinate lord of the fee, by escheat.

So also in some cases, where the laws of other nations give a right by occupancy, as in lands newly created, by the rising of an island in a river, or by the alluvion or dereliction of the sea; in these instances the law of England assigns them an immediate owner. For Bracton tells us, that if an island arise in the middle of a river, it belongs in common to those who have lands on each side thereof; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the nearest shore: which is agreeable to, and probably copied from, the civil law. Yet this seems
only to be reasonable, where the soil of the river is equally divided between
the owners of the opposite shores: for if the whole soil is the freehold of
any one man, as it must be whenever a several fishery is claimed, there it
seems just (and so is the usual practice) that the eyotts or little islands,
arising in any part of the river, shall be the property of him who owneth
the piscary and the soil. However, in case a new island rife in the sea,
though the civil law gives it to the first occupant, yet ours gives it to the
king. And as to lands gained from the sea, either by allu-

h l. 2. c. 2.
i Inst. 2. I. 22.
k Salk. 637.
l Inst. 2. I. 18.
m Bract. l. 2. c. 2. Callis of fewers. 22.

vion, by the washing up of sand and earth, so as in time to make terra
firma; or by dereliction, as when the sea shrinks back below the usual
watermark; in these cases the law is held to be, that if this gain be by little
and little, by small and imperceptible degrees, if shall go to the owner of
the land adjoining. For de minimis non curat lex: and, besides, these
owners being often losers by the breaking in of the sea, or at charges to
keep it out, this possible gain is therefore a reciprocal consideration for
such possible charge of loss. But, if the alluvion or dereliction be sudden
and considerable, in this case it belongs to the king: for, as the king is lord
of the sea, and so owner of the soil while it is covered with water, it is but
reasonable he should have the soil, when the water has left it dryn. So that
the quantity of ground gained, and the time during which it is gaining, are
what make it either the king’s or the subject’s property. In the same
manner if a river, running between two lordships, by degrees gains upon
the one, and thereby leaves the other dry; the owner who loses his ground
thus imperceptibly has no remedy: but if the course of the river be changed
by a sudden and violent flood, or other hasty means, and thereby a man
loses his ground, he shall have what the river has left in any other place, as
a recompense for this sudden losso. And this law of alluvions and
derelictions, with regard to rivers, is nearly the same in the imperial lawp;
from whence indeed those our determinations seem to have been drawn
and adopted: but we ourselves, as islanders, have applied them to marine
increases; and have given our sovereign the prerogative he enjoys, as well
upon the particular reasons before-mentioned, as upon this other general
ground of prerogative, which was formerly remarked, that whatever hath no other owner is vested by law in the king.

n Callis. 24. 28.
o Callis. 28.
p Inst. 2. I. 20, 21, 22, 23, 24.
q See Vol. I. pag. 289.

CHAPTER THE SEVENTEENTH.
OF TITLE BY PRESCRIPTION.

A THIRD method of acquiring real property by purchase is that by prescription; as when a man can shew no other title to what he claims, than that he, and those under whom he claims, have immemorially used to enjoy it. Concerning customs, or immemorial usages, in general, with the several requisites and rules to be observed, in order to prove their existence and validity, we enquired at large in the preceding part of these commentaries. At present therefore I shall only, first, distinguish between custom, strictly taken, and prescription; and then shew, what sort of things may be prescribed for.

AND, first, the distinction between custom and prescription is this; that custom is properly a local usage, and not annexed to any person; such as, a custom in the manor of Dale that lands shall descend to the youngest son: prescription is merely a personal usage; as, that Sempronius, and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege. As for example: if there be a usage in the parish of Dale, that all the inhabitants of that parish may dance on a certain close, at all times, for their recreation; (which is held to be a lawful usage) this is strictly a custom, for it is applied to the place in general, and not to any particular persons: but if the

a See Vol. I. pag. 75, &c.
b Co. Litt. 113.
c I Lev. 176.

tenant, who is seised of the manor of Dale in fee, alleges that he and his ancestors, or all those whose estate he hath in the said manor, have used time out of mind to have common of pasture in such a close, this is
properly called a prescription; for this is a usage annexed to the person of the owner of this estate. All prescription must be either in a man and his ancestors, or in a man and those whose estate he hath d; which last is called prescribing in a que estate. And formerl a man might, by the common law, have prescribed for a right which had been enjoyed by his ancestors of predecessors at any distance of time, though his or their enjoyment of it had been suspended c for an indefinite faries of years. But by the statute of limitations, 32 Hen.VIII. C.2. it is enacted, that no person shall make any prescription by the seisin or possession hath been within threescore years next before such prescription, unless such seisin or possession hath been within threescore years next before such prescription made f.

Secondly, as to the several species of things which may, or may not, be prescribed for: we may in the first place, observe, that nothing but incorporeal hereditaments can be claimed by prescription; as a right way, a common, & c; but that no prescription can give a title to lands, and other corporeal substances, of which more certain evidence may be had g. For no man can be said to prescribe, that he and his ancestors have immemorially used to hold the castle of Arundel: for this is clearly another fort of title; a title by corporal seisin and inheritance, which is more permanent, and therefore more capable of proof, than that of prescription. But, as to a right of way, a common, or the like, a man may be allowed to prescribe; for of these there is no corporal seisin, the enjoyment will be frequently by intervals, and therefore the right to enjoy them can depend on nothing else but immemorial usage. 2. A prescription must
d 4 Rep. 32.
e Co Litt. 113.

1. This title, of prescription, was well known in the Roman law by the name of ufucapio; (Ff.41.3.3.) so called, because a man, that gains a title by prescription, may be said ufu rem capere.
g Dr & St. dial. I. c. 8. Finch. 132.

always be laid in him that is tenant of the fee. A tenant for life, for years, at will, or a copyholder, cannot prescribe, by reason of the imbecility of their estates h For, as prescription is usage beyond time of memory, it is absurd that they should pretend to prescribe, whose estates commenced within the remembrance of man. And therefore the copyholder must prescribe
under cover of his lord's estate, and the tenant for life of a manor would prescribe for a right of common as appurtenant to the same, he must prescribe under cover of the tenant in fee-simple; and must plead, that John Styles and his ancestors had immemorially used to have this right of common, appurtenant to the said manor, and that John Styles demised the said manor, with its appurtenances, to him the said tenant for life. 3. A prescription cannot be for a thing which cannot be raised by grant. For the law allows prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed. Thus a lord of a manor cannot prescribe to raise a tax or toll upon strangers; for, as such claim could never have been good by any grant, it shall not be good by any grant, it shall not be good by prescription. 4. A fourth rule is, that what is to arise by matter of record cannot be prescribed for, but must be claimed by grant, entered on record: such as for instance, the royal franchises of deodands, felons' goods, and the like. These, not being forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself cannot be claimed by any inferior title. But the franchises of treasure-trove, waifs, estrays, and the like, may be claimed by prescription; for they arise from private contingencies, and not from any matter of record. 5. 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 his ancestors. For, if a man prescribes in a que estate, (that is, in himself and those whose estate he holds) nothing is claimable by this prescription, but such things as are incident, appendant, or appurtenant to lands; for it would be absurd to claim any thing as the consequence, or appendix, of an estate, with which the thing claimed has no connexion: but, if he prescribes in himself and his ancestors, he may prescribe for any thing whatsoever that lies in grant; not only things that are appurtenant, but also such as may be in gross. Therefore a man may prescribe, that he, and those whose estate he hath in the manor of Dale, have used to hold the advowson of Dale, as appendant to that manor: but, if the advowson be a distinct inheritance, and not appendant, then he can only prescribe in his ancestors. So also a man may prescribe in a que estate.

h Rep. 31, 32.
I I Ventr. 387.
kCo. Litt. 114

able by this prescription, but such things as are incident, appendant, or appurtenant to lands; for it would be absurd to claim any thing as the consequence, or appendix, of an estate, with which the thing claimed has no connexion: but, if he prescribes in himself and his ancestors, he may prescribe for any thing whatsoever that lies in grant; not only things that are appurtenant, but also such as may be in gross. Therefore a man may prescribe, that he, and those whose estate he hath in the manor of Dale, have used to hold the advowson of Dale, as appendant to that manor: but, if the advowson be a distinct inheritance, and not appendant, then he can only prescribe in his ancestors. So also a man may prescribe in a que estate.
for a common appurtenant to a manor; but, if he would prescribe for a
common in gross, he must prescribe in a que estate for a common
appurtenant to a manor; but, if he would prescribe for a common in gross
he must prescribe in himself and his ancestors, 6. Lastly, we may observe,
that estates pained by prescription ane not, of course, descendible to the
heirs general, like other purchased estates, but are an exception to the
rule, For, properly speaking, the prescription is rather to be considered as
an evidence of a former acquisition, than as a acquisition de novo: and
therefore, if a man prescribes for a right of way in himself and his
ancestors, it will descend only to the blood of that line of ancestors in
whom he so prescribes; the prescription in this case being indeed a species
of descent. But, if he prescribes for it in a que estate, it will follow the
nature of that estate in which the prescription is laid, and be inheritable in
the same manner, whether that were acquired by descent or purchase: for
every accessory followeth the nature of its principal.

I

Chapter the eighteenth.
Of TITLE by FORFEITURE.

Forfeiture is a punishment annexed by law to some illegal act, or
negligence, in the owner of lands, tenements, or hereditaments; whereby
he loses all his interest therein, and they go to the party injured, as a
recompense for the wrong which either he alone, or the public together
with himself, hath sustained.

Lands, tenements, and hereditaments, may be forfeited in various degrees
and by various means: i. By alienation contrary to law. 3. By non-
presentation to a benefice, when the forfeiture is denominated a lapse. 4.
By fimony. 5. By non-performance of conditions. 6. By waste. 7. By breach
of copyhold customs. 8. By bankruptcy.

I. The foundation and justice of forfeitures for crimes and misdemeanors,
and the several degrees of those forfeitures, preceding volume a; but will
be more properly considered, and more at large, in the fourth book of
these commentaries. At present I shall only observe in general, that the
offences which induce a forfeiture of lands and tenements to the crown are
principally the following fix; I. Treason. 2. Felony. 3. misprison of
treason. 4. Praemunire. 5. Drawing a weapon on a judge, or striking any one in the presence of the king's principal courts of justice. 6. Popish recusancy, or non-observance of certain laws enacted in restraint of papists. But at what time they severally commence, how far they extend, and how long they endure, will with greater propriety be reserved as the object of our future enquiries.

II. Lands and tenements may be forfeited by alienation, or conveying them to another, contrary to law. This is either alienation in mortmain, alienation to an alien, or alienation by particular tenants; in the two former of which cases the forfeiture arises from the incapacity of the alienee to take, in the latter from the incapacity of the alienor to grant.

1. Alienation in mortmain, in mortua manu, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. But these purchases having been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one dead hand, this hath occasioned the general appellation of mortmain to be applied to such alienations, and the religious houses themselves to be principally considered in forming the statutes of mortmain: in deducing the history of which statutes, it will be matter of curiosity to observe the great address and subtil contrivance of the ecclesiastics in eluding from time to time the laws in being, and the zeal with which successive parliaments have pursued them through all their finesses; how new remedies were still the parents of new evasions; till the legislature at last, though with difficulty, hath obtained a decisive victory.

By the common law any man might dispose of his lands to any other private man at his own discretion, especially when the feodal restraints of alienation were worn away. Yet in consequence of these it was always, and is still, necessary for corporations to have a licence of mortmain from the crown, to enable them to purchase lands: for as the king is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats and other
feodal profits, by the vesting of lands in tenants that can never be attainted or die. And such licences of mortmain seem to have been necessary among the Saxons, above sixty years before the Norman conquest d. But, besides this general licence from the king, as lord paramount of the kingdom, it was also requisite, whenever there was a mesne or intermediate lord between the king and the alienor, to obtain his licence also (upon the same feodal principles) for the alienation of the specific land. And if no such licence was obtained, the king or other lord might respectively enter on the lands so aliened in mortmain, as a forfeiture. The necessity of this licence from the crown was acknowledged by the constitutions of Clarendon e, in respect of advowsons, which the monks always greatly coveted, as being the groundwork of subsequent appropriations f. Yet such were the influence and ingenuity of the clergy, that (notwithstanding this fundamental principle) we find that the largest and most considerable donations of religious houses happened within less than two centuries after the conquest. And (when a licence could not be obtained) their contrivance seems to have been this: that, as the forfeiture for such alienations accrued in the first place to the immediate lord of the fee, the tenant who meant to alienate first conveyed his lands to the religious house, and instantly took them back again, to hold as tenant to the monastery; which kind of instantaneous seisin was probably held not to occasion any forfeiture: and then, by pretext of some other forfeiture, surrender, or escheat, the society entered into those lands in right of such their newly acquired signiory, as immediate lords of the fee. But, when these donations began to grow numerous, it was observed that the feodal services, ordained for the defence of the kingdom, were every day visibly withdrawn; that the circulation of landed property from man to man began to


1. Ecclefias de feudo domini Regis non poffunt in perpetuum dari, abfque affenfu et confenfione ipfius. c. 2. A. D. 1164.
f See Vol. I. pag. 373.
ccelefiatial stagnant; and that the lords were curtailed of the fruits of their signiories, their escheats, wardships, reliefs, and the like: and therefore, in order to prevent this, it was ordained by the second of king Henry III’s great charters g, and afterwards by that printed in our common statute-books,
that all such attempts should be void, and the land forfeited to the lord of the fee h.

But, as this prohibition extended only to religious houses, bishops and other sole corporations were not included therein; and the aggregate ecclesiastical bodies (who, sir Edward Coke observes I, in this were to be commended, that they ever had of their counsel the best learned men that they could get) found many means to creep out of this statute, by buying in lands that were bona side holden of themselves as lords of the fee, and thereby evading the forfeiture; or by taking long leases for years, which first introduced those extensive terms, for a thousand or more years, which are now so frequent in conveyances. This produced the statute de religiosis, 7 Edw. I; which provided, that no person, religious or other whatsoever, should buy, or fell, or receive, under pretence of a gift, or term of years, or any other title whatsoever, nor should by any art or ingenuity appropriate to himself, any lands or tenements in mortmain; upon pain that the immediate lord of the fee, or, on his default for one year, the lords paramount, and in default of all of them, the king, might enter thereon as a forfeiture.

This seemed to be a sufficient security against all alienations in mortmain: but, as these statutes extended only to gifts and conveyances between the parties, the religious houses now began to set up a fictitious title to the land, which it was intended they should have, and to bring an action to recover it against the tenant;

g A.D. 1217. cap. 43. edit. Oxon.

1. Non licet alicui de caetero dare terram fuam alicui domui religiofæ, ita quod illam resumat tencndum de eadem domo; nec liceat alicui domui religiofæ terram alicujus fic accipere, quod tradat illam ei a quo ipfam receipt tenendam: fi quis autem autem de caetero terram fuam domui religiofæ fic dederit, et super hoc convincatur, donum fuum penitus caffetur, et terra illa domino tuo illius feodi incurratur. Mag. Cart. 9 Hen. III. c. 36.
   i 2 Inst. 75.

who, by fraud and collusion, made no defence, and thereby judgment was given for the religious house, which then recovered the land by sentence of law upon a supposed prior title. And thus they had the honour of inventing
those fictitious adjudications of right. which are since become the great assurance of the kingdom, under the name of common recoveries. But upon this the statute of Westminster the second, 13 Edw. I. c. 32. enacted, that in such cases a jury shall try the true right of the demandants or plaintiffs to the land, and if the religious house or corporation be found to have it, they shall still recover seisin; otherwise it shall be forfeited to the immediate lord of the fee, or else to the next lord, and finally to the king, upon the immediate or other lord's default. And the like provision was made by the succeeding chapter k, in case the tenants set up crosses upon their lands (the badges of knights templars and hospitallers) in order to protect them from the feodal demands of their lords, by virtue of the privileges of those religious and military orders. And so careful was this this provident prince to prevent any future evasions, that when the statute of quia emptores, 18 Edw. I. abolished all subinfeudations, and gave liberty for all men to alienate their lands to be holden of the next immediate lord l, a proviso was inserted m that this should not extend to authorize any kind of alienation in mortmain. And when afterwards the method of obtaining the king's licence by writ of ad quod damnum was marked out, by the statute 27 Edw. I. ft. 2. it was farther provided by statute 34 Edw. I. ft. 3. that no such licence should be effectual, without the consent of the mesne or intermediate lords.

Yet still it was found difficult to set bounds to ecclesiastical ingenuity : for when they were driven out of all their former holds, they devised a new method of conveyance, by which the lands were granted, not to themselves directly, but to nominal feoffees to the use of the religious houses; thus distinguishing between the possession and the use, and receiving the actual profits,

k capt. 33.
I 2 Inst. 501.
m cap. 3.

while the seisin of the land remained in the nominal feoffee: who was held by the courts of equity (then under the direction of the clergy) to be bound in conscience to account to his cestui que use for the rents and emoluments of the estate. And it is to these inventions that our practisers are indebted for the introduction of uses and trusts, the foundation of modern conveyancing. But, unfortunately for the inventors themselves, they did not long enjoy the advantage of their new device, for the statute 15
Ric. II. c. 5. enacts, that the lands which had been so purchased to uses should be amortised by licence from the crown, or else be sold to private persons; and that, for the future, uses shall be subject to the statutes of mortmain, and forfeitable like the lands themselves. And whereas the statutes had been eluded by purchasing large tracts of land, adjoining to churches, and consecrating them by the name of church-yards, such subtile imagination is also declared to be within the compass of the statutes of mortmain. And civil or lay corporations, as well as ecclesiastical, are also declared to be within the mischief, and of course within the remedy provided by those salutary laws. And, lastly, as during the times of popery lands were frequently given to superstitious uses, though not to any corporate bodies; or were made liable in the hands of heirs and devisees to the charge of obits, chaunteries, and the like, which were equally pernicious in a well-governed state as actual alienations in mortmain; therefore, at the dawn of the reformation, the statute 22 Hen. VIII. c. 10. declares, that all future grants of lands for any of the purposes aforesaid, if granted for any longer term than twenty years, shall be void.

But, during all this time, it was in the power of the crown, by granting a licence of mortmain, to remit the forfeiture, so far as related to its own rights; and to enable any spiritual or other corporation to purchase and hold any lands or tenements in perpetuity: which prerogative is declared and confirmed by the statute 18 Edw. III. ft. 3. c. 3. But, as doubts were conceived at the time of the revolution how far such licence was valid n, since

n 2 Hawk. P. C. 391.

the king had no power to dispense with the statutes of mortmain by a clause of non obstante o, which was the usual course, though it seems to have been unnecessary p; and as, by the gradual declension of mesne signories through the long operation of the statute of quia emptores, the rights of intermediate lords were reduced to a very small compass; it was therefore provided by the statute 7 & 8 W. III. c. 37. that the crown for the future at its own discretion may grant licences to alien or take in mortmain, of whomsoever the tenements may be holden.

After the dissolution of monasteries under Henry VIII, though the policy of the next popish successor affected to grant a security to the possessors of abbey lands, yet, in order to regain so much of them as either the zeal or
timidity of their owners might induce them to part with, the statutes of mortmain were suspended for twenty years by the statute 1 & 2 P. & M. c. 8. and, during that time, any lands or tenements were allowed to be granted to any spiritual corporation without any licence whatsoever. And, long afterwards, for a much better purpose, the augmentation of poor livings, it was enacted by the statute 17 Car. II. c. 3. that appropriators may annex the great tithes to the vicarages ; and that all benefices under 100 l. per annum may be augmented by the purchase of lands, without licence of mortmain in either case : and the like provision hath been since made, in favour of the governors of queen anne's bounty q. It hath also been held r, that the statute 23 Hen. VIII. before-mentioned did not extend to any thing but superstitious uses ; and that therefore a man may give lands for the maintenance of a school, an hospital, or any other charitable uses. But as it was apprehended from recent experience, that persons on their deathbeds might make large and improvident dispositions even for these good purposes, and defeat the political ends of the statutes of mortmain ; it is therefore enacted by the statute 9 Geo. II. c. 36. that no lands or tenements, or money to be laid out thereon shall be given for or charged with any charitable uses whatsoever, unless by deed indented, executed in the presence of two witnesses twelve calendar months before the death of the donor, and enrolled in the court of chancery within six months after its execution, (except stocks in the public funds, which may be transferred within six months previous to the donor's death) and unless such gift be made to take effect immediately, and be without power of revocation : and that all other gifts shall be void. The two universities, their colleges, and the scholars upon the foundation of the colleges of Eaton, Winchester, and Westminster, are excepted out of this act : but such exemption was granted with this proviso, that no college shall be at liberty to purchase more advowsons, than are equal in number to one moiety of the fellows or students, upon the respective foundations.

2. Secondly, alienation to an alien is also a cause of forfeiture to the crown of the lands so alienated, not only on account of his incapacity to hold them, which occasions him to be passed by in descents of land s, but
likewise on account of his presumption in attempting, by an act of his own, to acquire any real property; as was observed in the preceding volume t.

3. Lastly, alienations by particular tenants, when they are greater than the law entitles them to make, and devest the remainder or reversion v, are also forfeitures to him whose right is attacked thereby. As, if tenant for his own life alienes by feeMOntment or fine for the life of another, or in tail, or in fee; these being estates, which either must or may last longer than his own, the creating them is not only beyond his power, and inconsistent with the nature of his interest, but is also a forfeiture of his own particular estate to him in remainder or reversionu. For which there seem to be two reasons. First, because such alienation amounts to a renunciation of the feodal connexion and dependence; it implies a refusal to perform the due renders and services to the lord.

s See pag. 249. 250.
t Book I. ch. 10.
v Co. Litt. 251.,
u Litt. 415.

of the fee, of which fealty is constantly one; and it ends in its consequences to defeat and devest the remainder or reversion expectant: as therefore that is put in jeopardy, by such act of the particular tenant, it is but just that, upon discovery, the particular estate should be forfeited and taken from him, who has shewn so manifest an inclination to make an improper use of it. The other reason is, because the particular tenant, by granting a larger estate than his own, has by his own act determined and put an entire and to his own original interest; and on such determination the next taker is intitled to enter regularly, as in his remainder or reversion. The same law, which is thus laid down with regard to tenants for life, holds also with respect to all tenants of the mere freehold, or of chattel interests; but if tenant in tail alienes in fee, this is no immediate forfeiture to the remainder-man, but a mere discontinuance (as it is called w) of the estate-tail, which he issue may afterwards avoid by due course of law/x: for he in remainder or reversion hath only a very remote and barely possible interest therein, until the issue in tail is extinct. But, in case of such forfeitures by particular tenants, all legal estates by them before created, as if enant for twenty years grants a lease for fifteen, and all charges by him lawfully made on the lands, shall be good and available in law y. For the law will not hurt an innocent lessee for the fault of his lessor.
; nor permit the lessor, after he has granted a good and lawful estate, by his own act to avoid it, and defeat the interest which he himself has created.

Equivalent, both in its nature and its consequences, to an illegal alienation by the particular tenant, is the civil crime of disclaimer; as where a tenant, who holds of any lord, neglects to render him the due services, and upon an action brought to recover them, disclaims to hold of his lord. Which disclaimer of tenure in any court of record is a forfeiture of the lands to the lord, upon reasons most apparently feodal. And so likewise, if

w See Book III.
z Litt. 595, 6, 7.
y Co. Litt. 233.
z Finch. 270, 271.

in any court of record the particular tenant does any act which amounts to a vitual disclaimer; if he claims any greater estate than was granted him at the first infeodation, or takes upon himself those rights which belong only to tenants of a superior class a; if he affirms the reversion to be in a stranger, by accepting his fine, attorning as his tenant, collusive pleading, and the like b; such behaviour amounts to a forfeiture of his particular estate.

III. Lapse is a species of forfeiture, whereby the right of prefenation to a church accrues to the ordinary by neglect of the patron to present, to the metropolitan by neglect of the ordinary, and to the king by neglect of the metropolitan. For it being for the interest of religion, and the good of the public, that the church should be provided with an officiating minister, the law has therefore given this right of lapse, in order to quicken the patron; who might otherwise, by suffering the church to remain vacant, avoid paying his ecclesiastical dues, and frustrate the pious intentions of his ancestors. This right of lapse was first established about the time (though not by the authority c) of the council of Lateran d, which was in the reign of our Henry the secund, when the bishops first began to exercise universally the right of institution to churches e. And therefore, where there is no right of institution, there is no right of lapse: so that no donative can lapse to the ordinary f, unless it hath been augmented by the queen's bounty g. But no right of lapse can accrue, when the original presentation is in the crown h.
The term, in which the title to present by lapse accrues from the one to the other successively, is six calendar months; (following in this case the computation of the church, and not the usual one of the common law) and this exclusive of the day of

a Co. Litt. 152.
b Ibid. 153.
c 2 Roll. Abr. 336. pl. 10.
d Bracton. l. 4. tr. 2. c. 3.
e See pag. 23.
g Stat. 1 Geo. I. ft. 2. c. 10.
h stat. 17 Edw. II. c. 8. 2 Inst. 273.

the avoidance. But, if the bishop be both patron and ordinary, he shall not 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. And also, if the bishop doth not collate his own clerk immediately to the living, and the patron presents, though after the six months are lapsed, yet his presentation is good, and the bishop is bound to institute the patron's clerk. For as the law only gives the bishop this title by lapse, to punish the patron's negligence, there is no reason that, if the bishop himself be guilty of equal or greater negligence, the presentation to lapse to the metropolitan, the patron also has the same advantage if he presents before the arch-bishop has filled up the benefice; and that for the same reason. Yet the ordinary cannot, after lapse to the metropolitan, collate his own clerk to the prejudice of the arch-bishop. For he had no permanent right and interest in the advowson, as the patron hath, but merely a temporary one; which having neglected to make use of during the time, he cannot afterwards retrieve it. But if the presentation lapses to the king, prerogative here intervenes and makes a difference; and the patron shall never recover his right, till the king has satisfied his turn by presentation: for nullum tempus occurrit regi. And therefore it may seem, as if the church might continue void for ever, unless the king shall be pleased to present; and a patron thereby be absolutely defeated of his advowson. But to prevent this inconvenience, the law has lodged a power in the patron's hands, of as it were compelling the king to present. For if, during the delay of the crown, the patron himself presents, and his clerk is
instituted, the king indeed by presenting another may turn out the patron's clerk; but if he does not, and the patron's clerk dies incumbent, or is canonically deprived, the king hath lost his right, which was only to the next or first presenation p.

k 2 Inst. 361.
i Gibf. Cod. 769.
m 2 Inst. 273.
n 2 Roll. Abr. 368.
o Dr. & St. d. 2. c. 36. Cro. Car. 355.
p. 7 Rep. 28. Cro. Eliz. 44.

In case the benefice becomes void by death, or cession through plurality of benefices, there the patron is bound to take notice of the vacancy at his own peril; for these are matters of equal notoriety to the patron and ordinary: but in case of a vacancy by resignation, or canonical deprivation, or if a clerk presented be refused for insufficiency, these being matters of which the bishop alone is presumed to be cognizant, here the law requires him to give notice thereof to the patron, otherwise he can take no advantage by way of lapse q. Neither shall any lapse thereby accrue to the metropolitan or to the king; for it is universally true, that neither the archbishop or the king shall ever present by lapse, but where the immediate ordinary might have collated by lapse, within the six months, and hath exceeded his time: for the first step or beginning faileth, et quod non babet principium, non babet finem r. If the bishop refuse or neglect to examine and admit the patron's clerk, without good reason assigned or notice given, he is styled a disturber by the law, and shall not have any title to present by lapse; for no man shall taken advantage of his own wrong g. Also if the right of presentation be litigious or contested, and an action be brought against the bishop to try the title, no lapse shall incur till the question of right be decided t.

IV. BY simony, the right of presenation to a living is forfeited, and vested pro hac vice in the crown. Simony is the corrupt presenation of any one to an ecclesiastical benefice for money, gift, or reward. It is so called from the resemblance it is said to bear to the fin of Simon Magus, though the purchasing of holy orders seems to approach nearer to his offence. It was by the canon law a very grievous crime: and is so much the more odious, because, as sir Edward Coke observes u, it is ever accompanied with
perjury; for the presentee is sworn to have committed no fimony. However it is not an offence punishable in a crim-
x For other penalties inflicted by this statute, see Book IV.
y Cro. Eliz. 788. Moor. 914.
z Hob. 165.

thereupon presented at any future time to the living, is direct and palpable
fimony. But, 3. It is held that for a father to purchase such a presentation,
in order to provide for his son, is not fimony: for the son is not concerned
in the bargain, and the father is by nature bound to make a provision for
him a. 4. That if a fimoniacal contract be made with the patron, the clerk
not being privy thereto, the presentation for that turn shall indeed devolve
to the crown, as a punishment of the guilty patron; but the clerk, who is
innocent, does not incur any disability or forfeiture b. 5. That bonds given
to pay money to charitable uses, on receiving a presentation to a living, are
not fimoniacal c, provided the patron or his relations be not benefited
thereby d; for this is no corrupt consideration, moving to the patron. 6.
That bonds of resignation, in case of non-residence or taking any other
living, are not fimoniacale; there being no corrupt consideration herein,
but such only as is for the good of the public. So also bonds to resign, when
the patron's son comes to canonical age, are legal; upon the reason before
given, that the father is bound to provide for this son f. 7. Lastly, general
bonds to resign at the patron's request are held to be legal g: for they may
possibly be given for one of the legal considerations before-mentioned;
and where there is a possibility that a transaction may be fair, the law will
not suppose it iniquitous without proof. But, if the party can prove the
contract to have been a corrupt one, such proof will be admitted, in order
to shew the bond fimoniacal, and therefore void. Neither will the patron be
suffered to make an ill use of such a general bond of resignation; as by
extorting a composition for tithes, procuring an annuity for his relation, or
by demanding a resignation wantonly and without good cause, such as is
approved by the law; as, for the benefit of his own son, or on account of
non-residence, plurality of livings, or gross immorality in the incumbent h.

a Cro Eliz. 686. Moor. 916.
c Noy 142.
d Star. 534.
f Cro. Jac. 248. 274.
V. THE next kind of forfeitures are those by breach or nonperformance of a condition annexed to the estate, either expressly by deed at its original creation, or impliedly by law from a principle of natural reason. Both which we considered at large in a former chapter i.

VI. I THEREFORE now proceed to another species of forfeiture, viz. by waste. Waste, vastum, is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in feesimple or fee-tail k.

WASTE is either voluntary, which is a crime of commission, as by pulling down a house; or it is permissive, which is a matter of omission only, as by suffering it to fall for want of necessary reparations. Whatever does a lasting damage to the freehold or inheritance is waste l. Therefore removing wainscot, floors, or other things once fixed to the freehold of a house, is waste m. If a house be destroyed by tempest, lightening, or the like, which is the act of providence, it is no waste: but otherwise, if the house be burnt by the statute 6 Ann. c. 3. no action will lie against a tenant for an accident of this kind, lest misfortune be added to misfortune. Waste may also be committed in ponds, dove-houses, warrens, and the like; by so reducing the number of the creatures therein, that there will not be sufficient for the reversioner when he comes to the inheritance n. Timber also is part of the inheritance o. Such are oak, ash, and elm in all places: and in some particular countries, by local custom, where other trees are generally used for building, they are thereupon considered as timber; and to cut down such trees, or top them, or do any other act whereby the timber may decay, is waste p. But underwood

I See chap. 10. pag. 152.
k Co. Litt. 53.
l Hetl. 35.,
m 4 Rep. 64.
n Co. Litt. 53.
o 4 Rep. 62.
p Co. Litt. 53.
the tenant may cut down at any seasonable time that he pleases q; and may take sufficient estovers of common right for house-bote and cart-bote; unless restrained (which is usual) by particular covenants or exceptions r. The conversion of land from one species to another is waste. To convert wood, meadow, or pasture, into arable; to turn arable, meadow, or pasture into woodland; or to turn arable or woodland into meadow or pasture; are all of them waste s. For, as sir Edward Coke observes t, it not only changes the course of husbandry, but the evidence of the estate; when such a close, which is conveyed and described as pasture, is found to be arable, and e converso. And the same rule is observed, for the same reason, with regard to converting one species of edifice into another, even though it is improved in its value u. To open the land to search for mines of metal, coal, a, is waste; for that is a detriment to the inheritance w: but, if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use x; for it is now become the mere annual profit of the land. These three are the general heads of waste, viz. in houses, in timber, and in land. Though, as was before said, whatever tends to the destruction, or depreciating the value, of the inheritance, is considered by the law as waste.

LET us next see, who are liable to be punished for committing waste. And by the feodal law, feuds being originally granted for life only, we find that the rule was general for all vasals or feudatories; fi vasallus feudum diffipaverit, aut infigni detrimentodeterius fecerit, privabitur y. But in our ancient common law the rule was by no means so large; for not only he that was seised of an estate of inheritance might do as he pleased with it, but also waste was not punishable in any tenant, save only in three persons; guardian in chivalry, tenant in dower, and tenant by the curtesy/z; and not in tenant for life or years a. And the reason of the diversity was, that the estate of the three former was created by the act of
the law itself, which therefore gave a remedy against them: but tenant for
life, or for years, came in by the demise and lease of the owner of the fee,
and therefore he might have provided against the committing of waste by
his lessee; and if he did not, it was his own default. But, in favour of the
owners of the inheritance, the statutes of Marlbridge b and Glocester e
provided, that the writ of waste shall not only lie against tenants by the law
of England (or curtesy) and those in dower, but against any farmer or
other that holds in any manner for life or years. So that, for above five
hundred years past, all tenants for life or for any less estate, have been
punishable or liable to be impeached for waste, both voluntary and
permissive; unless their leases be made, as sometimes they are, without
impeachment of waste, abfque impetitione vasti; that is, with a provision
or protection that no man shall impetere, or sue him, for waste committed.

THE punishment for waste committed was, by common law and the
statute of Marlbridge, only single damages d; except in the case of a
 guardian, who also forfeited his wardship e by the provisions of the great
charter f: but the statute of Glocester directs, that the other four species of
tenants shall lose and forfeith the place wherein the waste is committed,
and also treble damages, to him that hath the inheritance. The expression
of the statute is, he shall forfeit the thing which he hath wasted;? and it
hath been determined, that under these words the place is also included g.
And if waste be done sparfim, or here and there, all over a wood, the whole
wood shall be recovered; or if in several rooms of a house, the whole
house shall be forfeited h; because it is impracticable for the reversioner to
enjoy only the identical places wasted,

z It was however a doubt whether waste was punishable at the common
law in tenant by the curtesy. Regift. 72. Bro. Abr. tit. waste. 88. 2 Inst. 301.
a 2 Inst. 299.
b 52 Hen. III. c. 24.
c 6 Edw. I. c. 5.
d 2 Inst. 146.
e Ibid. 300.
f 9 Hen. III. c. 4.
g 2. Inst. 303.
h Co. Litt. 51.

when lying interspersed with the other. But if waste be done only in one
end of a wood (or perhaps in one room of a house) if that can be
conveniently separated from the rest, that part only is the locus vastatus, or thing wasted, and that only shall be forfeited to the reversioner.

VII. A SEVENTH species of forfeiture is that of copyhold estates, by breach of the customs of the manor. Copyhold estates are not only liable to the same forfeitures as those which are held in focage, for treason, felony, alienation, and waste; whereupon the lord may seise them without any presentment by the homage; but also to peculiar forfeitures, annexed to this species of tenure, which are incurred by the breach of either the general customs of all copyholds, or the peculiar local customs of certain particular manors. and we may observe that, as these tenements were originally holden by the lowest and most abject vasals, the marks of feodal dominion continue much the strongest upon this mode of property. Most of the offences, which occasioned a resumption of the fief by the feodal law, and were denominated feloniae, per quas vasallus amitteret feuduml, still continue to be causes of forfeiture in many of our modern copyholds. As, by subtraction of suit and servicem; fi dominum deservire nolueritn: by disclaiming to hold of the lord, or swearing himself not his copyholdero; fi dominum ejuravit, i. e. negavit fe a domio feudum haberep: by neglect to be admitted tenant within a year and a dayq fi per annum et diem cefsaverit in petenda investiturar: by contumacy in not appearing in court after three proclamatonss; fi a domino ter citatus non comparueritt: or by refusing, when sworn of the homage, to present the truth according to his oathu; fi pares veritatem noverint, et dicant fe nefcire, cum fciantw. In

I 2 Inst. 304.
l Feud. l. 2. t. 26. in cale.
m 3 Leon. 108. Dyer. 211.
n Feud. l. 1. t. 21.
o Co. Copyh. 57.
p Feud. l. 2. t. 34. & t. 26. 3.
q Plowd. 372.
t Feud. l. 2. t. 24.
t Feud. l. 2. t. 22.
u Co. Copyh. 57.
w Feud. l. 2. t. 58.
these, and a variety of other cases, which it is impossible here to 
enumerate, the forfeiture does not accrue to the lord till after the offences 
are presented by the homage, or jury of the lord's court baron x; per 
laudamentum parium fuorum y; or, as it is more fully expressed in another 
place z, nemo miles adimatur de possessione fui beneficii, nisi convicta 
culpa, quae fit laudanda a per judicium parium juorum.

VIII. THE eighth and last method, whereby lands and tenements may 
become forfeited, is that of bankruptcy, or the act of becoming a bankrupt 
which unfortunate person may, from the several descriptions given of 
him in our statute law, be thus defined; a trader, who secretes himself, or 
does certain other acts, tending to defraud his creditors.

WHO shall be such a trader, or what acts are sufficient to denominate him 
a bankrupt, with the several connected consequences resulting from that 
unhappy situation, will be better considered in a subsequent chapter; 
when we shall endeavour more fully to explain its nature, as it most 
immediately relates to personal goods and chattels. I shall only here 
observe the manner in which the property of lands and tenements are 
transferred, upon the supposition that the owner of them is clearly and indisputably a 
bankrupt, and that a commission of bankrupt is awarded and issued 
against him.

BY the statute 13 Eliz. c. 7. the commissioners for that purpose, when a 
man is declared a bankrupt, shall have full power to dispose of all his lands 
and tenements, which he had in his own right at the time when he became 
a bankrupt, or which shall descend or come to him at any time afterwards, 
before his debts are satisfied or agreed for; and all lands and tenements 
which were purchased by him jointly with his wife or children to his own 

x Co. Copyh. 58.
y Feud. l. 1. t. 21.
z Ibid. t. 22.
a i.e. arbitranda, definicnda. Du Frefne. IV. 79.

use, (or such interest therein as he may lawfully part with) or purchased 
with any other person upon secret trust for his own use; and to cause them 
to be appraised to their full value, and to fell the same by deed indented 
and inrolled, or divide them proportionably among the creditors. The
statute expressly includes not only free, but copyhold, lands: but did not extend to estates, tail, farther than for the bankrupt's life; nor to equities of redemption on a mortgaged estate, wherein the bankrupt has no legal interest, but only an equitable reversion. Whereupon the statute 21 Jac. I. c. 19. enacts, that the commissioners shall be empowered to fell or convey, by deed indented and inrolled, any lands or tenements of the bankrupt, wherein he shall be seised of an estate-tail in possession, remainder, or reversion, unless the remainder or reversion thereof shall be in the crown; and that such sale shall be good against all such issues in tail, remaindermen, and reversioners, whom the bankrupt himself might have barred by a common recovery, or other means: and that all equities of redemption upon mortgaged estates, shall be at the disposal of the commissioners; for they shall have power to redeem the same, as the bankrupt himself might have done, and after redemption to fell them. And also, by this and a former act b, all fraudulent conveyances to defeat the intent of these statutes are declared void; but that no purchaser bona side, for a good or valuable consideration, shall be affected by the bankrupt laws, unless the commission be sued forth within five years after the act of bankruptcy committed.

BY virtue of these statutes a bankrupt may lose all his real estates; which may at once be transferred by his commissioners to their assignees, without his participation or consent.

b

CHAPTER THE NINETEENTH.

OF TITLE BY ALIENATION.

THE most usual and universal method of acquiring a title to real estates is that of alienation, conveyance, or purchase in its limited sense: under which may be comprized any method wherein estates are voluntarily resigned by one man, and accepted by another; whether that be effected by sale, gift, marriage settlement, devise, or other transmission of property by the mutual consent of the parties.

THIS means of taking estates, by alienation, is not of equal antiquity in the law of England with that of taking them by descent. For we may remember that, by the feodal law a, a pure and genuine feud could not be transferred
from one feudatory to another without the consent of the lord; lest thereby a feeble or suspicious tenant might have been substituted and imposed upon him, to perform the feudal services, instead of one on whose abilities and fidelity he could depend. Neither could the feudatory then subject the land to his debts; for, if he might, the feodal restraint of alienation would have been easily frustrated and evaded. And, as he could not alienate it in his lifetime, so neither could he by will defeat the succession, by devising his feud to another family; nor even alter the course of it, by imposing particular limitations, or prescribing an unusual path of descent. Nor, in short, could he alienate the estate, even with the consent of the lord, unless he had also obtained the consent of his own next apparent, or presumptive, heir. And therefore it was very usual in ancient feoffments to express, that the alienation was made by con-

a See pag. 57.
b Feud. l. 1. t. 27.
c Co. Litt. 94. Wright, 168.

sent of the heirs of the feoffor; or sometimes for the heir apparent himself to join with the feoffor in the grant. And, on the other hand, as the feodal obligation was looked upon to be reciprocal, the lord could not alienate or transfer his signiory without the consent of his vasal: for it was esteemed unreasonable to subject a feudatory to a new superior, with whom he might have a deadly enmity, without his own approbation; or even to transfer his fealty, without his being thoroughly apprized of it, that he might know with certainty to whom his renders and services were due, and be able to distinguish a lawful distress for rent from a hostile seising of his cattle by the lord of a neighbouring clan. This consent of the vasal was expressed by what was called attorning, or professing to become the tenant of the new lord; which doctrine of attornment was afterwards extended to all lessees for life or years. For if one bought an estate with any lease for life or years standing out thereon, and the lessee or tenant refused to attorn to the purchasor, and to become his tenant, the grant or contract was in most cases void, or at least incomplete: which was also an additional clog upon alienations.

BUT by degrees this feodal severity is worn off; and experience hath shewn, that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and unrestrained. The road was cleared in the first place by a law of king
Henry the first, which allowed a man to fell and dispose of lands which he himself had purchased; for over these he was thought to have a more extensive power, than over what had been transmitted to him in a course of descent from his ancestors h: a doctrine, which is coun-
d Madox, Formul. Angl. no. 316. 319. 427.
e Gilb. Ten. 75.
f The same doctrine and the same denomination prevailed in Bretagne.

emptiones vel acquisitiones suas det cui magis velit. Terram autem quam ei parentes dederunt, non mittat extra cognitionem suam. LL. Hen. 1. c. 70.

tenanced by the feodal constitutions themselves j: but he was not allowed to fell the whole of his own acquirements, so as totally to disinherit his children, any more than he was at liberty to alien his paternal estate i. Afterwards a man seems to have been at liberty to part with all his own acquisitions, if he had previously purchased to him and his assigns by name; but, if his assigns were not specified in the purchase deed, he was not empowered to alien k; and also he might part with one fourth of the inheritance of his ancestors without the consent of his heir l. By the great charter of Henry 111m, no subinfeudation was permitted of part of the land, unless sufficient was left to answer the services due to the superior lord, which sufficiency was probably interpreted to be one half or moiety of the land n. But these restrictions were in general removed by the statute of quia emptoreso, whereby all persons, except the king's tenants in capite, were left at liberty to alien all or any part of their lands at their own discretion p. And even these tenants in capite were by the statute 1 Edw. 111. c. 12. permitted to alien, on paying a fine to the king q. By the temporary statutes 11 Hen. V11. c. 3. and 3 Hen. V111. c. 4. all persons attending the king in his wars were allowed to alien their lands without licence, and were relieved from other feodal burdens. And, lastly, these very fines for alienations were, in all cases of freehold tenure, entirely abolished by the statute 12 Car. 11. c. 24. As to the power of charging lands with the debts of the owner, this was introduced so early as statute Whftn.
2. which r subjected a moiety of the tenant's lands to eecutions, for debts recovered by law; as the whole of them was likewise subjected to be pawned in a statute merchant by the statute de mercatonibus, made the same year, and in a statute staple by statute 27 Edw. 111. c. 9. and in other similar recognizances

j Feud. l. 2. t. 39.
i Si queftum tantum babuerit is, qui partem terrae fuae donare voluerit, tune quidem boe ei licet; fed non totum queftum, quia non poteft filium fuum baeredem exbaeredare. Glanv. l. 7. c. 1.
k Mirr. C. 1. 3. This is also borrowed from the feodal law. Feud. l. 2. t. 48. l Mirr. ibid.
m 9 Hen. 111. c. 32.
n Dalrymple of feuds. 95.
o 18 Edw. 1. c. 1.
p See pag. 72.
q 2 Inst. 67.
r 13 Edw. 1. c. 18.

by statute 23 Hen. V111. c. 6. And now, the whole of them is not only subject to be pawned for the debts of the owner, but likewise to be absolutely sold for the benefit of trade and commerce by the several statutes of bankruptcy. The restraint of devising lands by will, except in some places by particular custom, lasted longer; that not being totally removed, till the abolition of the military tenures. The doctrine of attornments continued still later than any of the rest, and became extremely troublesome, though many methods were invented to evade them; till, at last, they were made no longer necessary, by statutes 4 & 5 Ann. c. 16. and 11 Geo. 11. c. 19.

IN examining the nature of alienation, let us first enquire, briefly, who may aliene and to whom; and then, more largely, how a man may aliene, or the several modes of conveyance.

1.WHO may aliene, and to whom; or, in other words, who is capable of conveying and who of purchasing. And herein we must consider rather the incapacity, than capacity, of the several parties: for all persons in possession are, prima facie, capable both of conveying and purchasing, unless the law has laid them under any particular disabilites. But, if a man has only in him the right of either possession or property, he cannot
convey it to any other, lest pretended titles might be granted to great men, whereby justice might be trodden down, and the weak oppressed e. Yet reversion and vested remainders may be granted; because the possession of the particular tenant is the possession of him in reversion or remainder: but contingencies, and mere possibilities, though they may be released, or devised by will, or may pass to the heir or executor, yet cannot (it hath been said) be assigned to a stranger, unless coupled with some present interest f.

PERSONS attainted of treason, felony, and praemunire, are incapable of conveying, from the time of the offence committed,

e Co. Litt. 214.
f Sheppard's touchtone. 238, 239, 322. 11 Mod. 152.
1p. Wms. 574. Stra. 132.

provided attainder follows t: for such conveyance by them may tend to defeat the king of his forfeiture, or the lord of his escheat. But they may purchase for the benefit of the crown, or the lord of the fee, though they are disabled to hold: the lands so purchased, if after attainder, being subject to immediate forfeiture; if before, to escheat as well as forfeiture, according to the nature of the crime u. So also corporations, religious or others, may purchase lands; yet, unless they have a licence to hold in mortmain, they cannot retain such purchase; but it shall be forfeited to the lord of the fee.

IDIOTS and persons of nonfane 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. The king indeed, in behalf of an idiot, may avoid his grants or other acts w. But it hath been said, that a non compos himself, though he be afterwards brought to a right mind shall not be permitted to allege his own insanity in order to avoid such grant: for that no man shall be allowed to stultify himself, or plead his own disability. The progress of this notion is somewhat curious. In the time of Edward I, non compos was a sufficient plea to avoid a man's own bond x: and there is a writ in the register y for the alienor himself to recover lands aliened by him during his insanity; dum suit non compos mentis fuae, ut dicit, b c. But under Edward II a scruple began to arise, whether a man should be permitted to blemish himself, by pleading his own insanity z: and, afterwards, a defendant in
assise having pleaded a release by the plaintiff since the last continuance, to which the plaintiff replied (are tenus, as the manner then was) that he was out of his mind when he gave it, the court adjourned the assise; doubting, whether as the plaintiff was sane both then and at the commencement of the suit, he should be permitted to plead an intermediate deprivation of reason; and the question

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t Co. Litt. 42.
u Ibid. 2.
w Ibid. 247.
x Britton, c. 28. fol. 66.
y fol. 228.
z 5 Edw. 111. 70

was asked, how he came to remember the release, if out of his senses when he gave it a. Under Henry V1 this way of reasoning (that a man shall not be allowed to disable himself, by pleading his own incapacity, because he cannot know what he did under such a situation) was seriously adopted by the judges in argument b; upon a question, whether the heir was barred of his right of entry by the feoffment of his insane ancestor. And from these loose authorities which Fitzherbert does not scruple to reject as being contrary to reason c, the maxim that a man shall not stultify himself hath been handed down as settled law d: though later opinions, feeling the inconvenience of the rule, have in many points endeavoured to restrain it e. And, clearly, the next heir, or other person interested, may, after the death of the idiot or non compos, take advantage of his incapacity and avoid the grant f. And so too, if he purchases under this disability, and does not afterwards upon recovering his senses agree to the purchase, his heir may either waive or accept the estate at his option g. In like manner, an infant may waive such purchase or conveyance, when he comes to full age; or, if he does not then actually agree to it, his heirs may waive it after him h. Persons also, who purchase or convey under duress is ceased i. For all these are under the protection of the law; which will not suffer them to be imposed upon, through the imbecility of their present condition; so that their acts are only binding, in case they be afterwards agreed to, when such imbecility ceases.

THE case of a feme-covert is somewhat different. She 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 k. And, though he does nothing to avoid

a 35 Affif. pl. 10.
b 39 Hen. VI. 42.
e Comb. 469. 3 Mod. 310, 311. 1 Equ. Caf. Abr. 270.
f Perkins. 21.
g Co. Litt. 2.
h Ibid.
i 2 Inst. 483. 5 Reo. 119.
j Co. Litt. 3.

it, or even if he actually consents, the feme-covert herself may, after the death of her husband, waive or disagree to the same: nay, even her heirs may waive it after her, if she dies before her husband, or if in her widowhood she does nothing to express her consent or agreement l. But the coveyance or other contract of a feme-covert (except by some matter of record) is absolutely void, and not merely voidable m; and therefore cannot be affirmed or made good by any subsequent agreement.

THE case of an alien born is also peculiar. For he may purchase any thing; but after purchase he can hold nothing, except a lease for years of a house for convenience of merchandize, in case he be an alien-friend: all other purchases (when found by an inquest of office) being immediately forfeited to the king n.

PAPISTS, lastly, and persons professing the popish religion, are by statute 11 & 12 W. III. c. 4, disabled to purchase any lands, rents, or hereditaments; and all estates made to their use, or in trust for them, are void. But this statute is construed to extend only to papists above the age of eighteen; such only being absolutely disabled to purchase: yet the next protestant heir of a papist under eighteen shall have the profits, during his life; unless he renounces his errors within the time limited by law o.

II. WE are next, but principally, to enquire, how a man may aliene or convey; which will lead us to consider the several modes of conveyance.
IN consequence of the admission of property, or the giving a separate right by the law of society to those things which by the law of nature were in common, there was necessarily some means to be devised, whereby that separate right or exclusive property should be originally acquired; which, we have more than once observed was that of occupancy or first possession. But this pos-

i Ibid.
m Perkins. 154. 1 Sid. 120.
n Co. Litt. 2.
o I p. Wms. 354.

session, when once gained, was also necessarily to be continued; or else, upon one man's dereliction of the thing he had seised, it would again become common, and all those mischiefs and contentions would ensue, which property was introduced to prevent. For this purpose therefore, of continuing the possession, the municipal law has established descents and alienations: the former to continue the possession in the heirs of the proprietors, after his involuntary dereliction of it by his death; the latter to continue it in those persons, to whom the proprietor, by his own voluntary act, shall choose to relinquish it in his lifetime. A translation, or transfer, of property being thus admitted by law, it became necessary that this transfer should be properly evidenced: in order to prevent disputes, either about the fact, as whether there was any transfer at all; or concerning the persons, by whom and to whom it was transferred; or with regard to the subject matter, as what the thing transferred consisted of; or, lastly, with relation to the mode and quality of the transfer, as for what period of time (or, in other words, for what estate and interest) the conveyance was made. The legal evidences of this translation of property are called the common assurances of the kingdom; whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed.

THESE common assurances are of four kinds: 1. By matter in pais, or deed; which is an assurance transacted between two or more private persons in pais, in the country; that is (according to the old common law) upon the very spot to be transferred. 2. By matter of record, or an assurance transacted only in the king's public courts of record. 3. By special custom, obtaining in some particular places, and relating only to some particular species of property. Which three are such as take effect
during the life of the party conveying or assuring. 4. The fourth takes no
effect, till after his death, and that is by devise, contained in his last will
and testament. We shall treat of each in its order.

CHAPTER THE TWENTIETH.
OF ALIENATION BY DEED.

IN treating of deeds I shall consider, first, their general nature; and, next,
the several sorts or kinds of deeds, with their respective incidents. And in
explaining the former, I shall examine, first, what a deed is; secondly, its
requisites; and, thirdly, how it may be avoided.

1. FIRST than, a deed is a writing sealed and delivered by the parties a . It
is sometimes called a charter, carta, from its materials; but most usually,
when applied to the transactions of private subjects, it is called a deed, in
Latin factum, xat ecoxy, because it is the most solemn and authentic act
that a man can possibly perform, with relation to the disposal of his
property; and therefore a man shall always be estopped by his own deed,
or not permitted to aver or prove any thing in contradiction to what he has
once so solemnly and deliberately avowed b. If a deed be made by more
parties than one, there ought to be regularly as many copies of it as there
are parties, and each should be cut or indented (formerly in acute angles
inftar dentium, but at present in a waving line) on the top or side, to tally
or correspond with the other; which deed, so made, is called an indenture.
Formerly, when deeds were more
concise than at present, it was usual to
write both parts on the same piece of parchment, with some word or
letters of the alphabet written between them; through which the
parchment was cut, either in a strait or indented line, in such

a Co. Litt. 171.
b Ploed. 434.

c a manner as to leave half the word on one part and half on the other.
Deeds thus made were denominated fyngrapha by the canonifts c; and
with us chirographa, or hand-writings d ; the word cirographum or
cyrographum being usually that which was divided in making the
indenture: and this custom is still preserved in making out the indentures
of a fine, whereof hereafter. But at length indenting only has come into
use, without cutting through any letters at all; and it seems at present to
serve for little other purpose, than to give name to the species of the deed. When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the original, and the rest are counterparts: though of late it is most frequent for all the parties to execute every part; which renders them all originals. A deed made by one party only is not indented, but polled or shaved quite even; and is therefore called a deed-poll, or a single deed e.

II. WE are in the next place to consider the requisites of a deed. The first of which is, that there be persons able to contract and be contracted with, for the purposes intended by the deed; and also a thing, or subject matter to be contracted for; all which must be expressed by sufficient names f. So as in every grant there must be a grantor, a grantee, and a thing granted; in every lease a lessor, a lessee, and a thing demise.

SECONDLY; the deed must be founded upon good and sufficient consideration. Not upon an usurious contract g; nor upon fraud or collusion, either to deceive purchasers bona side h, or just and lawful creditors i; any of which bad considerations will vacate the deed. A deed also, or other grant, made without any consideration, is, as it were, of no effect; for it is construed to enure, or to be effectual, only to the use of the grantor himselfk.

c Lyndew. L. 1. t. 10. c. 1.
d Mirror. C. 2. 27.
e Ibid. Litt. 371, 372.
f Co. Litt. 35.
g Stat. 13 Eliz. c. 8.
h Stat. 27. Eliz. c. 4.
i Stat. 13 Eliz. c. 5.
k Perk. 533.

The consideration may be either a good, or a valuable one. A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation; being founded in motives of generosity, prudence, and natural duty; a valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant l; and is therefore founded in motives of justice. Deeds, made
upon good consideration only, are considered as merely voluntary, and are frequently set aside in favour of creditors, and bona side purchasers.

THIRDLY ; the deed must be written, or I presume printed; for it may be in any character or any language; but it must be upon paper, or parchment. For if it be written on stone, board, linen, leather, or the like, it is no deed m. Wood or stone may be more durable, and linen less liable to rasures; but writing on paper or parchment unites in itself, more perfectly than any other way, both those desirable qualities: for there is nothing else so durable, and at the same time so little liable to alteration; nothing so secure from alteration, that is at the same time so durable. It must also have the regular stamps, imposed on it by the several statutes for the increase of the public revenue; else it cannot be given in evidence. Formerly many conveyances were made by parol, or word of mouth only, without writing, but this giving a handle to a variety of frauds, the statute 29 Car. II. c. 3. enacts, that no lease or estate in lands, tenements, or hereditaments, (except leases, not exceeding three years from the making, and whereon the reserved rent is at least two thirds of the real value,) shall be looked upon as of greater force than a lease or estate at will; unless put in writing, and signed by the party granting, or his agent lawfully authorized in writing.

FOURTHLY ; the matter written must be legally and orderly set forth: that is, there must be words sufficient to specify the agreement and bind the parties: which sufficiency must be left to

l 3 Rep. 83.
m Co. Litt. 229. F. N. B. 122.

the courts of law to determine n. For it is not absolutely necessary in law, to have all the formal parts that are usually drawn out in deeds, so as there be sufficient words to declare clearly and legally the party's meaning. But, as these formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity; and therefore I will here mention them in their usual order.
1. THE premises may be used to set forth the number and names of the parties, with their additions or titles. They also contain the recital, if any, of such deeds, agreements, or matters of fact, as are necessary to explain the reasons upon which the present transaction is founded: and herein also is set down the consideration upon which the deed is made. And then follows the certainty of the grantor, grantee, and thing granted p.

2. 3. NEXT come the habendum and tenendum q. The office of the habendum is properly to determine what estate or interest is granted by the deed: though this may be performed, and sometimes is performed, in the premises. In which case the habendum cannot lessen, but it may enlarge, the estate granted in the premises; as if a grant beto A and the heirs of his body? in the premises, habendumto him and his heirs for ever,? here A has an estate-tail, and a fee-simple expectant thereon r. But had it been in the premises to him and his heirs,? the habendum would be utterly void s; for the larger and more beneficial estate is vested in him before the habendum comes, and shall not afterwards be narrowed, or devested, by it. The tenendum, and to hold,? is now of very little use, and is only kept in by custom. It was sometimes formerly used to signify the tenure, by which the estate granted was

n Co. Litt. 225.
o Ibid. 6.
p See appendix, No. 2. pag. V.
q Ibid.
r Co. Litt. 21.
s S Kep. 154.

to be holden; viz. tenendum per servitium militare, in burgagio, in libero focagio, ac. But, all these being now reduced to free and common focage, the tenure is never specified. Before the statute of quia emptores, 18 Edw. I. it was also sometimes used to denote the lord of whom the land should be holden; but that statute directing all future purchasers to hold, not of the immediate grantor, but of the chief lord of the fee, this use of the tenendum hath been also antiquated; though for a long time after we find it mentioned in ancient charters, that the tenements shall be holden de capitalibus dominis feodi t: but, as this expressed nothing more than the statute had already provided for, it gradually grew out of use.
4. NEXT follow the terms or stipulations, if any, upon which the grant is made: the first of which is the reddendem or reservation, whereby the grantor doth create or reserve some new thing to himself out of what he had before granted. As rendering therefore yearly the sum of ten shillings, or a pepper corn, or two days ploughing, or the like u. This render, reditus, return, or rent, under the pure feodal system consisted, in chivalry, principally of military services; in villenage, of the most slavish offices; and, in focage, it usually consists of money, though it may consist of services still, or of any other certain profit w. To make a reddendum good, if it be of any thing newly created by the deed, the reservation must be to the grantors, or some, or one of them, and not to any stranger to the deed x. But if it be of ancient services or the like, annexed to the land, then the reservation may be to the lord of the fee y.

5. ANOTHER of the terms upon which a grant may be made is a condition; which is a clause of contingency, on the happening of which the estate granted may be defeated; as provided always, that if the mortgagor shall pay the mortgagor 500.

? upon such a day, the whole estate granted shall determine,? and the like z.

6. NEXT may follow the clause of warranty; whereby the grantor doth for himself and his heirs, warrant and secure to the grantee the estate so granted a. By the feodal constitution, if the vasal's title to enjoy the feud was disputed, he might vouch, or call, the lord or donor to warrant or insure his gift; which if he failed to do, and the vasal was evicted, the lord was bound to give him another feud of equal value in recompense b. And so, by our ancient law, if before the statute of quia emptores a man enfeoffed another in fee, by the feodal verb dedi, to hold of himself and his heirs by certain services; the law annexed a warranty to this grant, which bound the feoffor and his heirs, to whom the services (which were the consideration and equivalent for the gift) were originall stipulated to be rendered c. Or if a man and his ancestors had immemorially holden land
of another and his ancestors by the service of homage (which was called homage aunceftral) this also bound the lord to warranty d; the homage being an evidence of such a feodal grant. And, upon a similar principle, in case, after a partition or exchange of lands of inheritance, either party or his heirs be evicted of his share, the other and his heirs are bound to warranty e, because they enjoy the equivalent. And, so even at this day, upon a gift in tail or lease for life, rendering rent, the donor or lessor and his heirs (to whom the rent is payable) are bound to warrant the title f. But in a feoffment in fee by the verb dedi, since the statute of quia emptores, the feoffor only is bound to the implied warranty, and not his heirs g; because it is a mere personal contract on the part of the feoffor, the tenure (and of course the ancient services) resulting back to the superior lord of the fee. And in other forms of alienation, gradually introduced since that sta-

z Append. No. II. 2. pag. Viii.
a Ibid. No. I. pag. I.
b Feud. I 2. t. 8, &25.
c Co. Litt. 384.
d Litt. 143.
e Co. Litt. 174.
f Ibid. 384.
g Ibid.

tute, no warranty whatsoever is implied h; they bearing no fort of analogy to the original feodal donation. And therefore in such cases it became necessary to add an express clause of warranty, to bind the grantor and his heirs; which is a kind of covenant real, and can only be created by the verb warrantizo or warrant i.

THESE express warranties were introduced, even prior to the statute of quia emptores, in order to evade the strictness of the feodal doctrine of non-alienation without the consent of the heir. For, though he, at the death of his ancestor, might have entered on any tenements that were aliened without his concurrence, yet, if a clause of warranty was added to the ancestor’s grant, this covenant descending upon the heir insured the grantee; not so much by confirming his title, as by obliging such heir to yield him recompense in lands of equal value: the law, in favour of alienations, supposing that no ancestor would wantonly disinherit his next of blood k; and therefore presuming that he had received a valuable
consideration, either in land, or in money which had purchased land, and that this equivalent descended to the heir together with the ancestor's warranty. So that when either an ancestor, being the rightful tenant of the freehold, conveyed the land to a stranger and his heirs, or released the right in feesimple to one who was already in possession, and superadded a warranty to his deed, it was held that such warranty not only bound the warrantor himself to protect and assure the title of the warrantee, but it also bound his heir: and this, whether that warranty was lineal, or collateral to the title of the land. Lineal warranty was where the heir derived, or might by possibility have derived, his title to the land warranted, either from or through the ancestor who made the warranty; as where a father, or an elder son in the life of the father, released to the disfeifor of either themselves or the grandfather, with warranty, this was lineal to the younger son l. Collateral warranty was where the heir's title to the land neither was, nor could have been, derived from

h Co. Litt. 102.
i Litt. 733.
k Co. Litt. 373.
l Litt. 703. 706. 707.

the warranting ancestor; as where a younger brother released to his father's disfeifor, with warranty, this was collateral to the elder brother m. But where the very conveyance, to which the warranty was annexed, immediately followed a disfeifin, or operated itself as such (as, where a father tenant for years, with remainder to his son in fee-simple with warranty) this, being in its original manifestly founded on the tort or wrong of the warrantor himself, was called a warranty commencing by disfeifin; and, being too palpably injurious to be supported, was not binding upon any heir of such tortious warrantor n.

IN both lineal and collateral warranty, the obligation of the heir (in case the warrantee was evicted, to yield him other lands in their stead) was only on condition that he had other sufficient lands by descent form the warranting ancestor o. But though, without assets, he was not bound to insure the title of another, yet, in case of lineal warranty, whether assets descended or not, the heir was perpetually barred from claiming the land himself; for, if he could succeed in such claim, he would then gain assets by descent (if he had them not before) and must fulfil the warranty of his ancestor: and the same rule p was with less justice adopted also in respect
of collateral warranties, which likewise (though no assets descended) barred the heir of the warrantor from claiming the land by any collateral title; upon the presumption of law that he might hereafter have assets by descent either from or through the same ancestor. The inconvenience of this latter branch of the rule was felt very early, when tenants by the curtesy took upon them to alienate their lands with warranty; which collateral warranty of the father descending upon his son (who was the heir of both his parents) barred him from claiming his maternal inheritance: to remedy which the statute of Glocester, 6 Edw. I. c. 3. declared, that such warranty should be no bar to the son, unless assets descended from the father. It was afterwards attempted in 50 Edw. III. to make the same pro-

m Litt. 705. 707.
n Ibid. 698. 702.
o Co. Litt. 102.
p Litt. 711. 712.

vision universal, by enacting that no collateral warranty should be a bar, unless where assets descended from the same ancestor, but it then proceeded not to effect. However, by the statute II Hen. V11. c. 20. notwithstanding any alienation with warranty by tenant in dower, the heir of the husband is not barred, though he be also heir to the wife. And by statute 4 & 5 Ann. c. 16. all warranties by any tenant for life shall be void against those in remainder or reversion; and all collateral warranties by any ancestor who has no estate of inheritance in possession shall be void against his heir. By the wording of which last statute it should seem, that the legislature meant to allow, that the collateral warranty of tenant in tail, descending (though without assets) upon a remainder-man or reversioner, should still bar the remainder or reversion. For though the judges, in expounding the statute de donis, held that, by analogy to the statute of Glocester, a lineal warranty by the tenant in tail without assets should not bar the issue in tail, yet they held such warranty with assets to be a sufficient barr: which was therefore formerly mentioned as one of the ways whereby an estate tail might be destroyed; it being indeed nothing more in effect, than exchanging the lands entailed for others of equal value. They also held that collateral warranty was not within the statute de donis; as that act was principally intended to prevent the tenant in tail from disinheriting his own issue: and therefore collateral warranty (though without assets) was allowed to be, as at common law, a sufficient
bar of the estate-tail and all remainders and reversions expectant thereon.

And so it still continues to be, notwithstanding the statute of queen Anne, if made by tenant in tail in possession: who therefore may now, without the forms of a fine or recovery, in some cases make a good conveyance in fee-simple, by superadding a warranty to his grant; which, if accompanied with assets, bars his own issue, and without them bars such of his heirs as may be in remainder or reversion.

q Co Litt. 373.
p Litt. 712. 2 Inst. 293.
s pag. 116.
t Co. Litt. 374. 2 Inst. 335.

7. AFTER warranty usually follow covenants, or conventions; which are clauses of agreement contained in a deed, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform, or give, something to the other. Thus the grantor may covenant that he hath a right to convey, or for the grantees quiet enjoyment; or the like: the grantee may covenant to pay his rent, to repair the premises, cu. If the covenantor covenants for himself and his heirs, it is then a covenant real, and descends upon the heirs; who are bound to perform it, provided they have assets by descent, but not otherwise: if he covenants also for his executors and administrators, his personal assets as well as his real, are likewise pledged for the performance of the covenant; which makes such covenant a better security than any warranty, and it has therefore in modern practice totally superseded the other.

8. LASTLY, comes 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 w. Not but a deed is good, although it mention no date; or hath a false date; or even if it hath an impossible date, as the thirtieth of February; provided the real day of its being dated or given, that is, delivered, can be proved x.

I PROCEED now to the fifth requisite for making a good deed; the reading of it. This is necessary, wherever any of the parties desire it; and, if it be not done on his request, the deed is void as to him. If he can, he should read it himself: if he be blind or illiterate, another must read it to him. If it be read falsely, it will be void; at least for so much as is misrecited: unless
it be agreed by collusion that the deed shall be read false, on purpose to make it void; for in such case it shall bind the fraudulent party.

u Append. No. II. 2. pag. Viii.
w Ibid. pag xiii.
x Co. Litt. 46. Dyer. 28.
y 2 Rep. 3. 9. II Rep. 27.

SIXTHLY, it is requisite that the party, whose deed it is, should seal, and in most cases I apprehend should sign it also. The use of seals, as a mark of authentcity to letters and other instruments in writing, is extremely ancient. We read of it among the Jews and persians in the earliest and most sacred records of history/z. And in the book of Jeremiah there is a very remarkable instance, not only of an attestation by seal, but also of the other usual formalities attending a Jewish purchase a. In the civil law also b, seals were the evidence of truth; and were required, on the part of the witnesses at least, at the attestation of every testament. But in the times of our Saxon ancestors, they were not much in use here. For though sir Edward coke c relies on an instance of king Edwayn's making use of a seal about an hundred years before the conquest, yet it does not follow that this was the usage among the whole nation: and perhaps the charter he mentions may be of doubtful aughority, from this very circumstance, of being sealed; since we are assured by all our ancient historians, that sealing was not then in common use. The method of the Saxons was for such as could write to subscribe their names, and, whether they could write or not, to affix the sign of the cross: which custom our illiterate vulgar do, for the most part, to this day keep up; by signing a cross for their mark, when unable to write their names. And indeed this inability to write, and therefore making a cross in its stead, is honestly avowed by Caedwalla, a Saxon king, at the end of one of his charters d. In like manner, and for the same unsurmountable reason, the Normans, a brave but

aAnd I bought the field of Hanameel, and weighed him the money, even seventeen shekels of filver. And I subscribed the evidence, and sealed it, and took witnesses, and weighed him the money in the balances. And I took the evidence of the purchase, both that which was sealed according to the law and custom, and also that which was open. c. 32.
b Inst. 2. 10. 2 &3.
illiterate nation, at their first settlement in France, used the practice of sealing only, without writing their names: which custom continued, when learning made its way among them, though the reason for doing it had ceased; and hence the charter of Edward the confessor to Westminster abbey, himself being brought up in Normandy, was witnessed only by his seal, and is generally thought to be the oldest sealed charter of any authenticity in England. At the conquest, the Norman lords brought over into this kingdom their own fashions; and introduced waxen seals only, instead of the English method of writing their names, and signing with the sign of the cross. The impressions of these seals were sometimes a knight on horseback, sometimes other devises: but coats of arms were not introduced into seals, not indeed into any other use, till about the reign of Richard the first, who brought them from the croisade in the holy land; where they were first invented and painted on the shields of the knights, to distinguish the variety of persons of every christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained.

THIS neglect of signing, and resting only upon the authenticity of seals, remained very long among us; for it was held in all our books that sealing alone was sufficient to augmentate a deed: and so the common form of attesting deeds, sealed and delivered, continues to this day; notwithstanding the statute 29 Car. II. c. 3. before-mentioned revives the Saxon custom, and expressly directs the signing, in all grants of lands, and many other species of deeds; in which therefore signing seems to be now as necessary as sealing, though it hath been sometimes held, that the one includes the other.

A SEVENTH requisite to a good deed is that it be delivered, by the party himself or his certain attorney: which therefore is
also expressed in the attestation; sealed and delivered. A deed takes effect only from this tradition or delivery; for, if the date be false or impossible, the delivery ascertains the time of it. And if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing, and by a parity of reason the signing also, and makes them both his own. A delivery may be either absolute, that is, to the party or grantee himself; or to a third person, to hold till some conditions be performed on the part of the grantee: in which last case it is not delivered as a deed, but as an escrow; that is, as a scrowl or writing, which is not to take effect as a deed till the conditions be performed; and then it is a deed to all intents and purposes.

THE last requisite to the validity of a deed is the attestation, or execution of it in the presence of witnesses: though this is necessary, rather for preserving the evidence, than for constituting the essence, of the deed. Our modern deeds are in reality nothing more than an improvement or amplification of the brevia taftata mentioned by the feodal writers k; which were written memorandums, introduced to perpetuate the tenor of the conveyance and investiture, when grants by parol only became the foundation of frequent dispute and uncertainty. To this end they registered in the deed the persons who attended as witnesses, which was formerly done without their signing their names (that not being always in their power) but they only heard the deed read; and then the clerk or scribe added their names, in a form of memorandum; thus;his festibus, Fohanne Moore, Facobo Smith, et alis ad banc rem convocatis l. This, like all other solemn transactions, was originally done only coram paribus m, and frequently when assembled in the court baron, hundred, or county court; which was then expressed in the attestation, teste comitatu, bunfredo, & c n. Afterwards the attestation of other witnesses was allowed, the trial in

h Perk. 130.
i Co. Litt. 36.
k Feud. l. I. t. 4.
l Co. Litt. 7.
case of a dispute being still reserved to the pares; with whom the witnesses (if more than one) were associated, and joined in the verdict o: till that also was abrogated by the statute of York, 12 Edw. II. ft. I. c. 2. And in this manner, with some such clause of bijs testibus, are all old deeds and charters, particularly magna carta, witnessed. And, in the time of sir Edward coke, creations of nobility were still witnessed in the same manner p. But in the king's common charters writs, or letters patent, the style is now altered: for, at present, the king is his own witness, and attests his letters patent thus; testef meipso, witness ourself at Westminster, &c.: a form which was introduced by Richard the first q, but not commonly used till about the beginning of the fifteenth century; nor the clause of bijs testibus entirely discontinued till the reign of Henry the eighth r: which was also the era of discontinuing it in the deeds of subjects, learning being then revived, and the faculty of writing more general: and therefore ever since that time the witnesses have subscribed their attestation, either at the bottom, or on the back, of the deed s.

III. WE are next to consider, how a deed may be availed, or rendered of no effect. And from what has been before laid down it will follow, that if a deed wants any of the essential requisites before-mentioned; either, 1. Proper parties, and a proper subject matter: 2. A good and sufficient consideration: 3. Writing, on paper or parchment, duly stamped: 4. Sufficient and legal words, properly disposed: 5. Reading, if desired, before the execution: 6. Sealing; and, by the statute, in many cases signing also: or, 7. Delivery: it is a void deed ab initio. It may also be avoided by matter ex post facto: as, I. By rasure, interlining, or other alteration in any material part; unless a memorandum be made thereof at the time of the execution and attestation t. 2. By breaking off, or defacing, the seal u. 3. By

o Co. Litt. 6.
p 2 Inst. 77.
q Madox, formul. no. 515.
r Ibid. Differt. fol. 32.
s 2 Inst. 78.
t II Rep. 27.
u 5 Rep. 23.
delivering it up to be cancelled; that is to have lines drawn over it, in the form of lattice work of cancelli; though the phrase is now used figuratively for any manner of obliteration or defacing it. 4. By the disagreement of such, whose concurrence is necessary, in order for the deed to stand: as, the husband, where a feme covert is concerned; an infant, or person under duress, when those disabilities are removed; and the like. 6. By the judgment or decree of a court of judicature. This was anciently the province of the court of star chamber, and now of the chancery: when it appears that the deed was obtained by fraud, force, or other foul practice; or is proved to be an absolute forgery w. In any of these cases the deed may be voided, either in part or totally, according as the cause of avoidance is more or less extensive.

AND, having thus explained the general nature of deeds, we are next to consider their several species, together with their respective incidents. And herein I shall only examine the particulars of those, which, from long practice and experience of their efficacy, are generally used in the alienation of real estates: for it would be tedious, nay of in personal concerns, but which fall under our general definition of a deed; that is, a writing sealed and delivered. The former, being principally such as serve to convey the property of lands and tenements from man to man, are commonly denominated conveyances: which are either conveyances at common law, or such as receive their force and efficacy by virtue of the statute of uses.

I. OF conveyances by the common law, some may be called original, or primary conveyances; which are those by means whereof the benefit or estate is created or first arises: others are derivative or estate, originally created, is enlarged, restrained, transferred, or extinguished.

w Toth. 90.


1. A FEOFFMENT, feofsamentum, is a substantive derived from the verb, to enfeoff, feoffare or infeudare, to give one a feud; and therefore feoffment is properly donatio feudi/x. It is the most ancient method of conveyance, the most solemn and public, and therefore the most easily remembered and
proven. And it may properly be defined, the 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.

THIS is plainly derived from, or is indeed itself the very mode of the ancient feodal donation; for though it may be performed by the wordenfeoff? orgrant,? yet the aptest word of feoffment is do or dedi y. And it is still directed and governed by the same feodal rules; insomuch that the principal rule relating to the extent and effect of a feodal grant, tenor eft qui legem dat feudo,? is in other words become the maxim of our law with relation to feoffments, modus legem dat donationiz . And therefore as in pure feodal donations the lord, from whom the feud moved, must expressly limit and declare the continuance or quantity of estate he meant to confer, ne quis plus donasse praesumatur, quam in donatione expresserit a;? so, if one grants by feoffment lands or tenements to another, and limits or expresses no estate, the grantee ( due ceremonies of law being performed) hath barely an estate for life b. For, as the personal abilities of the feoffee were originally presumed to be the immediate or principal inducements to the feoffment, the feoffee's estate ought to be confined to his person, and subsist only for his life; unless the feoffor, by express provision in the creation and constitution of the estate, hath given it a longer continuance. These express provisions are indeed generally made, for this was for ages the only conveyance, whereby our ancestors were wont to create an estate in fee-simple c, by giving the land to the feoffee, to hold to him and his heirs for ever; though it serves equally well to convey any other estate of freehold d.

BUT by the mere words of the deed the feoffment is by no means perfected. There remains a very material ceremony to be performed, called livery of seisin; without which the feoffee has but a mere estate at will e. This livery of seisin is no other than the pure feodal investiture, or delivery of corporal possession of the land or tenement; which was held absolutely

x Co. Litt. 9.
y Ibid.
z Wright. 21.
a pag. 108.
b Co. Litt. 42.
necessary to complete the donation. Nam feudum fine investitūra nullo modo confitui potuit f: and an estate was then only perfect, when, as Fleta expresses it in our law, fit juris et seisinae conjunctio g.

**INVESTITURES**, in their original rise, were probably intended to demonstrate in conquered countries the actual possession of the lord; and that he did not grant a bare litigious right, which the soldier was ill qualified to prosecute, but a peaceable and firm possession. And, at a time when writing was seldom practised, a mere oral gift, at a distance from the spot that was given, was not likely to be either long or accurately retained in the memory of bystanders, who were very little interested in the grant. Afterwards they were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate; and that such as claimed title by other means might know against whom to bring their actions.

In all well-governed nations, some notoriety of this kind has been ever held requisite, in order to acquire and ascertain the

c See Appendix. No. I.
d Co. Litt. 9.
e Litt. 66.
f Wright. 37.
g l. 3. c. 15. 5.

property of lands. In the Roman law plenum dominium was not said to subsist, unless where a man hath both the right, and the corporal possession; which possession could not be acquired with out both an actual intention to possess, and an actual seisin, or entry into the premises, or part of them in the name of the whole h. And even in ecclesiastical promotions, where the freehold passes to the person promoted, corporal possession is required at this day, to vest the property completely in the new proprietor; who, according to the distinction of the canonists i, acquires the jus ad rem, or inchoate and imperfect right, by nomination and institution; but not the jus in re, or complete and full right, unless by corporal possession. Therefore in dignities possession is given by installment; in rectories and vicarages by induction, without which no temporal rights accrue to the minister, though every ecclesiastical power is vested in him by institution. So also even in descents of lands, by our law, which are cast on the heir by act of the law
itself, the heir has not plenum dominium, or full and complete ownership, till he has made an actual corporal entry into the lands: for if he dies before entry made, his heir shall not be intitled to take the possession, but the heir of the person who was last actually seised k. It is not therefore only a mere right to enter, but the actual entry, that makes a man complete owner; so ad to transmit the inheritance to his own heirs: non jus, fed seisina, facit fipiteml.

YET, the corporal tradition of lands being sometimes inconvenient, a symbolical delivery of possession was in many cases anciently allowed; by transferring something near at hand, in the presence of credible witnesses, which by agreement should serve to represent the very thing designed to be conveyed; and an oc-

h Nam apifcimur possessioncm corpore et animo: neque per fe animo. Non autem ita accipiendum eft, ut qui fundum poffidere velit, omnes glebas circumambulet; fed sufficit quamlibet partem ejus fundi introire. (f. 41. 2. 3.) And again: traditionibus dominia rerum, non nudis pactis, transferuntur (Cod. 2. 3. 20.)

/i Decretal. I. 3. t. 4. c. 40.
/k See pag. 209. 227, 228.
/l Flet. I. 6. c. 2. 2.

occupancy of this sign or symbol was permitted as equivalent to occupancy of the land itself. Among the Jews we find the evidence of a purchase thus defined in the book of Ruth m :now this was the manner in former time in Israel, concerning redeeming and concerning changing, for to confirm all things : a man plucked off his shoe, and gave it to his neighbour; and this was a testimony in Israel? Among the ancient Goths and Swedes, contracts for the sale of lands were made in the presence of witnesses, who extended the cloak of the buyer, while the feller cast a clod of the land into it, in order to give possession: and a staff or wand was also delivered from the vendor to the vendee, which passed through the hands of the witnesses n. With our Saxon ancestors the delivery of a turf was a necessary solemnity, to establish the conveyance of lands o. And, to this day, the conveyance of our copyhold estates is usually made from the feller to the lord or his steward by delivery of a rod or virge, and then from the lord to the purchaser by re-delivery of the same, in the presence of a jury of a jury of tenants.
CONVEYANCES in writing were the last and most refined improvement. The mere delivery of possession, either actual or symbolical, depending on the ocular testimony and remembrance of the witnesses, was liable to be forgotten or misrepresented, and became frequently incapable of proof. Besides, the new occasions and necessities, introduced by the advancement of commerce, required means to be devised of charging and incumbering estates, and of making them liable to a multitude of conditions and minute designations for the purposes of raising money, without an absolute sale of the land; and sometimes the like proceedings were found useful in order to make a decent and competent provision for the numerous branches of a family, and for other domestic views. None of which could be effected by a mere, simple, corporal transfer of the soil from one man to another, which was principally calculated for conveying an absolute

m ch. 4. v. 7.
n Stiernhook. de jure Suton. I. 2. c. 4.
o Hickes. Differt. epistolar. 8.

unlimited dominion. Written deeds were therefore introduced, in order to specify and perpetuate the peculiar purposes of the party who conveyed: yet still, for a very long series of years, they were never made use of, but in company with the more ancient and notorious method of transfer, by delivery of corporal possession.

LIVERY of seisin, by the common law, is necessary to be made upon every grant of an estate of freehold in hereditaments corporeal, whether of inheritance or for life only. In hereditaments incorporeal it is impossible to be made; for they are not the object of the senses: and in leases for years, or other chattel interests, it is not necessary. In leases for years indeed an actual entry is necessary; to vest the estate in the lessee: for the bare lease gives him only a right to enter, which is called his interest in the term, or interesse termini; and, when he enters in pursuance of that right, he is then and not before in possession of his term, and complete tenant for years p. This entry by the tenant himself serves the purpose of notoriety, as well as livery of seisin from the grantor could have done; which it would have been improper to have given in this case, because that solemnity is appropriated to the conveyance of a freehold. And this is one reason why freeholds cannot be made to commence in futuro, because they cannot be
made but by livery of seisin; which livery, being an actual manual tradition of the land, must take effect in praesenti, or not at all q.

ON the creation of a freehold remainder, at one and the same time with a particular estate for years, we have before seen that at the common law livery must be made to the particular tenant. But if such a remainder be created afterwards, expectant on a lease for years now in being, the livery must not be made to the lessee for years, for then it operates nothing; nam quod semel meum est, amplius meum esse non potest s: but it must be made

to the remainder-man himself, by consent of the lessee for years: for without his consent no livery of the possession can be given t; partly because such forcible livery would be an ejectment of the tenant from his term, and partly for the reasons before given u for introducing the doctrine of attornments.

LIVERY of seisin is either in deed, or in law. Livery in deed is thus performed. The feoffor, lessor, or his attorney, together with the feoffee, lessee, or his attorney, (for this may as effectually be done by deputy or attorney, as by the principals themselves in person ) 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 then the feoffor, if it be of land, doth deliver to the feoffee, all other persons being out of the ground, a clod or turf, or a twig or bough there growing, with words to this effect.I deliver these to you in the name of seisin of all the lands and tenements contained in this deed. But, if it be of a house, the feoffor must take the ring, or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone, and shut to the door, and then open it, and let in the others w. If the conveyance or feoffment be of divers lands, lying scattered in one and the same county, then in the feoffor's possession, livery of seisin of any parcel, in the name of the rest, sufficeth for all/x; but, if they be in several counties, there must be as many liveries as there are counties. For, if the title to these lands comes to be disputed, there must be as many
trials as there are counties, and the jury of one county are no judges of the
notoriety of a fact in another. Besides, ancienly this seisin was obliged to
be delivered coram paribus de vicineto, before the peers or freeholders of
the neighbourhood, who attested such delivery in the body or on the back
of the deed; according to the rule of the feudal law y, pares debent
interesse investiturae feudi, et non alii : for which

t Co. Litt. 48.
u pag. 288.
x Litt. 414.
y Feud. l. 2. t. 58.

this reason is expressly given; because the peers or vassals of the lord,
being bound by their oath of fealty, will take care that no fraud be
committed to his prejudice, which strangers might be apt to connive at.
And though, afterwards, the ocular attestation of the pares was held
unnecessary, and livery might be made before any credible witnesses, yet
the trial, in case it was disputed, (like that of all other attestations z) was
still reserved to the pares or jury of the county a. Also, if the lands be out
on lease, though all lie in the same county, there must be as many liveries
as there are tenants : because no livery can be made in this case, but by the
consent of the particular tenant; and the consent of one will not bind the
rest b. And in all these cases it is prudent, and usual, to endorse the livery
of seisin on the back of the deed, specifying the manner, place, and time of
making it; together with the names of the witnesses c. And thus much for
livery in deed.

LIVERY in law is where the same is not made on the land, but in fight of it
only; the feoffor saying to the feoffee,I give you yonder land, enter and
take possession. Here, if the feoffee enters during the life of the feoffor, it
is a good livery, but not otherwise; unless he dares not enter, through fear
of his life or bodily harm: and then his continual claim, made yearly, in
due form of law, as near as possible to the lands d, will suffice without an
entry e. This livery in law cannot however be given or received by attorney,
but only by the parties themselves f.

2. THE conveyance by gift, donatio, is properly applied to the creation of
an estate-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: for the operative words of conveyance in this case are do or dedi g; and gifts in tail are equally imperfect without livery

z See pag. 307.
a Gilb. Ten. 35.
b Dyer. 18.
c See appendix. No. I.
d Litt. 421, &c.
e Co. Litt. 48.
f Ibid. 52.
g West’s symbol. 206.

of seisin, as feoffments in fee-simple h. And this is the only distinction that Littleton seems to take, when he says i, it is to be understood that there is feoffor and feoffee, donor and donee, lessor and lessee;? viz. feoffor is applied to a feoffment in feepsimple, donor to a gift in tail, and lessor to a lease for life, or for years, or at will. In common acceptation gifts are frequently confounded with the next species of deeds: which are,

3. GRANTS, concessiones; the regular method by the common law of transferring the property of incorporeal hereditaments, or, such things whereof no livery can be had k. For which reason all corporeal hereditaments, as lands and houses, are said to lie in livery; and the others, as advowsons, commons, rents, reversions, &c, to lie in grant l. And the reason is given by Bracton m: traditio, or livery, nihil aliud et quam rei corporalis de persona in personam, de manu in manum, translatio aut in possessionem inductio; sed res incorporales, quae sunt ipsum jus rei vel corpori inhaerens, traditionem non patiuntur. These therefore pass merely by the delivery of the deed. And in dignitories, or reversions of lands, such grant, together with the attornment of the tenant (while attornments were requisite) were held to be of equal notoriety with, and therefore equivalent to, a feoffment and livery of lands in immediate possession. It therefore differs but little from a feoffment, except in its subject matter: for the operative words therein commonly used are dedi et conceffi, have given and granted.

4. ALEASE is properly a conveyance of any lands or tenements, (usually in consideration of rent or other annual recompense) made for life, for years, or at will, but always for a less time than the lessor hath in the premises:
for if it be for the whole interest, it is more properly an assignment than a lease. The usual words of operation in it are, demise, grant,

h Litt. 59.
i 57.
k Co. Litt. 9.
l Ibid. 172.
m l. 2. c. 18.

and to farm let; dimifi, conceffi, et ad firmam tradidi. Farm, or feorme, is an old Saxon word signifying provisions: and it came to be used instead of rent or, render, because anciently the greater part of rents were reserved in provisions; in corn, in poultry, and the like; till the use of money became more frequent. So that a farmer, firmarius, was one who held his lands upon payment of a rent or feorme: though at present, by a gradual departure from the original sense, the word farm is brought to signify the very estate or lands so held upon farm or rent. By this conveyance an estate for life, for years, or at will, may be created, either in corporeal or incorporeal hereditaments: though livery of seisin is indeed incident and necessary to one species of leases, viz. leases for life of corporeal hereditaments; but to no other.

WHATEVER restrictions, by the severity of the feodal law, might in times of very high antiquity be observed with regard to leases; yet by the common law, as it has stood for many centuries, all persons deified of any estate might let leases to endure so long as their own interest lasted, but no longer. Therefore tenant in fee-simple might let leases of any duration; for he hath the whole interest: but tenant in tail, or reversioner; nor could a husband, seised jure uxoris, make a firm or valid lease for any longer term than the joint lives of himself and his wife, for then his interest expired. Yet some tenants for life, where the fee-simple was in abeyance, might (with the concurrence of such as have the guardianship of the fee) make leases of equal duration with those granted by tenants in fee-simple: such as parsons and vicars with consent of the patron and ordinary. So also bishops, and deans, and such other sole ecclesiastical corporations as are seised of the fee-simple of lands in their corporate right, might, with the concurrence and confirmation of such persons as the law requires, have made leases for years, or for life, estates in tail, or in fee, without any limitation or controll.
And corporations aggregate might have made what estates they pleased, without the confirmation of any other person whatsoever. Whereas now, by several statutes, this power where it was unreasonable, and might be made an ill use of, is restrained; and, where in the other cases the restraint by the common law seemed too hard, it is in some measure removed. The former statutes are called the restraining, the latter the enabling statute. We will take a view of them all, in order of time.

AND, first, the enabling statute, 32 Hen. VIII. c. 28. empowers three manner of persons to make leases, to endure for three lives or one and twenty years, which could not do so before. As, first, tenant in tail, may by such leases bind his issue in tail, but not those in remainder or reversion. Secondly, a husband seised in right of his wife, in fee-simple or fee-tail, provided the wife joins in such lease, may bind her and her heirs thereby. Lastly, all persons seised of an estate of fee-simple in right of their churches, except parsons and vicars, may (without the concurrence of any other person) bind their successors. But then there must many requisites be observed, which the statute specifies, otherwise such leases are not binding p. 1. The lease must be by indenture; and not by deed poll, or by parol. 2. It must begin from the making, or day of the making, and not at any greater distance of time. 3. If there be any old lease in being, it must be first absolutely surrendered, or be within a year of expiring. 4. It must be either for twenty one years, or three lives; and not for both. 5. It must not exceed the term of three lives, or twenty one years, but may be for a shorter term. 6. It must be of corporeal hereditaments, and not of such things as lie merely in grant; for no rent can be reserved thereout by the common law, as the lessor cannot resort to them to distrein q. 7. It must be of

p Co. Litt. 44.
q But now by the statute 5 Geo. III. c. 17. a lease of tithes or other incorporeal hereditaments, alone, may be granted by any bishop or ecclesiastical or elcemosynary corporation, and the successor shall be intitled to recover the rent by an action of debt, which (in case of a freehold lease) he could not have brought at the common law.
lands and tenements most commonly letten for twenty years past; so that if they have been let for above half the time (or eleven years out of the twenty) either for life, for years, at will, or by copy of court roll, it is sufficient. 8. The most usual and customary feorm or rent, for twenty years, past, must be reserved yearly on such lease. 9. Such leases must not be made without impeachment of waste. These are the guards, imposed by the statute (which was avowedly made for the security of farmers and the consequent improvement of tillage) to prevent unreasonable abuses, in prejudice of the issue, the wife, or the successor, of the reasonable indulgence here given.

NEXT follows, in order of time, the disabling or restraining statute, 1 Eliz. c. 19. (made entirely for the benefit of the successor) which enacts, that all grants by archbishops and bishops (which include even those confirmed by the dean and chapter; the which, however long or unreasonable, were good at common law) other than for the term of one and twenty years or three lives from the making, or without reserving the usual rent, shall be void. Concurrent leases, if confirmed by the dean and chapter, are held to be within the exception of this statute, and therefore valid; provided they do not exceed (together with the lease in being) the term permitted by the act r. But, by a saving expressly made, this statute of I Eliz. did not extend to grants made by any bishop to the crown; by which means queen Elizabeth procured many fair possessions to be made over to her by the prelates, either for her own use, or with intent to be granted out again to her favourites, whom she thus gratified without any expense to herself. To prevent which s for the future, the statute I Jac. I. c. 3. extends the prohibition to grants and leases made to the king, as well as to any of his subjects.

NEXT comes the statute 13 Eliz. c. 10. explained and enforced by the statutes 14 Eliz. c. 11 & 14. 18 Eliz. c. II. and 43 Eliz. c. 29. which extend the restrictions, laid by the last

r Co. Litt. 45.
s II Rep. 71.

mentioned statute on bishops, to certain other inferior corporations, both sole and aggregate. From laying all which together we may collect, that all colleges, cathedrals, and other ecclesiastical, or elcemosynary corporations, and all parsons and vicars, are restrained from making any
leases of their lands, unless under the following regulations: 1. They must not exceed twenty one years, or more, must be yearly reserved thereon. 2. The accustomed rent, or more, must be yearly reserved thereon. 3. 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: and they may also be aliened in fee-simple for lands of equal value in recompense. 4. Where there is an old lease in being, no concurrent lease shall be made, unless where the old one will expire within three years. 5. No lease (by the equity of the statute) shall be made without impeachment of waste. t. 6. All bonds and covenants tending to frustrate the provisions of the statutes 13 & 18 Eliz. shall be void.

CONCERNING these restrictive statutes there are two observations to be made. First, that they do not, by any construction, enable any persons to make such leases as they were by common law disabled to make. Therefore a parson, or vicar, though he is restrained from making longer leases than for twenty one years or three lives, even with the consent of patron and ordinary, yet is not enabled to make any lease at all, so as to bind his successor, without obtaining such consent u. Secondly, that though leases contrary to these acts are declared void, yet they are good against the lessor during his life, if he be a sole corporation; and are also good against an aggregate corporation so long as the head of it lives, who is presumed to be the most concerned in interest. For the act was intended for the benefit of the successor only; and no man shall make an advantage of his own wrongw.

t Co. Litt. 45.
u Ibid. 44.
w Ibid. 45.

THERE is yet another restriction with regard to college leases, by statute 18 Eliz. c. 6. which directs, that one third of the old rent, then paid, should for wheat for each 6 s 8 d , or a quarter of malt for every 5 s ; or that the lessees should pay for the same according to the price that wheat and malt should be sold for, in the market next adjoining to the respective colleges, on the market-day before the rent becomes due. This is said/xt o have been an invention of lord treasurer Burleigh, and sir Thomas Smith, then principal secretary of state; who, observing how greatly the value of money
had sunk, and the price of all provisions risen, by the quantity of bullion imported from the newfound Indies, (which effects were likely to increase to a greater degree) devised this method for upholding the revenues of colleges. Their fore-fight and penetration has in this respect been very apparent: for, though the rent so reserved in corn was at first but one third of the old rent, or half of what was still reserved in money, yet now the proportion is nearly inverted; and the money arising from corn rents is, communibus annis, almost double to the rents reserved in money.

THE leases of beneficed clergymen are farther restrained, in case of their non-residence, by statutes 13 Eliz. c. 20. 14 Eliz. c. II. and 18 Eliz. c. II. which direct, that, if any beneficed clergyman be absent from his cure above fourscore days in any one year, he shall not only forfeit one year's profit of his benefice, to be distributed among the poor of the parish; but that all leases made by him, of the profits of such benefice, and all covenants and agreements of like nature, shall cease and be void: except in the case of licensed pluralists, who are allowed to demise the living, on which they are non-resident, to their curates only; provided such curates do not absent themselves above forty days in any one year. And thus much for leases, with their several enlargements and restrictions y.

x Strype's annals of Eliz.
y For the other learning relating to leases, which is very curious and diffusive, I must refer the student to 3 Bac. Abridge. 295. (title, leases)

5. AN exchange is a mutual grant of equal interests, the one in consideration of the other. The word exchange? is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word or expressed by any circumlocution z. The estates exchanged must be equal in quantity a; not of value, for that is immaterial, but if interest; as fee-simple for fee-simple, a lease for twenty years for a lease for twenty years, and the like. And the exchange may be of things that lie either in grant or in livery b. But no livery of seisin, even in exchanges of freehold, is necessary to perfect the conveyance c: for each party stands in the place of the other and occupies his right, and each of them hath already had corporal possession of his own land. But entry must be made on both sides; for, if either party die before entry, the exchange is void, for want of sufficient notoriety d. And so also, if two parsons, by consent of patron and ordinary, exchange their preferments; and the one is presented, instituted, and inducted, and the other is presented, and
instituted, but dies before induction; the former shall not keep his new benefice, because the exchange was not completed, and therefore he shall return back to his own. For if, after an exchange of lands or other hereditaments, either party be evicted of those which were taken by him in exchange, through defect of the other's title; he shall return back to the possession of his own, by virtue of the implied warranty contained in all exchanges.

6. APARTITION, is when 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. Here, as in some instances there is a unity of interest, and in all a unity leases and terms for years) where the subject is treated in a perspicuous and masterly manner; being supposed to be extracted from a manuscript of sir Geoffrey Gilbert.

z Co. Litt. 50, 51.
a Litt. 64, 65.
b Co. Litt. 51.
c Litt. 62.
d Co. Litt. 50.
e Perk. 288.
f Pag. 301.

of possession, it is necessary that they all mutually convey and assure to each other the several estates, which they are to take and enjoy separately. By the common law coparceners, being compellable to make partition, might have made it by parol only; but joint-tenants and tenants in common must have done it by deed: and in both cases the conveyance must have been perfected by livery of seisin g. And the statutes of 31 Hen. VIII. c. I. and 32 Hen. VIII. c. 32. made no alteration in this point. But the statute of frauds 29 Car. II. c. 3. hath now abolished this distinction, and made a deed in all cases necessary.

THESE are the several species of primary, or original conveyances. Those which remain are of the secondary, or derivative sort; which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. As,
7. RELEASES; which 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. And these releases may enure either, 1. By way of enlarging an estate, or enlarger l' estate: as, if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives him the estate in fee. But in this case the releassee must be in possession of some estate, for the release to work upon; for if there be lessee for years, and, before he enters and is in possession, the lessor releases to him all his right in the reversion, such release is void for want of possession in the releassee. 2. By way of passing an estate, or mitter l' estate: as when one of two coparceners releaseth all her right to the other, this passeth the fee-simple of the whole. And in both these cases there must be a privity of estate between the relessor and releassee; that is one of their estates must be so related to the other, as to make but one and the same estate in law. 3. By way of passing a right, or mitter le droit: as if a man be disseised, and releaseth to his disseisor all his right; hereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious. 4. By way of extinguishment: as if my tenant for life makes a lease to A for life, remainder to B and his heirs, and I release to A; this extinguishes may right to the reversion, and shall enure to the advantage of B's remainder as well as of A's particular estate. 5. By way of entry and feoffment: as if there be two joint disseisors, and the disseisee releases to one of them, he shall be sole seised, and shall keep out his former companion; which is the same in effect as if the disseisee had entered, and thereby put an end to the disseifin, and afterwards had enfeoffed one of the disseisors in fee. And hereupon we may observe, that when a man has in himself the possession of lands, he must at the common law convey the freehold by feoffment and livery; which makes a notoriety in the country: but if a man has only a right or a future interest, he may convey that right or interest by a mere release to him that is in
possession of the land: for the occupancy of the relessee is a matter of sufficient notoriety already.

8. A CONFIRMATION is of a nature nearly allied to a release. Sir Edward Coke defines it q to be a conveyance of an estate or right in effe, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is encreased: and the words of making it are these, have given, granted, ratified, approved, and confirmed r. An instance of the first branch of the definition is if tenant for life leaseth for forty years, and dieth during that term; here the lease for years is voidable by him in reversion: yet, if he hath confirmed the estate of the lessee for years, before the death of tenant for life, it is no longer voidable but sure s. The latter branch, or that which tends

n Litt. 466.
o Ibid. 470.
p Co. Litt. 278.
q I Inst. 295.
r Litt. 515. 531.
s Ibid. 516

to the encrease of a particular estate, is the same in all respects with that species of release, which operates by way of enlargement.

9. A SURRENDER, fur sumeredditio, or rendering up, is of a nature directly opposite to a release; for, as that operates by the greater estate's descending upon the less, a surrender is the falling of a less estate into a greater by deed. It is defined t, a yielding up of an estate for life or years to him that hath the immediate reversion or remainder, wherein the particular estate may merge or drown, by mutual agreement between them. It is done by these words, hath surrendered, granted, and yielded up. The surrenderor must be in possession u; and the surrenderee must have a higher estate, in which the estate surrendered may merge: therefore tenant for life cannot surrender to him in remainder for years w. In a surrender there is no occasion for livery of seisin x; for there is a privity of estate between the surrenderor, and the surrenderee; the one's particular estate, and the other's remainder are one and the same estate; and livery having been once made at the creation of it, there is no necessity for having it afterwards. And, for the same reason, no livery is required on a release or confirmation in fee to tenant for years or at will, though a
freehold thereby passes; since the reversion of the reessor, or confirmor, and the particular estate of the relessee, or confirmee, are one and the same estate; and where there is already a possession, derived from such a privity of estate, any farther delivery of possession would be vain and nugatory y.

10. AN assignment is properly a transfer, or making over to another, of the right one has in any estate; but it is usually applied to an estate for life or years. And it differs from a lease only in this: that by a lease one grants an interest less than his own, reserving to himself a reversion; in assignments he parts with the whole

t Co. Litt. 337.
u Ibid. 338.
w Perk. 589.
x Co. Litt. 50.
y Litt. 460.

Property, and the assignee stands to all intents and purposes in the place of the assignor.

11. A DEFEAZANCE is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the proformance of which the estate then created may be defeated/zor totally undone. And in this manner mortgages were in former times usually made; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeazance, whereby the feoffment was rendered void on re-payment of the money borrowed at a certain day. And this, when executed at the same time with the original feoffment, was considered as part of it by the ancient law a; and, therefore only, indulged: no subsequent secret revocation of a solemn conveyance, executed by livery of seisin, being allowed in those days of simplicity and truth; though. When uses were afterward introduced, a revocation of such uses was permitted by the courts of equity. But things that were merely executory, or to be completed by matter subsequent, (as rents, of which no seisin could be had till the time of payment; and so also annuities, conditions, warranties, and the like) were always liable to be recalled by defeazances made subsequent to the time of their creation b.
II. THERE yet remain to be spoken of some few conveyances, which have their force and operation by virtue of the statute of uses.

USES and trusts are in their original of a nature very similar, or rather exactly the same: answering more to the sidei-commissum than the ufus-fructus, of the civil law; which latter was the temporary right of using a thing, without having the ultimate property, or full dominion of the substance c. But the sidei-commissum, which usually was created by will, was the disposal of an inheritance to one, in confidence that he should convey it or dis-

z From the French verb defaire, infectum reddere.
a Co. litt. 236.
b Ibid. 237.
c Ff. 7. 1. 1.

pose of the profits at the will of another. And it was the business of a particular magistrate, the praetor sidei-commissarius, instituted by Augustus, to enforce the observance of this confidence d. So that the right thereby given was looked upon as a vested right, and entitled to a remedy from a court of justice: which occasioned that known division of rights by the Roman law, into jus legitimum, a legal right, which was remedied by the ordinary course of law; jus fiduciariurn, a right in trust, for which in courtesy, for which the remedy was only by imtreaty or request e. In our law, a use might be ranked under the rights of the second kind; being a confidence reposed in another who was tenant of the land, or terre-

tenant, that he should dispose of the land according to the intentions of cestui que, or him to whose use it was granter, and suffer him to take the profits f. As, if a feoffment was made to A and his heirs, to the use of (or in trust for) B and his heirs; here at the common law A the terre-tenant had the legal property and possession of the land, but B the cestui que use was in conscience and equity to have the profits and disposal of it.

THIS notion was transplanted into England from the civil law, about the close of the reign of Edward III g, by means of the foreign ecclesiastics; who introduced it to evade the statutes of mortmain, by obtaining grants of lands, not to their religious houses directly, but to the use of the religious houses h: which the clerical chancellors of those times held to be sidei-commissa, and binding in conscience; and therefore assumed the jurisdiction, which Augustus had vested in his praetor, of compelling the
execution of such trusts in the court of chancery. And, as it was most easy to obtain such grants from dying persons, a maxim was established, that though by law the lands themselves were not devisable, yet if a testator had enfeoffed another to his own use, and so was possessed of the use only, such, use was devisable by

d Inst. 2. tit. 23.
e Ff. 43. 26. 1. Bacon on uses. 8 o. 306.
f Plowd. 352.
g Stat. 50 Edw. III. c. 6. I Ric. II. c. 9.
h See pag. 271.

will. But we have seen how this evasion was crushed in its infancy, by statute 15 Ric. II. c. 5. with respect to religious houses.

YET, the idea being once introduced, however fraudulently, it afterwards continued to be often innocently, and sometimes very laudably, applied to number of civil purposes: particularly as it removed the restraint of alienations by will, and permitted the owner of lands in his lifetime to make various designations of their profits, as prudence, or justice, or family convenience, might from time to time require. Till at length, during our long wars in France and the subsequent civil commotions between the houses of York and Lancaster, uses grew almost universal: through the desire that men had (when their lives were continually in hazard) of providing for their children by will, and of securing their estates from forfeitures; when each of the contending parties, as they became uppermost, alternately attainted the other. Wherefore about the reign of Edward IV, (before whose time, lord Bacon remarks k, there are not six cases to be found relating to the doctrine of uses) the courts of equity began to reduce them to something of a regular system.

ORIGINALLY it was held that the chancery could give no relief, but against the very person himself intrusted for cestui que use, and not against his heir or alience. This was altered in the reign of Henry VI, with respect to the heir l; and afterwards the same rule, by a parity of reason, was extended to such alienees as had purchased either without a valuable consideration, or with an express notice of the use m. But a purchasor for a valuable consideration, without notice, might hold the land discharged of any trust or confidence. And also it was held, that neither the king or queen, on account of their dignity royal n, nor any corporation aggregate,
on account of its limited capacity o, could be seised to any use but their own; that is, they

i pag. 272.
k on uses. 313.
m Keilw. 46. Bacon of uses. 312.
might hold the lands, but were not compellable to execute the trust. And, if the feoffee to uses died without heir, or committed a forfeiture, or married, neither the lord who entered for his escheat or forfeiture, nor the husband who retained the possession as tenant by the curtesy, nor the wife who was assigned her dower, were liable to perform the use p; because they were not parties to the trust, but came in by act of law: though doubtless their title in reason was no better than that of the heir.

ON the other hand the use itself, or interest of cestui que use, was learnedly refined upon with many elaborate distinctions. And, 1. It was held that nothing could be granted to a use, whereof the use is inseparable from the possession; as annuities, ways, commons, and authorities, quae ipso ufu consumuntur q: or whereof the seisin could not be instantly given r. 2. A use could not be raised without a sufficient consideration. For where a man makes a feoffment to another without any consideration, equity presumes that he meant it to the use of himself s: unless he expressly declares it to be to the use of another, and then nothing shall be presumed contrary to his own expressions t. But, if either a good or a valuable consideration appears, equity will immediately raise a use correspondent to such consideration u. 3. Uses were descendible according to the rules of the common law, in the case of inheritances in possession w; for in this and many other respects aequitas sequitur legem, and cannot establish a different rule of property from that which the law has established. 4. uses might be assigned by secret deeds between the parties x, or be devised by last will and testament y: for, as the legal estate in the soil was not transferred by these transactions, no livery of seisin was necessary; and, as the intention of the parties was the leading principle in this species of property, any instrument declaring that intention was allowed to be binding in
equity. But cestui que use could not at common law alien the legal interest of the lands, without the concurrence of his feoffee z; to whom he was accounted by law to be only tenant at sufferance a. 5. Uses were not liable to any of the feodal burdens; and particularly did not escheat for felony or other defect of blood; for escheats, c, are the consequence of tenure, and uses are held of nobody: but the land itself was liable to escheat, whenever the blood of the feoffee to uses was extinguished by crime or by defect; and the lord (as was before observed) might hold it discharged of the use b. 6. No wife could be endowed, or husband have his curtesy, of a use c: for no trust was declared for their benefit, at the original grant of the estate. And therefore it became customary, when most estates were put in use, to settle before marriage some joint estate to the use of the husband and wife for their lives; which was the original of modern jointures d. 7. A use could not be extended by writ of elegit, or other legal process, for the debts of cestui que use e. For, being merely a creature of equity, the common law, which looked no farther than to the person actually seised of the land, could award no process against it.

IT is impracticable, upon our present plan, to pursue the doctrine of uses through all the refinements and niceties, which the ingenuity of the times (abounding in subtile disquisitions) deduced from this child of the imagination; when once a departure was permitted from the plain simple rules of property established by the ancient law. These principal outline will be fully sufficient to shew the ground of lord Bacon's complaint f, that this course of proceeding was turned to deceive many of their just and reasonable rights. A man, that had cause to sue for land, knew not against whom to bring his action, or who was the owner of it. The wife was defrauded of her thirds; the husband of
his curtesy; the lord of his wardship, relief, heriot, and escheat; the
creditor of his extent for debt; and the poor tenant of his lease. To remedy
these inconveniences abundance of statutes were provided, which made
the lands liable to be extended by the creditors of cestui que use; /g
allowed actions for the freehold to be brought against him, if in the actual
pernancy or enjoyment of the profits h; made him liable to actions of
waste; /i established his conveyances and leases made without the
concurrence of his feoffees; /kand gave the lord the wardship of his heir,
with certain other feodal perquisites. /l

THESE provisions all tended to consider cestui que use as the real owner
of the estate; and at length that idea was carried into full effect by the
statute 27 Hen. VIII. c. 10. which is usually called the statute of uses, or, in
carry conveyances and pleadings, the statute for transferring uses into
possession. The hint seems to have been derived from what was done at
the accession of king Richard III; who having, when duke of Glocester,
been frequently made a feoffee to uses, would upon the assumption of the
crown (as the law was then understood ) have been intitled to hold the
lands discharged of the use. But, to obviate so notorious an injustice, an
act of parliament was immediately passed m, which ordained that, where
he had been so infeoffed jointly with other persons, the land should vest in
the other feoffees, as if he had never been named; and that, where he stood
solely infeoffed, the estate itself should vest in cestui que use in like
manner as he had the use. And so the statute of Henry VIII, after reciting
the various inconveniences before-mentioned and many others, enacts,
that when any person shall be seised of lands,c, to the use, confidence, or
trust, of any other person or body politic, the person or corporation
intitled to the use in fee-simple, fee-tail, for life,
? or years, or otherwise, shall from thenceforth stand and be seised or possessed of the land, of and in the like estates as they have in the use, trust, or confidence; and that the estate of the person so seised to uses shall be deemed to be in him or them that have the use, in such quality, manner, form, and condition, as they had before in the use. The statute thus executes the use, as our lawyers term it; that is, it conveys the possession to the use, and transfers the use into possession: thereby making cestui que use complete owner of the lands and tenements, as well at law as in equity.

THE statute having thus, not abolished the conveyance to uses, but only annihilated the intervening estate of the feoffee, and turned the interest of cestui que use into a legal instead of an equitable ownership; the courts of common law began to take cognizance of uses, instead of fending the party to seek his relief in chancery. And, considering them now as merely a mode of conveyance, very many of the rules before established in equity were adopted with improvements by the judges of the common law. The same persons only were held capable of being seised to a use, the same considerations were necessary for raising it, and it could only be raised of the same hereditaments, as formerly. But as the statute, the instant it was reified, converted it into an actual possession of the land, a great number of the incidents, that formerly attended it in its fiduciary state, were now at an end. The land could not escheat or be forfeited by the act or defect of the feoffee, nor be aliened to any purchaser discharged of the use, nor be liable to dower or curtesy on account of the seisin of such feoffee; because the legal estate never rests in him for a moment, but is instantaneously transferred to cestui que use, as soon as the use is declared. And, as the use and the land were now convertible terms, they became liable to dower, curtesy, and escheat, in consequence of the seisin of cestui que use, who was now become the terre-tenant also; and they like wife were no longer devisable by will.

THE various necessities of mankind induced also the judges very soon to depart from the rigor and simplicity of the rules of the common law, and to allow a more minute and complex construction upon conveyances to uses than upon others. Hence it was adjudged, that the use need not always be
executed the instant the conveyance is made: but, if it cannot take effect at
that time, the operation of the statute may wait till the use shall arise upon
some future contingency, to happen within a reasonable period of time;
and in the mean while the ancient use shall remain in the original grantor:
as, when lands are conveyed to the use of A and B, after a marriage shall be
had between them n, or to the use of A and his heirs till B shall pay him a
sum of money, and then to the use of B and his heirs o. Which doctrine,
when devises by will were again introduced, and considered as equivalent
in point of construction to declarations of uses, was also adopted in favour
of executory devises p. But herein these, which are called contingent or
springing, uses differ form an executory devise; in that there must be a
person seised to such uses at the time when the contingency happens, else
they can never be executed by the statute; and therefore, if the estate of the
feoffee to such use be destroyed by alienation or otherwise, before the
contingency arises, the use is destroyed for ever q: whereas by an
executory devise the freehold itself is transferred to the future devisee.
And, in both these cases, a fee may be limited to take effect after a fee r;
because, though that was forbidden by the common law in favour of the
lord's escheat, yet. When the legal estate was not extended beyond one fee-
simple, such subsequent uses (after a use in fee) were before the statute
executed the legal estate in the same manner as the use before subsisted. It
was also held that a use, though executed, may change from one to another
by circumstances ex poft facto s; as, if A makes a feoffment
to the use of his intended wife and her eldest son for their lives, upon the
marriage the wife takes the whole use in severalty; and, upon the birth of a
son, the use is executed jointly in them both t. This is sometimes called a
secondary, sometimes a shifting, use. And, whenever the use limited by the
deed expires, or cannot vest, it returns back to him who raised it, after
such expiration or during such impossibility, and is styled a resulting use.
As, if a man makes a feoffment to the use of his intended wife for life, with
remainder to the use of her first-born son in tail: here, till he marries the
use results back to himself; after marriage, it is executed in the wife for

p See pag. 173.
r Pollex f. 78. 10 Mod. 423.
life; and, if the dies without issue, the whole results back to him in fee. It was likewise held, that the uses originally declared may be revoked at any future time, and new uses be declared of the land, provided the grantor reserved to himself such a power at the creation of the estate; whereas the utmost that the common law would allow, was a deed of defeazance coeval with the grant itself (and therefore esteemed a part of it) upon events specifically mentioned. And, in case of such a revocation, the old uses were held instantly to cease, and the new ones to become executed in their stead. And this was permitted, partly to indulge the convenience, and partly the caprice of mankind; who (as lord Bacon observes) have always affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards.

BY this equitable train of decisions in the courts of law, the power of the court of chancery over landed property was greatly curtailed and diminished. But one or two technical scruples, which the judges found it hard to get over, restored it with tenfold increase. They held in the first place, that no use could be limited on a use; and that when a man bargains and sells his land for money, which raises a use by implication to the bargainee, the limitation of a farther use to another person is repugnant and therefore void. And therefore, on a feoffment to A and his heirs, to the use of B and his heirs, in trust for C and his heirs, they held that the statute executed only the first use, and that the second was a mere nullity: not adverting, that the instant the first use was executed in B, he became seised to the use of C, which second use the statute might as well be permitted to execute as it did the first; and so the legal estate might be instantaneously transmitted down, through a hundred uses upon uses, till finally executed in the last centuries que use. Again; as the statute mentions only such persons as were seised to the use of others, this was held not to extend to terms of years, or other chattel interests, whereof the tremor is not seised, but only possessed; and therefore, if a term of one thousand years be limited to A, to the use of (or in trust for) B, the statute does not

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u Ibid. 350. 1 Rep. 120.
w See pag. 327.
x Co. Litt. 237.
y on uses. 316.
z Dyer. 155.
execute this use, but leaves it as at common law c. And lastly, (by more modern resolutions) where lands are given to one and his heirs, in trust to receive and pay over the profits to another, this use is not executed by the statute: for the land must remain in the trustee to enable him to perform the trust d.

OF the two more ancient distinctions the courts of equity quickly availed themselves. In the first case it was evident, that B was never intended by the parties to have any beneficial interest; and, in the second, the cestui que use of the term was expressly driven into the court of chancery to seek his remedy: and therefore that court determined, that though these were not uses, which the statute could execute, yet still they were trusts in equity, which in conscience ought to be performed. To this the reason of mankind assented, and the doctrine of uses was revived, under the denomination of trusts: and thus, by this strict construction of the courts of law, a statute made upon great deliberation, and introduced in the most solemn manner, has had little other effect than to make a slight alteration in the formal words of a conveyance e.

a 1 And. 37. 136.
b Bacon law of uses. 335. Jenk. 244.
c Poph 76. Dyer. 369.
e Vaugh. 50. Atk. 591.

HOWEVER, the courts of equity, in the exercise of this new jurisdiction, have wisely avoided in a great degree those mischiefs which made uses intolerable. They now consider a trust-estate(either when expressly declared or resulting by necessary implication) as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge in equity, which the other is subject to in law: and, by a long series of uniform determinations, for now near a century past, with some assistance from the legislature, they have raised a new system of rational jurisprudence, by which trusts are made to answer in general all the beneficial ends of uses, without their inconvenience or frauds. The treason is considered as merely the instrument of conveyance, and can in no shape affect the estate, unless by alienation for a valuable consideration to a purchaser without notice f; which, as cestui que use is generally in possession of the land, is a thing that can rarely happen. The trust will descend, may be aliened, is liable to debts, to forfeiture, to leases and other
incumbrances, nay even to the curtesy of the husband, as if it was an estate at law. It has not yet indeed been subjected to dower, more from a cautious adherence to some hasty precedents, than from any well-grounded principle. It hath also been held not liable to escheat to the lord, in consequence of attainder or want of heirs: because the trust could never be intended for his benefit. But let us now return to the statute of uses.

THE only service, as was before observed, to which this statute is now consigned, is in giving efficacy to certain new and secret species of conveyances; introduced in order to render transactions of this fort as private as possible, and to save the trouble of making livery of seisin, the only ancient conveyance of corporeal freeholds: the security and notoriety of which public investiture abundantly overpaid the labour of going to the land, or of sending an attorney in one's stead. But this now has given way to

f 2 Freem. 43.
g 1 Chanc. Rep. 254. 2 P. Wms. 640.

12. A TWELFTH species of conveyance, called a covenant to stand seised to uses: by which a man, seised of lands, covenants in consideration of blood or marriage that he will stand seised of the same to the use of his child, wife, or kinsman; for life, in tail, or in fee. Here the statute executes at once the estate; for the party intended to be benefited, having thus acquired the use, is thereby put at once into corporal possession of the land, without ever seeing it, by a king of parliamentary magic. But this conveyance can only operate, when made upon such weighty and interesting considerations as those of blood or marriage.

13. A THIRTEENTH species of conveyance, introduced by this statute, is that of a bargain and sale of lands; which is a kind of a real contract, whereby the bargainor for some pecuniary consideration bargains and falls, that is, contracts to convey, the land to the bargainee; and becomes by such bargain a trustee for, or seised to the use of, the bargainee; and then the statute of uses completes the purchase: or, as it hath been well expressed, the bargain first vests the use, and then the statute vests the possession. But as it was foreseen that conveyances, thus made, would want all those benefits of notoriety, which the old common law assurances were calculated to give; to prevent therefore clandestine conveyances of
freeholds, it was enacted in the same session of parliament by statute 27 Hen. VIII. c. 16. that such bargains and sales should not enure to pass a freehold, unless the same be made by indenture, and enrolled within six months in one of the courts of Westminster-hall or with the custos rotulorum of the county. Clandestine bargains and sales of chattel interests, or leases for years, were thought not worth regarding, as such interests were very precarious till about six years before l; which also occasioned them to be overlooked in framing the statute of uses: and therefore such bargains and sales are not directed to be enrolled. But how impossible is it to foresee, and

I Bacon. Use the law. 151. Ibid. 150.
k Cro. Jac. 696.
l See pag. 142.

provide against, all the consequence of innovations! This omission has given rife to

14. A FOURTEENTH species of conveyance, viz. by lease and release; first invented by serjeant Moore, soon after the statute of uses, and now the most common of any, and therefore not to be shaken; though very great lawyers (as, particularly, Mr. Noy) have formerly doubted its validity m. It is thus contrived. A lease, or rather bargain and sale, upon some pecuniary consideration, for one year, is made by the tenant of the freehold to the lessee or bargainee. Now this, without any enrollment, makes the bargainor stand seised to the use of the bargainee, and vest in the bargainee the use of the term for a year; and then the statute immediately annexes the possession. He therefore, being thus in possession, is capable of receiving a release of the freehold and reversion; which, we have seen before n, must be made to a tenant in possession: and accordingly, the next day, a release is granted to him o. This is held to supply the place of livery of seisin; and so a conveyance by lease and release is said to amount to a feoffment p.

15. TO these may be added deeds to lead or declare the uses of other more direct conveyances, as feoffments, fines, and recoveries; of which we shall speak in the next chapter: and,

16. DEEDS of revocation of uses; hinted at in a former page q, and founded in a previous power, reserved at the raising of the uses r, to
revoke such as were then declared; and to appoint others in their stead, which is incident to the power of revocation s. And this may suffice for a specimen of conveyances founded upon the statute of uses; and will finish our observations upon such deeds as serve to transfer real property.

m 2 Mod. 25.
n pag. 324.
q pag. 335.
r See Appendix. NO. II. pag. xi.
s Co. Litt. 237.

BEFORE we conclude, it will not be improper to subjoin a few remarks upon such deeds as are used not to convey, but to charge or incumber, lands, and discharge them again: of which nature are, obligations or bonds, recognizances, and defeasances upon them both.

1. AN obligation, or bond, is a dead t whereby the obligor obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day appointed. If this be all, the bond is called a single one, simplex obligatio; but there is generally a condition added, that if the obligor does some particular act, the obligation shall be void, or else shall remain in full force: as, payment of rent; performance of covenants in a deed; or repayment of a principal sum of money borrowed of the obligee, with interest, which principal sum is usually one half of the penal sum specified in the bond. In case this condition is not performed, the bond becomes forfeited, or absolute at law, and charges the obligor while living; and after his death the obligation descends upon his heir, who (on defect of personal assets) is bound to discharge it, provided he has real assets by descent as a recompense. So that it may be called, t

IF the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law that is merely positive, or be uncertain, or insensible, the condition alone is void, and the bond shall stand single and unconditional: for it is the folly of the obligor to enter into such an obligation, from which he can never be released. If it be to do a thing that is malum in se, the obligation itself is void: for the whole is an
unlawful contract, and the obligee shall take no advantage from such a transaction. And if the condition be possible at the time of making it, and afterwards becomes impossible by the act of God, the act of law, or the act of the obligee himself, there the penalty of the obligation is saved: for no prudence or foresight of the obligor could guard against such a contingency. On the forfeiture of a bond, or its becoming single, the whole penalty was recoverable at law: but here the courts of equity interposed, and would not permit a man to take more than in conscience he ought; viz. his principal, interest, and expenses, in case the forfeiture accrued by non-payment of money borrowed; the damages sustained, upon non-performance of covenants; and the like. And the statute 4 & 5 Ann. c. 16. hath also enacted, in the same spirit of equity, that in case of a bond, conditioned for the payment of money, the payment or tender of the principal sum due, with interest, and costs, even though the bond be forfeited and a suit commenced thereon, shall be a full satisfaction and discharge.

2. A recognizance is an obligation of record, which a man enters into before some court of record or magistrate duly authorized, with condition to do some particular act; as to appear at the assises, to keep the peace, to pay a debt, or the like. It is in most respects like another bond: the difference being chiefly this; that the bond is the creation of a fresh debt or obligation de novo, the recognizance is an acknowledgement of a former debt upon record; the form whereof is, that A. B. doth acknowledge to owe to our lord the king, to the plaintiff, to C. D. or the like, the sum of ten pounds, with condition to be void on performance of the thing stipulated: in which case the king, the plaintiff, C. D. &c, is called the cognizee, is cui cognoscitur; as he that enters into the recognizance is called the cognizor, is qui cognoscit. This, being either certified to, or taken by the officer of some court, is witnessed only by the record of that court, and not by the party's seal: so that it is not in strict property a deed, though the effects of it are greater than a common obligation; being allowed a priority in point of payment,
and binding the lands of the cognizor, from the time of enrollment on record x. There are also other recognizances, of a private kind, in nature of a statute staple, by virtue of the statute 23 Hen. VIII. c. 6. which have been already explained y, and shewn to be a charge upon real property.

3. A DEFEAZANCE, on a bond, recognizance, or judgment recovered, is a condition which, when performed, defeats or undoes it, in the same manner as a defeazance of an estate before-mentioned. It differs only from the common condition of a bond, in that the one is always inserted in the deed or bond itself, the other is made between the same parties by a separate and frequently a subsequent deed z. This, like the condition of a bond, when performed, discharges and disincumbers the estate of the obligor.

THESE are the principal species of deeds or matter in pais, by which estates may be either conveyed, or at least affected. Among which the conveyances to uses are by much the most frequent of any; though in these there is certainly one palpable defect, the want of sufficient notoriety: so that purchaser or creditors cannot know with any absolute certainty, what the estate, and the title to it, in reality are, upon which they are to lay out or to lend their money. In the ancient feodal method of conveyance (by giving corporal seisin of the lands) this notoriety was in some measure answered; but all the advantages resulting from thence are now totally defeated by the introduction of death-bed devises and secret conveyances: and there has never been yet any sufficient guard provided against fraudulent charges and incumbrances; since the disuse of the old Saxon custom of transacting all conveyances at the county court, and entering a memorial of them in the chartulary or leger-book of some adjacent monastery a; and the failure of the general register established by king Richard the first, for mortgages made to Jews, in the capitula de Judaeis,

/x Stat. 29 Car. II. c. 3. 18.
/y See pag. 160.
/z Co. Litt. 237. 2 Saund. 47.
/a Hickes Differtat. epistolar. 9.

of which Hoveden has preserved a copy. How far the establishment of a like general register, for deeds, and wills, and other acts affecting real
property, would remedy this inconvenience, deserves to be well considered. In Scotland every act and event, regarding the transmission of property, is regularly entered on record. And some of our own provincial divisions, particularly the extended county of York, and the populous county of Middlesex, have prevailed with the legislature to erect such registers in their several districts. But, however plausible these provisions may appear in theory, it hath been doubted by very competent judges, whether more disputes have not arisen in those counties by the inattention and omissions of parties, than prevented by the use of registers.

/b Dalrymple on feodal property. 262, &c.
/c c. 4. 6 Ann. c. 35. 7 Ann. c. 20. 8 Geo. II. c. 6.

CHAPTER THE TWENTY FIRST.
OF ALIENATION BY MATTER OF RECORD.

ASSURANCES by matter of record are such as do not entirely depend on the act or consent of the parties themselves: but the sanction of a court of record is called in, to substantiate, preserve, and be a perpetual testimony of, the transfer of property from one man to another; or of its establishment, when already transferred. Of this nature are, 1. Private acts of parliament. 2. The king's grants. 3. Fines. 4. Common recoveries.

I. PRIVATE acts of parliament are, especially of the late years, become a very common mode of assurance. For it may sometimes happen, that, by the ingenuity of from, and the blunders of other practitioners, an estate is most grievously entangled by a multitude of contingent remainders, resulting trusts, springing uses, executory devises, and the like artificial contrivances; (a confusion unknown to the simple conveyances of the common law) so that it is out of the power of either the courts of law or equity to relieve the owner. Or it may sometimes happen, that, by the strictness or omissions of family settlements, the tenant of the estate is abridged of some reasonable power, (as letting leases, making a jointure for a wife, or the like) which power cannot be given him by the ordinary judges either in common law or equity. Or it may be necessary, in settling an estate, to secure it against the claims of infants or other persons under legal disabilities; who are not bound by any judgments or decrees of the ordinary courts of justice. In these, or other cases of the like kind, the transcendent power of parliament is called in, to cut the Gordian knot; and
by a particular law, enacted for this very purpose, to unfetter an estate; to give its tenant reasonable powers; or to assure it to a purchaser, against the remote or latent claims of infants or disabled persons, by settling a proper equivalent in proportion to the interest so barred. This practice was carried to a great length in the year succeeding the restoration; by setting aside many conveyances alleged to have been made by constraint, or in order to screen the estates from being forfeited during the usurpation. And at last it proceeded so far, that, as the noble historian expresses it a, every man had raised an equity in his own imagination, that he thought ought to prevail against any descent, testament, or act of law, and to find relief in parliament: which occasioned the king at the close of the session to remark b, that the good old rules of law are the best security; and to wish, that men might not have too much cause to fear, that the settlements which they make of their estates shall be too easily unsettled when they are dead, by the power of parliament.

ACTS of this kind are however at present carried on, in both houses, with great deliberation and caution; particularly in the house of lords they are usually referred to two judges, to examine and report the facts alleged, and to settle all technical forms. Nothing also is done without the consent, expressly given, of all parties in being and capable of consent, that have the remotest interest in the matter; unless such consent shall appear to be perversely and without any reason withheld. And, as was before hinted, an equivalent in money or other estate is usually settled upon infants, or persons not in effe, or not of capacity to act for themselves, who are to be concluded by this act. And a general saving is constantly added, at the close of the bill, of the right and interest of all persons whatsoever; except those whose con-

a Lord Clar. Contin. 162.
b Ibid. 163.

sent so given or purchased, and who are therein particularly named.

A LAW, thus made, thought it binds all parties to the bill, is yet looked upon rather as a private conveyance, than as the solemn act of the legislature. It is not therefore allowed to be a public, but a mere private statute; it is not printed or published among the other laws of the session; and no judge or jury is bound to take notice of it, unless the same be specially set forth and pleaded to them. It remains however enrolled
among the public records of the nation, to be for ever preserved as a perpetual testimony of the conveyance or assurance so made or established.

II. THE king's grants are also matter of public record. For, as St. Germyn says, the king's excellency is so high in the law, that no freehold may be given to the king, nor derived from him, but by matter of record. And to this end a variety of offices are erected, communicating in a regular subordination one with another, through which all the king's grants must pass, and be transcribed, and enrolled; that the same may by narrowly inspected by his officers, who will inform him if any thing contained therein is improper, or unlawful to be granted. These grants, whether of lands, honours, liberties, franchises, or ought besides, are contained in charters, or letters patent, that is, open letters, literae patentes: so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and are usually directed or addressed by the king to all his subjects at large. And therein they differ from certain other letters of the king, sealed also with his great seal, but directed to particular persons, and for particular purposes: which therefore, not being proper for public inspection, are closed up and sealed on the outside, and are thereupon called writs close, literae clausae; and are recorded in the close-rolls, in the same manner as the others are in the patent-rolls.

c Dr. & Stud. l. 1. d. 8.

GRANTS or letters patent must first pass by bill: which is prepared by the attorney and solicitor general, in consequence of a warrant from the crown; and is then signed, that is, that is, superscribed at the top, with the king's own sign manual, and sealed with his privy signet, which is always in the custody of the principal secretary of state; and then sometimes it immediately passes under the great seal, in which case the patent is subscribed in these words, per ipsum regem, by the king himself d. Otherwise the course is to carry an extract of the bill to the keeper of the privy seal, who makes out a writ or warrant thereupon to the chancery; so that the sign manual is the warrant to the privy seal, and the privy seal is the warrant to the great seal: and in this last case the patent is subscribed, per breve de privato figillo, by writ of privy seal e. But there are some grants, which only pass through certain offices, as the admiralty or treasury, in consequence of a sign manual, without the confirmation of either the signet, the great, or the privy seal.
THE manner of granting by the king, does not more differ from that by a subject, than the construction of his grants, when made. 1. A grant made by the king, at the suit of the grantee, shall be taken most beneficially for the king, and against the party: whereas the grant of a subject is construed most strongly against the grantor. Wherefore is is usual to insert in the king's grants, that they are made, not at the suit of the grantee, but ex speciali gratia, certa scientia, et mero motu regis;? and then they have a more liberal construction f. 2. A subject's grant shall be construed to include many things, besides what are expressed, if necessary for the operation of the grant. Therefore, in a private grant of the profits of land for one year, free ingress, egress, and regress, to cut and carry away those profits, are also inclusively granted g: and if a feoffment of land was made by a lord
d 9 Rep. 18.
o Ibid. 2 Inst. 555.
f Finch. L. 100. 10 Rep. 112.
g Co. Litt. 56.
to his villein, this operated as a manumission h; for he was otherwise unable to hold it. But the king's grant shall not enure to any other intent, than that which is precisely expressed in the grant. As, if he grants land to an alien, it operates nothing; for such grant shall not also enure to make him a denizen, that so he may be capable of taking by grant i. 3. When it appears, from the face of the grant, that the king is mistaken, or deceived, either in matter of fact or matter of law, as in case of false suggestion, misinformation, or misrecital of former grants; or if his own title to the thing granted be different from what he supposes; or if the grant be informal; or if he grants an estate contrary to the rules of law; in any of these cases the grant is absolutely void k. For instance; if the king grants lands to one and his heirs male, this is merely void: for it shall not be an estate-tail, because there want words of procreation, to ascertain the body, out of which the heirs shall issue: neither is it a fee-simple, as in common grants it would be; because it may reasonably be supposed, that the king meant to give no more than an estate-tail l: the grantee is therefore (if any thing) nothing more than tenant at will m. And, to prevent deceits of the king, with regard to the value of the estate granted, it is particularly provided by the statute 1 Hen. IV. c. 6. that no grant of his shall be good,
unless, in the grantee's petition for them, express mention be made of the real value of the lands.

III. WE are next to consider a very usual species of assurance, which is also of record; viz. a fine of lands and tenements. In which it will be necessary to explain, 1. The nature of a fine; 2. Its several kinds; and 3. Its force and effect.

1. A FINE is sometimes said to be a feoffment of record n: though it might with more accuracy be called, an acknowledgement of a feoffment on record. By which is to be understood,

h Litt. 206.
k Freem. 172.
l Finch. 101, 102.
n Co. Litt. 50.

that it has at least the same force and effect with a feoffment, in the conveying and assuring of lands: though it is one of those methods of transferring estates of freehold by the common law, in which livery of seisin is not necessary to be actually given; the supposition and acknowledgement thereof in a court of record, however fictitious, inducing an equal notoriety. But, more particularly, a fine may be described to be an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices; whereby the lands in question become, or are acknowledged to be, the right of one of the parties o. In its original it was founded on an actual suit, commenced at law for recovery of the possession of land; and the possession thus gained by such composition was found to be so sure and effectual, that fictitious actions were, and continue to be, every day commenced, for the sake of obtaining same security.

A FINE is so called because it puts an end, not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter. Or, as it is expressed in an ancient record of parliament p, 18 Edw. I.non in regno Angliae providetur, vel eft, aliqua securitas major vel folennior, per quam aliquisfitatum certiore habere poffit, neque ad ftatum fuum verificandumaliquod folennius teftimonium producere, quam
finem in curia dominiregis levatum: qui quidem finis fic vocatur, eo quod finis et consummatio ommum placitorum esse debet, et hac de causa providatur. Fines indeed are of equal antiquity with the first rudiments of the law itself; are spoken of by Glanvil and Bracton in the reigns of Henry II, and Henry III, as things then well known and long established; and instances have been produced of them even before the Norman invasion. So that the statute 18 Edw. I. called modus levandi fines, did not give them original, but only declared and regulated the manner in which they should be levied, or carried on. And that is as follows:

1. THE party, to whom the land is to be conveyed or assured, commences an action or suit at law against the other, generally an action of covenant, by suing out a writ or praecipe, called a writ of covenant: the foundation of which is a supposed agreement or covenant, that the one shall convey the lands to the other; on the breach of which agreement the action is brought. On this writ there is due to the king, by ancient prerogative, a primer fine, or a noble for every five marks of land sued for; that is, one tenth of the annual value. The suit being thus commenced, then follows,

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 peace and accommodation to the plaintiff. Who, accepting them, but having, upon suing out the writ, given pledges to prosecute his suit, which he endangers if he now deserts it without licence, he therefore applies to the court for leave to make the matter up. This leave is readily granted, but for it there is also another fine due to the king by his prerogative; which is an ancient revenue of the crown, and is called the king's silver, or sometimes the post fine, with respect to the primer fine before-mentioned. And it is as much as the primer fine, and half as much more, or ten shillings for every five marks of land; that is, three twentieths of the supposed annual value.

3. NEXT comes the concord, or agreement itself, after leave obtained from the court; which is usually an acknowledgement from the deforciants
(or those who keep the other out of possession) that the lands in question
are the right of the complainant. And from this acknowledgement, or
recognition of right, the party levying the fine is called the cognizor, and he
to whom it is levied.

t See Appendix. No. IV. 1.
u 2 Inst. 511.
w Append. No. IV. 2.
x 5 Rep. 39. 2 Inst. 511.
y Append. No. IV. 3.

the cognizee. This acknowledgement must be made either openly in the
court of common pleas, or before one of the judges of that court, or else
before commissioners in the country, empowered by a special authority
called a writ of dedimus potestatem; which judges and commissioners are
bound by statute 18 Edw. I. ft. 4. to take care that the cognizors be of full
age, sound memory, and out of prison. If there be any feme-covert among
the cognizors, she is privately examined whether she does it willingly and
freely, or by compulsion of her husband.

BY these acts all the essential parts of a fine are completed; and, if the
cognizor dies the next moment after the fine is acknowledged, provided it
be subsequent to the day on which the writ is made returnable z, still the
fine shall be carried on in all its remaining parts: of which the next is

4. THE note of the fine a: which is only an abstract of the writ of covenant,
and the concord; naming the parties, the parcels of land, and the
agreement. This must be enrolled of record in the proper office, by
direction of the statute 5 Hen. IV. c. 14.

5. THE fifth part is the foot of the fine, or conclusion of it: which includes
the whole matter, reciting the parties, day, year, and place, and before
whom it was acknowledged or levied b. Of this there are indentures made,
or engrossed, at the chirographer’s office, and delivered to the cognizor
and the cognizee; usually beginning thus, haec eft finalis concordia, this is
the final agreement,? and then reciting the whole proceeding at length.
And thus the fine is completely levied at common law.
BY several statutes still more solemnities are superadded, in order to render the fine more universally public, and less liable to be levied by fraud or covin. And, first, by 27 Edw. I. c. 1. the

z Comb. 71.
a Append. No. IV. 4.
b Ibid. 5.

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. IV. 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 Ric. III. c. 7. confirmed and enforced by 4 Hen. VII. 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 c. 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 assises fix the same in some open place in the court, for the more public notoriety of the fine.

2. FINES, thus levied, are of four kinds. 1. What in our law French is called a fine fur cognizance de droit, come ceo quel ad de son done; or, a fine upon acknowledgement of the right of the cognizee, as that which he hath of the gift of the cognizor d. This is the best and surest kind of fine; for thereby the deforciant, in order to keep his covenant with the plaintiff, of conveying to him the lands in question, and at the same time to avoid the formality of an actual feoffment, or gift in possession, to have been made by him to the plaintiff. This fine is therefore said to be a feoffment of record; the livery thus acknowledged in court, being equivalent to an actual livery: so that this assurance is rather a confession of a former conveyance, than a conveyance now originally made; for the deforciant, or cognizor, acknowledges,

c Append. No. IV. 6.
This is that sort, of which an example is given in the appendix, No. IV.

cognofcit, the right to be in the plaintiff, or cognizee, as that which he hath de son done, of the proper gift of himself, the cognizor. 2. A finefur cognizance de droit tantum,? or, upon acknowledgement of the right merely; not with the circumstance of a preceding gift from the cognizor. This is commonly used to pass a reversionary interest, which is in the cognizor. For of such reversions there can be no feoffment, or donation with livery, supposed; as the possession during the particular estate belongs to a third person e. It is worded in this manner; that the cognizor acknowledges the right to be in the cognizee; and grants for himself and his heirs, that the reversion, after the particular estate determines, shall go to the cognizee f. 3. A finefur conceffit? is where the cognizor, in order to make an end of disputes, though he acknowledges no precedent right, yet grants to the cognizee an estate de novo, usually for life or years, by way of supposed composition. And this may be done reserving a rent, or the like: for it operates as a new grant. 4. A finefur done, grant et render,? is a double fine, comprehending the fine fur cognizance de droit come ceo, &c, and the fine fur conceffit; and may be used to create particular limitations of estate: whereas the fine fur cognizance de droit come ceo, &c, conveys nothing but an absolute estate, either of inheritance or at least of freehold h. In this last species of fine, the cognizee, after the right is acknowledged to be in him, grants back again, or renders to the cognizor, or perhaps to a stranger, some other estate in the premises. But, in general, the first species of fine, fur cognizance de droit come ceo, &c,? is the most used, as it conveys a clean and absolute freehold, and gives the cognizee a seisin in law, without any actual livery; and is therefore called a fine executed, whereas the others are but executory.

3. WE are next to consider the force and effect of a fine. These principally depend, at this day, on the common law, and the two statutes, 4 Hen. VII. c. 24. and 32 Hen. VIII. c. 36. The

e Moor. 629.
f West. Symb. p. 2. 95.
g West. p. 2. 66.
h Salk 340.

ancient common law, with respect to this point, is very forcibly declared by the statute 18 Edw. I. in these words. And thereason, why such solemnity is
required in the passing of a fine, is this; because the fine is so high a bar, and of so great force, and of a nature so powerful in itself, that it precludes not only those which are parties and privies to the fine, and their heirs, but all other persons in the world, who are of full age, out of prison, of sound memory, and within the four seas the day of the fine levied; unless they put in their claim within a year and a day. But this doctrine, of barring the right by non-claim, was abolished for a time by a statute made in 34 Edw. I. c. 16. which admitted persons to claim, and falsify a fine, at any indefinite distance: whereby, as sir Edward Coke observes, great contention arose, and few men were sure of their possessions, till the parliament held 4 Hen. VII reformed that mischief, and excellently moderated between the latitude given by the statute and the rigor of the common law. For the statute, then made, restored the doctrine of non-claim; but extended the time of claim. So that now, by that statute, the right of all strangers whatsoever is bound unless they make claim, not within one year and a day, as by the common law, but within five years after proclamations made: except feme-coverts, infants, prisoners, persons beyond the seas, and such as are not of whole mind; who have five years allowed to them and their heirs, after the death of their husbands, their attaining full age, recovering their liberty, returning into England, or being restored to their right mind.

IT seems to have been the intention of that politic prince, king Henry VIII, to have covertly by this statute extended fines to have been a bar of estates-tail, in order to unfetter the more easily the estates of his powerful nobility, and lay them more open to alienations; being well aware that power will always could, by mere implication, be adjudged a sufficient bar, (which they

I Litt. 441.
k 2 Inst. 518.
l 4 Hen. V. 24.

were expressly declared not to be by the statute de donis) the statute 32 Hen. VIII. c. 36. was thereupon made; which removes all difficulties, by declaring that a fine levied by any person of full age, to whom or to whose ancestors lands have been entailed, shall be a perpetual bar to them and their heirs claiming by force of such entail: unless the fine be levied by a woman after the death of her husband, of lands which were, by the gift of him or his ancestor, assigned to her in tail for her jointure; or unless it
be of lands entailed by act of parliament or letters patent, and whereof the reversion belongs to the crown.

FROM this view of the common law, regulated by these statute, it appears, that a fine is a solemn conveyance on record from the cognizor to the cognizee, and that the persons bound by a fine are parties, privies, and strangers.

THE parties are either the cognizors, or cognizes; and these are immediately concluded by the fine, and barred of any latent right they might have, even though under the legal impediment of coverture. And indeed, as this is almost the only act that a feme-covert, or married woman, is permitted by law to do, (and that because she is privately examined as to her voluntary consent, which removes the general suspicion of compulsion by her husband) it is therefore the usual and almost the only safe method, whereby she can join in the sale, settlement, or incumbrance, of any estate.

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 statute of Henry the eighth, the vendee, the devisee and all others who must make title by the persons who levied the fine. For the act of the ancestor shall bind the heir, and the act of the principal his substitute, or such as claim under any conveyance made by him subsequent to the fine so levied.

n See statute 11 Hen. VII. c. 20.

STRANGERS to a fine are all other persons in the world, except only parties and privies. And these are also bound by a fine, unless, within five years after proclamations made, they interpose their claim; provided they are under no legal impediments, and have then a present interest in the estate. The impediments, as hath before been said, are coverture, infancy, imprisonment, insanity, and absence beyond sea: and persons, who are thus incapacitated to prosecute their rights, have fine years allowed them to put in their claims after such impediments are removed. Persons also that have not a present, but a future interest only, as those in remainder or reversion, have five years allowed them to claim in, from the time that
such right accrues o. And if within that time they neglect to claim, or (by the statute 4 Ann. c. 16.) if they do not bring an action to try the right, within one year after making such claim, and prosecute the same with effect, all persons whatsoever are barred of whatever right they may have, by force of the statute of non-claim.

BUT, in order to make a fine of any avail at all, it is necessary that the parties should have some interest or estate in the lands to be affected by it. Else it were possible that two strangers, by a mere confederacy, might without any risque defraud the owners by levying fines of their lands; for if the attempt be discovered, they can be no sufferers, but must only remain instatu quo: whereas if a tenant for life or years levies a fine, it is an absolute forfeiture of his estate to the remainder-man or reversioner p, if claimed in proper time. It is not therefore to be supposed that such tenants will frequently run so great a hazard; but if they do, and the claim is not duly made within five years after their respective terms expire q, the estate is for ever barred

n 3 Rep. 87.
o Co. Litt. 372.
p Ibid. 251.
q 2 Lev. 52.

by it. Yet where a stranger, whose presumption cannot thus be punished, officiously interferes in an estate which in no wise belongs to him, his fine is of no effect; and may at any time be set aside (unless by such as are parties or privies thereunto r) by pleading that partes finis nihil habuerunt.
And thus much for the conveyance or assurance by fine: which not only like other conveyances binds the grantor himself, and his heirs; but also all mankind, whether concerned in the transfer or no, if they fail to put in their claims within the time allotted by law.

IV. THE fourth species of assurance, by matter of record, is a common recovery. Concerning the original of which, it was formerly observed s, that common recoveries were invented by the ecclesiastics to elude the statutes of mortmain; and afterwards encouraged by the finesse of the courts of law in 12 Edw. IV. in order to put an end to all fettered inheritances, and bar not only estates-tail, but also all remainders and reversions expectant thereon. I am now therefore only to consider, first, the nature of a common recovery; and, secondly, its force and effect.
I. AND, first, the nature of it; or what a common recovery is. A common recovery is so far like a fine, that it is a suit or action, either actual or fictitious: and in it the lands are recovered against the tenant of the freehold; which recovery, being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee-simple in the recoveror. A recovery therefore being in the nature of an action at law, not immediately compromised like a fine, but carried on through every regular stage of proceeding, I am greatly apprehensive that its form and method will not be easily understood by the student, who is not yet acquainted with the course of judicial proceedings; which cannot be thoroughly explained, till treated of at large in the third book of these commentaries. However I shall endeavour to state its nature and progress, as clearly and concisely as I can; avoid-

r Hob. 334.
s pag. 117. 271.

ing, as far as possible, all technical terms, and phrases not hitherto interpreted.

LET us, in the first place, suppose David Edwards t to be tenant of the freehold, and desirous to suffer a common recovery, in order to bar all entails, remainders, and reversions, and to convey the same in fee-simple to Francis Golding. To effect this, Golding is to bring an action against him for the lands; and he accordingly sues out a writ, called a praecipe quod reddat, because those were its initial or most operative words, when the law proceedings were in Latin. I in this writ the demandant Golding alleges, that the defendant Edwards (here called the tenant) has no legal title to the land; but that he came into possession of it after one Hugh Hunt had turned the demandant out of it v. The subsequent proceedings are made up into a record or recovery roll u, in which the writ and complaint of the demandant are first recited: whereupon the tenant appears, and calls upon one Jacob Morland, who is supposed, at the original purchase, to have warranted the title to the tenant; and thereupon he prays, that the said Jacob Morland may be called in to defend the title which he so warranted. This is called the voucher, vocatio, or calling of Jacob Morland to warranty; and Morland is called the vouchee. Upon this, Jacob Morland, the vouchee, appears, is impleaded, and defends the title. Whereupon Golding, the demandant, desires leave of the court to imparl, or confer
with the vouchee in private; which is (as usual) allowed him. And soon afterwards the demandant, Golding, returns to court, but Morland the vouchee disappears, or makes default. Whereupon judgment is given for the demandant, Golding, now called the recoveror, to recover the lands in question against the tenant, Edwards, who is now the recoveree: and Edwards has judgment to recover of Jacob Morland lands of equal value, in recompense for the lands so warranted by him, and now lost by his default; which is agreeable to the doctrine of warranty mentioned in the preceding

t See appendix, No. V.

v 1.
u 2.

chapter w. This is called the recompense, or recovery in value. But Jacob Morland having no lands of his own, being usually the cryer of the court (who, from being frequently thus vouched, is called the common vouchee) it is plain that Edwards has only a nominal recompense for the lands so recovered against him by Golding; which lands are now absolutely vested in the said recoveror by judgment of law, and seisin thereof is delivered by the sheriff of the county. So that this collusive recovery operates merely in the nature of a conveyance in fee-simple, from Edwards the tenant in tail, to Golding the purchasor.

THE recovery, here described, is with a single voucher only; but sometimes it is with double, treble, or farther voucher, as the exigency of the case may require. And indeed it is now usual always to have a recovery with double voucher at the least; by first conveying an estate of freehold to any indifferent person, against whom the praecipe is brought; and then he vouches the tenant in tail, who vouches over the common vouchee x. For, if a recovery be had immediately against tenant in tail, it bars only such estate in the premises of which he is then actually seised; whereas if the recovery be had against another person, and the tenant in tail be vouched, it bars every latent right and interest which he may have in the lands recovered y. If Edwards therefore be tenant of the freehold in possession, and John Barker be tenant in tail in remainder, here Edwards doth first vouch Barker, and then Barker vouches Jacob Morland the common vouchee; who is always the last person vouched, and always makes default: whereby the demandant Golding recovers the land against the tenant Edwards, and Edwards recovers a recompense of equal value against
Barker the first vouchee; who recovers the like against Morland the common vouchee, against whom such ideal recovery in value is always ultimately awarded.

w pag. 301.
x See appendix, pag. xviii.

THIS supposed recompense in value is the reason why the issue in tail is held to be barred by a common recovery. For, if the recoveree should ever obtain a recompense in lands from the common vouchee (which there is a possibility in contemplation of law, though a very improbable one, of his doing) these lands would supply the place of those so recovered from him by collusion, and would descend to the issue in tail z. This reason will also hold, with equal force, as to most remainder-men and reversioners; to whom the possibility will remain in and revert, as a full recompense for the reality, which they were otherwise entitled to: but it will not always hold; and therefore, as Pigott says a, the judges have been even astuti, in inventing other reasons to maintain the authority of recoveries. And, in particular, it hath been said, that, though the estate-tail is gone from the recoveree, yet it is not destroyed, but only transferred; and still subsists, and will ever continue to subsist (by construction of law) in the recoveror, his heirs, and assigns: and, as the estate-tail so continues to subsist for ever, the remainders or reversions expectant on the determination of such estate-tail can never take place.

TO such awkward sHists, such subtile refinements, and such strange reasoning, were our ancestors obliged to have recourse, in order to get the better of that stubborn statute de donis. The design, for which these contrivances were set on foot, was certainly laudable; the unrivetting the fetters of estates-tail, which were attended with a legion of mischiefs to the commonwealth: but, while we applaud the end, we cannot but admire the means. Our modern courts of justice have indeed adopted a more manly way of treating the subject; by considering common recoveries in no other light, than as the formal mode of conveyance, by which tenant in tail is enabled to alien his lands. But, since the ill consequences of fettered inheritances are now generally seen and allowed, and of course the utility and expedience of setting them at liberty are apparent; it hath often been wished, that the pro-
cess of this conveyance was shortened, and rendered less subject to niceties, by either totally repealing the statute de donis, which perhaps, by reviving the old doctrine of conditional fees, might give birth to many litigations: or by vesting in every tenant in tail of full age the same absolute fee-simple at once, which now he may obtain whenever he pleases, by the collusive fiction of a common recovery; though this might possibly bear hard upon those in remainder or reversion, by abridging the chances they would otherwise frequently have, as no recovery can be suffered in the intervals between term and term, which sometimes continue for near five months together: or, lastly, by empowering the tenant in tail to bar the estate-tail by a solemn deed, to be made in term time and enrolled in some court of record; which is liable to neither of the other objections, and is warranted not only by the usage of our American colonies, but by the precedent of the statute b 21 Jac. I. c. 19. which, in case of a bankrupt tenant in tail, empowers his commissioners to sell the estate at any time, by deed indented and enrolled. And if, in so national a concern, the emoluments of the officers, concerned in passing recoveries, are thought to be worthy attention, those might be provided for in the fees to be paid upon each enrollment.

2. THE force and effect of common recoveries may appear, from what has been said, to be an absolute bar not only of all estates-tail, but of remainders and reversions expectant on the determination of such estates. So that a tenant in tail may, by this method of assurance, convey the lands held in tail to the recoveror his heirs and assigns, absolutely free and discharged of all conditions and limitations in tail, and of all remainders and reversions. But, by statute 34 & 35 Hen. VIII. 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 the statute 11 Hen. VII. c. 20. no woman, after her husband's death, shall suffer a recovery of lands settled on her in tail by way of jointure

b See pag. 286.

by her husband or any of his ancestors. And by statute 14 Eliz. c. 8. no tenant for life, of any sort, can suffer a recovery, so as to bind them in
remainder or reversion. For which reason, if there be tenant for life, with remainder in tail, and other remainders over, and the tenant for life is desirous to suffer a valid recovery; either he, or the tenant to the praecipe by him made, must vouch the remainder-man in tail, otherwise the recovery is void: but if he does vouch such remainder-man, and he appears and vouches the common vouchee, it is then good; for if a man be vouched and appears, and suffers the recovery to be had, it is as effectual to bar the estate-tail as if he himself were the recoveree c.

IN all recoveries it is necessary that the recoveree, or tenant to the praecipe, as he is usually called, be actually seised of the freehold, else the recovery is void d. For all actions, to recover the seisin of lands, must be brought against the actual tenant of the freehold, else the suit will lose its effect; since the freehold cannot be recovered of him who has it not. And, though these recoveries are in themselves fabulous and fictitious, yet it is necessary that there be actors fabulae, properly qualified. But the nicety thought by some modern practitioners to be requisite in conveying the legal freehold, in order to make a good tenant to the praecipe, is removed by the provisions of the statute 14 Geo. II. c. 20. which enacts, with a retrospect and conformity to the ancient rule of law e, that, though 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 praecipe: and that, though the deed or fine which creates such tenant be subsequent to the judgment of recovery, yet, if it be in the same term, the recovery shall be valid in law: and that, though the recovery itself do not appear to be entered, or be not regularly entered, on record, yet the deed to make a tenant to the praecipe, and declare the uses of the recovery, shall after a possession of

c Salk. 571.
d Pigott. 28.

twenty years be sufficient evidence, on behalf of a purchaser for valuable consideration, that such recovery was duly suffered. And this may suffice to give the student a general idea of common recoveries, the last species of assurances by matter of record.

BEFORE I conclude this head, I must add a word concerning deeds to lead, or to declare, the uses of fines, and of recoveries. For if they be levied
or suffered without any good consideration, and without any uses declared, they, like other conveyances, enure only to the use of him who levies or suffers them. And if a consideration appears, yet as the most usual fine, fur cognizance de droit come ceo. &c., conveys an absolute estate, without any limitations, to the cognizee; and as common recoveries do the same to the recoveror; these assurances could not be made to answer the purpose of family settlements, (wherein a variety of uses and designations is very often expedient) unless their force and effect were subjected to the direction of other more complicated deeds, wherein particular uses can be more particularly expressed. The fine or recovery itself, like a power once gained in mechanics, may be applied and directed to give efficacy to an infinite variety of movements, in the vast and intricate machine of a voluminous family settlement. And, if these deeds are made previous to the fine or recovery, they are called deeds to lead the uses; if subsequent, deeds to declare them. As, if A tenant in tail, with remainder to himself in fee, would settle his estate on B for life, remainder to C in tail, remainder to D in fee; this is what by law he has no power of doing effectually, while his own estate-tail is in being. He therefore usually covenants to levy a fine (or, if there be any remainders over, to suffer a recovery) to E, and that the same shall enure to the uses in such settlement mentioned. This is now a deed to lead the uses of the fine or recovery; and the fine when levied, or recovery when suffered, shall enure to the uses so specified and no other. For though E, the cognizee or recoveree, hath a fee-simple vested in himself by the fine or recovery; yet, by the operation of this deed, he be-

f Dyer. 18.

comes a mere instrument or conduit-pipe, seised only to the use of B, C, and D, in successive order: which use is executed immediately, by force of the statute of uses. Or, if a fine or recovery be had without any previous settlement, and a deed be afterwards made between the parties, declaring the uses to which the same shall be applied, this will be equally good, as if it had been expressly levied or suffered, in consequence of a deed directing its operation to those particular uses. For/ystatute 4 & 5 Ann. c. 16. indentures to declare the uses of fines and recoveries, made after the fines and recoveries had and suffered, shall be good and effectual in law, and the fine and recovery shall enure to such uses, and be esteemed to be only in trust, notwithstanding the statute of frauds 29 Car. II. c. 3. enacts, that
all trusts shall be declared in writing, at (and not after) the time when such
trusts are created.

This doctrine may perhaps be more clearly illustrated by example. In the
deed or marriage settlement in the appendix, No. II. 2. we may suppose the
lands to have been originally settled on Abraham and Cecilia Barker for
life, remainder to John Barker in tail, with divers other remainders over,
reversion to Cecilia Barker in fee; and now intended to be settled to the
several uses therein expressed, viz. of Abraham and Cecilia Barker till the
marriage; remainder to John Barker for life; remainder to trustees to
preserve the contingent remainders; remainder to his widow for life, for
her jointure: remainder to other trustees, for a term of five hundred years;
remainder to their first and other sons in tail; remainder to their
daughters in tail; remainder to John Barker in tail; remainder to Cecilia
Barker in fee. Now it is necessary, in order to bar the estate-tail of John
Barker, and the remainders expectant thereon, that a recovery be suffered
of the premises; and it is thought proper (for though usual, it is by no
means necessary: see Forrester. 167.) that in order to make a good tenant
of the freehold, or tenant to the praecipe, during the coverture, a fine
should be levied by Abraham, Cecilia, and John Barker; and it is agreed
that the recovery ifteft be suffered against this tenant to the praecipe, who
shall vouch John Barker, and thereby bar his estate-tail; and become
tenant of the foe-simple by virtue of such recovery: the uses of which
estate, so acquired, are declared to be those expressed in this deed.
Accordingly the parties covenant to do these several acts, (see pag. viii.)
And in consequence thereof the fine and recovery are had and suffered
(No. IV. and No. V.) of which this conveyance is a deed to lead the uses.

CHAPTER THE TWENTY SECOND.
OF ALIENATION BY SPECIAL CUSTOM.

WE are next to consider assurances by special custom, obtaining only in
particular places, and relative only to a particular species of real property.
This therefore is a very narrow title: being confined to copyhold lands, and
such customary estates, as are holden in ancient demesne, or in manors of
a similar nature: which, being of a very peculiar kind, and originally no
more than tenancies in pure or privileged villenage, were never alienable
by deed; for, as that might tend to defeat the lord of his signiory, it is
therefore a forfeiture of a copyhold a. Nor are they transferable by matter
of record, even in the king's courts, but only in the court baron of the lord. The method of doing this is generally by surrender; though in some manors, by special custom, recoveries may be suffered of copyholds: but these differing in nothing material from recoveries of free land, save only that they are not suffered in the king's courts, but in the court baron of the manor, I shall confine myself to conveyances by surrender, and their conveyances.

SURRENDER, fursumredditio, is the yielding up of the estate by the tenant into the hands of the lord, for such purposes as in the surrender are expressed. As, it may be, to the use and be-hoof of A and his heirs; to the use of his own will; and the like. The process, in most manors, is, that the tenant comes to

a Litt. 74.
b Moor. 637.

the steward, either in court, (or, if the custom permits, out of court) or else to two customary tenants of the same manor, provided that also have a custom to warrant it; and there by delivering up a rod, a glove or other symbol, as the custom directs, resigns into the hands of the lord, by the hands and acceptance of his said steward, or of the said two tenants, all his interest and title to the estate; in trust to be again granted out by the lord, to such persons and for such uses as are named in the surrender, and the custom of the manor will warrant. If the surrender be made out of court, then at the next or some subsequent court, the jury or homage must present and find it upon their oaths; which presentment is an information to the lord or his steward of what has been transacted out of court. Immediately upon such surrender in court, or upon presentment of a surrender made out of court, the lord by his steward grants the same land again to cestui que use, (who is sometimes, though rather improperly, called the surrenderee) to hold by the ancient rents and customary services; and thereupon admits him tenant to the copyhold, according to the form and effect of the surrender, which must be exactly pursued. And this is done by delivering up to the new tenant the rod, or glove, or the like, in the name, and as the symbol, of corporal seisin of the lands and tenements. Upon which admission he pays a fine to the lord, according to the custom of the manor, and takes the oath of fealty.
IN this brief abstract, of the manner of transferring copyhold estates, we
many plainly trace the visible footsteps of the feodal institutions. The fief,
being of a base nature and tenure, is unalienable without the knowledge
and consent of the lord. For this purpose it is resigned up, or surrendered
into his hands. Custom, and the indulgence of the law, which favours
liberty, has now given the tenant a right to name his successor; but
formerly it was far otherwise. And I am apt to suspect that this right is of
much the same antiquity with the introduction of uses with respect to
freehold lands: for the alieenee of a copyhold had merely jus fiduciariurn,
for which there was no remedy at law, but only by subpoena
in chancery c. When therefore the lord had accepted a surrender of his
tenant's interest, upon confidence to re-grant the estate to another person,
either then expressly named or to be afterwards named in the tenant's will,
the chancery inforced this trust as a matter of conscience; which
jurisdiction, though seemingly new in the time of Edward IV d, was
generally acquiesced in, as it opened the way for the alienation of
copyholds, as well as of freehold estates, and as it rendered the use of them
both equally devisable by testament. Yet, even to this day, the new tenant
cannot be admitted but by composition with the lord, and paying him a
fine by way of acknowledgement for the licence of alienation. Add to this
the plain feodal investiture, by delivering the symbol of seisin in presence
of the other tenants in open court; euando hafta vel aliud corporeum
quidlibet porrigitur a domino fe investituram facere dicente; quae faltem
coram duobus vasallis folenniter fieri debet e:? and, to crown the whole,
the oath of fealty annexed, the very bond of feodal subjection. From all
which we may fairly conclude, that, had there been no other evidence of
the fact in the rest of our tenures and estates, the very existence of
copyholds, and the manner in which they are transferred, would
incontestably prove the very universal reception, which this northern
system of property for a long time obtained in this island; and which
communicated itself, or at least its similitude, even to our very villains and
bondmen.

THIS method of conveyance is so essential to the nature of a copyhold
estate, that it cannot possibly be transferred by any other assurance. No
feoffment, fine, or recovery (in the king's courts) has any operation
thereupon. If I would exchange a copyhold estate with another, I cannot
do it by an ordinary deed of exchange at the common law; but we must
surrender to each other's use, and the lord will admit us accordingly. If I
would devise a copyhold, I must surrender it to the use of my last will
and testament; and in my will I must declare my intentions, and name a devisee, who will then be entitled to admission.

IN order the more clearly to apprehend the nature of this peculiar assurance, let us take a separate view of its several parts; the surrender, the presentment, and the admittance.

1. A SURRENDER, by an admittance subsequent whereto the conveyance is to receive its perfection and confirmation, is rather a manifestation of the alienor's intention, than a transfer of any interest in possession. For, till admittance of cestui que use, the lord taketh notice of the surrenderor as his tenant; and he shall receive the profits of the land to his own use, and shall discharge all services due to the lord. Yet the interest remains in him not absolutely, but sub modo; for he cannot pass away the land to any other, or make it subject to any other incumbrance than it was subject to at the time of the surrender. But no manner of legal interest is vested in the nominee before admittance. If he enters, he is a trespasser and punishable in an action of trespass: and if he surrenders to the use of another, such surrender is merely void, and by no matter ex post facto can be confirmed. For though he be admitted in pursuance of the original surrender, and thereby acquires afterwards a sufficient and plenary interest as absolute owner, yet his second surrender previous to his own admittance is absolutely void ab initio; because at the time of such surrender he had but a possibility of an interest, and could therefore transfer nothing: and no subsequent admittance can make an act good, which was ab initio void. Yet, though upon the original surrender the nominee hath but a possibility, it is however such a possibility, as may whenever he pleases be deprived or deluded of the effect and fruits of the surrender; but if the lord refuse to admit him, he is compellable to do it by a bill in chancery or a mandamus: and the surrenderor can in no wise defeat his grant; his hands being for ever bound from disposing of the land.
in any other way, and his mouth for ever stopped from revoking or countermanding his own deliberate act h; except in the case of a surrender to the use of his will, which is always revocable j.

2. AS to the presentment: that, by the general custom of manors, 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. And it is to be brought into court by the same persons that took the surrender, and then presented by the homage; and in all points material must correspond with the true tenor of the surrender itself. And therefore, if the surrender be conditional, and the presentment be absolute, both the surrender, presentment, and admittance thereupon are wholly void I: the surrender, as being never truly presented; the presentment, as being false; and the admittance, as being founded on such nature presentment. If a man surrenders out of court, and dies before presentment, and presentment be made after his death, according to the custom, this is sufficient k. So too, if cestui que use dies before presentment, yet, upon presentment made after his death, his heir according to the custom shall be admitted. The same law is, if those, into whose hands the surrender is made, die before presentment; for, upon sufficient proof in court that such a surrender was made, the lord shall be compelled to admit accordingly. And if the steward, the tenants, or others into whose hands such surrender is made, do refuse or neglect to bring it in to be presented, upon a petition preferred to the lord in his court baron the party grieved shall find remedy. But if the lord will not do him right and justice, he may sue both the lord, and them that took the surrender, in chancery, and shall there find relief l.

h Co. Copyh. 39.
j 4 Rep. 23.
i Co. Copyh. 40.
k Co. Litt. 62.
l Co. Copyh. 40.

3. ADMITTANCE is the last stage, or perfection, of copyhold assurances. And this is of three sorts: first, an admittance upon a voluntary grant from the lord; secondly, an admittance upon surrender by the former tenant; and thirdly, an admittance upon a descent from the ancestor.
IN admittances, even upon a voluntary grant from the lord, when copyhold lands have escheated or reverted to him, the lord is considered as an instrument. For, though it is in his power to keep the lands in his own hands, or to dispose of them at his pleasure, by granting an absolute fee-simple, a freehold, or a chattel interest therein; and quite to change their nature from copyhold to focage tenure, so that he may well be reputed their absolute owner and lord; yet, if he will still continue to dispose of them as copyhold, he is bound to observe the ancient custom precisely in every point, and can neither in tenure nor estate introduce any kind of alteration; for that were to create a new copyhold: wherefore in this respect the law accounts him custom's instrument. For if a copyhold for life falls into the lord's hands, by the tenant's death, though the lord may destroy the tenure and enfranchise the land, yet if he grants it out again by copy, he can neither add to nor diminish the ancient rent, nor make any the minutest variation in other respects m: nor is the tenant's estate, so granted, subject to any charges or incumbrances by the lord n.

IN admittances upon surrender, of another, the lord is to no intent reputed as owner, but wholly as an instrument: and the tenant admitted shall likewise be subject to no charges or incumbrances of the lord; for his claim to the estate is solely under him that made the surrender.

m Co. Cop. 41.
n 8 Rep. 63.

AND, as is admittances upon surrenders, so in admittances upon descents by the death of the ancestor, the lord is used as a mere instrument; and, as no manner of interest passes into him by the surrender or the death of his tenant, so no interest passes out of him by the act of admittance. And therefore neither in the one case, nor the other, is any respect had to the quantity or quality of the lord's estate in the manor. For whether he be tenant in fee or for years, whether he be in possession by right or by wrong, it is not material; since the admittances made by him shall not be impeached on account of his title, because they are judicial, or rather ministerial, acts, which every lord in possession is bound to perform p.

ADMITTANCES, however, upon surrender differ from admittances upon descent in this; that by surrender nothing is vested in cestui que use before admittance, no more than in voluntary admittances; but upon descent the
heir is tenant by copy immediately upon the death of his ancestor: not
indeed to all intents and purposes, for he cannot be sworn on the homage
nor maintain an action in the lord’s court as tenant; but to most intents the
law taketh notice of his ancestor, especially where he is concerned with
any stranger. He may enter into the land before admittance; may take the
profits; may punish any trespass done upon the ground q; nay, upon
satisfying the lord for his fine due upon the descent, may surrender into
the hands of the lord to whatever use he pleases. For which reasons we
may conclude, that the admittance of an heir is principally for the benefit
of the lord, to intitle him to his fine, and not so much necessary for the
strengthening and compleating the heir's title. Hence indeed an
observation might arise, that if the benefit, which the heir is to receive by
the admittance, is not equal to the charges of the fine, he will never come
in and be admitted

p 4 Rep. 27. 1 Rep. 140.
q 4 Rep. 23.

to his copyhold in court; and so the lord may be defrauded of his fine. But
to this we may reply in the words of sir Edward Coke r, I assure myself, if it
were in the election of the heir to be admitted or not to be admitted, he
would bebest contented without admittance; but the custom in
everymanor is in this point compulsory. For, either upon pain of forfeiture
of their copyhold, or of incurring some great penalty, the heirs of
copyholds are inforced, in every manor, to come into court and be admitted
according to the custom, within a short time after notice given of their
ancestor's decease.

r Copyh. 41.

CHAPTER THE TWENTY THIRD.
OF ALIENATION BY DEVISE.

THE last method of conveying real property, is by devise, or disposition
contained in a man's last will and testament. And, in considering this
subject, I shall not at present enquire into the nature of wills and
testaments, which are more properly the instruments to convey personal
estates; but only into the original and antiquity of devising real estates by
will, and the construction of the several statutes upon which that power is now founded.

IT seems sufficiently clear, that, before the conquest, lands were devisable by will. But, upon the introduction of the military tenures, the restraint of devising lands naturally took place, as a branch of the feodal doctrine of non-alienation without the consent of the lord. And some have questioned, whether this restraint (which we may trace even from the ancient Germans) was not founded upon truer principles of policy, than the power of wantonly disinheriting the heir by will, and transferring the estate, through the dotage or caprice of the ancestor, from those of his blood to utter strangers. For this, it is alleged, maintained the balance of property, and prevented one man from growing too big or powerful for his neighbours; since it rarely happens,

a Wright of tenures. 172.
b See pag. 57.
c Tacit. de mer. Germ. c. 23.

d that the same man is heir to many others, though by art and management he may frequently become their devisee. Thus the ancient law of the Athenians directed that he estate of the deceased should always descend to his children; or, on failure of lineal descendants, should go the collateral relations: which had an admirable effect in keeping up equality and preventing the accumulation of estates. But when Solon made a slight alteration, by permitting them (though only on failure of issue) to dispose of their lands by testament, and devise away estates from the collateral heir, this soon produced an excess of wealth in some, and of poverty in others: which, by a natural progression, first produced popular tumults and dissentions; and these at length ended in tyranny, and the utter extinction of liberty; which was quickly followed by a total subversion of their state and nation. On the other hand, it would now seem hard, on account of some abuses, (which are the natural consequence of free agency, when coupled with human infirmity) to debar the owner of lands from distributing them after his death, as the exigence of his family affairs, or the justice due to his creditors, may perhaps require. And this power, if prudently managed, has with us a peculiar property; by preventing the very evil which resulted from Solon's institution, the too great accumulation of property: which is the natural con of our doctrine of succession by primogeniture, to which the Athenians were strangers. Of
this accumulation the ill effects were severely felt even in the feodal times; but it should always be strongly discouraged in a commercial country, whose welfare depends on the number of moderate fortunes engaged in the extension of trade.

HOWEVER this be, we find that, by the common law of England since the conquest, no estate, greater than for term of years, could be disposed of by testament e; except only in Kent, and in some ancient burghs, and a few particular manors, where their Saxon immunities by special indulgence subsisted. And

d Plutarch. in vita Solon.
e 2 Inst. 7.
f Litt. 167. 1 Inst. 111.

though the feodal restraint on alienations by deed vanished very early, yet this on wills continued for some centuries after; from an apprehension of infirmity and imposition on the testator in extremis, which made such devises suspicious. Besides, in devises there was wanting that general notoriety, and public designation of the successor, which in descents is apparent to the neighbourhood, and which the simplicity of the common law always required in every transfer and new acquisition of property.

BUT when ecclesiastical ingenuity had invented the doctrine of uses, as a thing distinct from the land, uses began to be devised very frequently g, and the devisee of the use could in chancery compel its execution. For it is observed by Gilbert h, that, as the popish clergy then generally sate in the court of chancery, they considered that men are most liberal when they can enjoy their possessions no longer; and therefore at their death would choose to dispose of them to those, who, according to the superstition of the times, could intercede for their happiness in another world. But, when the statute of uses I had annexed the possession to the use, these uses, being now the very land itself, became no longer devisable: which might have occasioned a great revolution in the law of devises, had not the statute of wills been made about five years after, viz. 32. Hen. III. c. 1. explained by 34 Hen. VIII. c. 5. which enacted, that all persons being seised in fee-simple (except feme-coverts, infants, idiots, and persons of nonsane memory) might by will and testament in writing devise to any other person, but not to bodies corporate, two thirds of their lands, tenements, and hereditaments, held in chivalry, and the whole of those
held in focage: which now, through the alteration of tenures by the statute of Charles the second, amounts to the whole of their landed property, except their copyhold tenements.

CORPORATIONS were excepted in these statutes, to prevent the extension of gifts in mortmain; but now, by construc-

g Plowd. 414.
h on devises. 7.
I 27 Hen. VIII. c. 10.

tion of the statute 43 Eliz. c. 4. it is held, that a devise to a corporation for a charitable use is valid, as operating in the nature of an appointment, rather than of a bequest. And indeed the piety of the judges hath formerly carried them great lengths in supporting such charitable uses k; it being held that the statute of Elizabeth, which favours appointment to charities, supersedes and repeals all former statutes l, and supplies all defects of assurances m: and therefore not only a devise to a corporation, but a devise by a copyhold tenant without surrendering to the use of his will n, and a devise (nay even a settlement) by tenant in tail without either fine or recovery, if made to a charitable use, are good by way of appointment o.

WITH regard to devises in general, experience soon shewed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law; which are so nicely constructed and so artificially connected together, that the least breach in any one of them disorders for a time the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance: for so loose was the construction made upon this act by the courts of law, that bare notes in the hand writing of another person were allowed to be good wills within the statute p. To remedy which, the statute of frauds and perjuries, 29 Car. II. 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 last statute, it has been adjudged that the testator's name, written with his own hand, at the beginning of his will, as, I John Mills do make this my last will
?and testament,? is a sufficient signing, without any name at the bottom q; though the other is the safer way. It has also been determined, that though the witnesses must all see the testator sign, or at least acknowledge the signing, yet they may do it at different times r. But they must all subscribe their names as witnesses in his presence, lest by any possibility they should mistake the instrument s. And, in a case determined about twenty years ago t, the judges were extremely strict in regard to the credibility, or rather the competency, of the witnesses: for they would not allow any legatee, nor by consequence a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish the establishment of the will; for, if it were established, he gained a security for his legacy or debt from the real estate, whereas otherwise he had no claim but on the personal assets. This determination however alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom, that depended on devises by will. For, if the will was attested by a servant to whom wages were due, by the apothecary or attorney whose very attendance made them creditors, or by the minister of the parish who had any demand for tithes or ecclesiastical dues, (and these are the persons most likely to be present in the testator's last illness) and if in such case the testator had charged his real estate with the payment of his debts, the whole will, and every disposition therein, so far as related to real property, were held to be utterly void. This occasioned the statute 25 Geo. II. c. 6. which restored both the competency and the credit of such legatees, by declaring void all legacies given to witnesses, and thereby removing all possibility of heir interest affecting their testimony. The same statute likewise established the competency of creditors, by directing the testimony of all such creditors to be admitted, but leaving their credit (as well as that of all other witnesses) to be considered, on a view of all the circumstances, by the court and

q 3 Lev. 1.
jury before whom such will shall be contested. And in a much later case the testimony of three witnesses, who were creditors, was held to be sufficiently credible, though the land was charged with the payment of debts; and the reasons of the former determination were adjudged to be insufficient.

ANOTHER inconvenience was found to attend this new method of conveyance by devise; in that creditors by bond and other specialties, which affected the heir provided he had assets by descent, were now defrauded of their securities, not having the same remedy against the devisee of their debtor. To obviate which, the statute 3 & 4 W. & M. c. 14. hath provided, that all wills, and testaments, limitations, dispositions, and appointments of real estates, by tenants in fee-simple or having power to dispose by will, shall (as against such creditors may maintain their actions jointly against both the heir and the devisee.

A WILL of lands, made by the permission and under the controll of these statutes, is considered by the courts of law not so much in the nature of a testament, as of a conveyance declaring the uses to which the land shall be subject: with this difference, that in other conveyances the actual subscription of the witnesses is not required by law w, though it is prudent for them so to do, in order to assist their memory when living and to supply their evidence when dead; but in devises of lands such subscription is now absolutely necessary by statute, in order to identify a conveyance, which in its nature can never be set up till after the death of the devisor. And upon this notion, that a devise affecting lands is merely a species of conveyance, is founded this distinction between such devises and testaments of personal chattels; that the latter will operate upon whatever the testator dies possessed of, the former only upon such real estates as were his at the time.
purchased lands will pass under such devise y, unless, subsequent to the purchase or contract z, the deviser re-publishes his will a.

WE have now considered the several species of common assurances, whereby a title to lands and tenements may be transferred and conveyed from one man to another. But, before we conclude this head, it may not be improper to take notice of a few general rules and maxims, which have been laid down by courts of justice, for the construction and exposition of them all. These are

1. THAT the construction be favourable, and as near the minds and apparent intents of the parties, as the rules of law will admit b. For the maxims of law are, that verba intentioni debent inservire;? and, benigne interpretamur chartas propter fimplicitatem laicorum. And therefore the construction must also be reasonable, and agreeable to common understanding c.

2. THAT quoties in verbis nulla est ambiguitas, ibi nulla expopitio contra verba fienda est d: but that, where the intention is clear, too minute a stress be not laid on the strict and precise signification of words; nam qui haeret in litera, haeret in cortice. Therefore, by a grant of remainder a reversion may well pass, and e converso e. And another maxim of law is, that mala grammatical non vitiat chartam;? neither false English nor bad Latin will destroy a deed f. Which perhaps a classical critic may think to be no unnecessary caution.

3. THAT the construction be made upon the entire deed, and not merely upon disjointed parts of it. Nam ex antecedentibus et consequentibus fit optima interpretatio g. And therefore that every part of it, be (if possible) made to take effect; and no word but what may
operate in some shape or other h. Namverba debent intelligi cum effectu, ut res magis valeat quem pereat i.

4. THAT the deed be taken most strongly against him that is the agent or contractor, and in favour of the other party. Verbafortius accipiuntur contra proferentem. For the principle of self-preservation will make men sufficiently 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 betaken 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 of the grantor only, and shall be taken most strongly against him k. However, this, being a rule of some strictness and rigor, is the last to be resorted to, and is never to be relied upon, but where all other rules of exposition fail l.

5. THAT, if the words will bear two senses, one agreeable too, and another against, law; that sense be preferred, which is most agreeable thereto m. As if tenant in tail lets a lease for life generally, it shall be construed for his own life only, for that stands with the law; and not for the life of the lessee, which is beyond his power to grant.

g 1 Bulfrtr. 101.
h 1 P. Wms. 457.
I Plowd. 156.
k Plowd. 134.
l Bacon's Elem. c. 3.
m Co. Litt. 42.

6. THAT, in a deed, if there be two clauses so totally repugnant to each other, that they cannot stand together, the first shall be received and the latter rejected n: wherein, it differs from a will; for there, of two such repugnant clauses the latter shall stand o. Which owing to the different natures of the two instruments; for the first deed, and the last will are always most available in law. Yet in both cases we should rather attempt to reconcile them p.
7. THAT a devise be most favourably expounded, to pursue if possible the will of the devisor, who for want of advice or learning may have omitted the legal and proper phrases. And therefore many times the law dispenses with the want of words in devises, that are absolutely requisite in all other instruments. Thus a fee may be conveyed without words of inheritance q; and an estate-tail without words of procreation r. By a will also an estate may pass by mere implication, without any express words to direct its course. As, where A devises lands to his heir at law, after the death of his wife: here, though no estate is given to the wife in express terms, yet she shall have an estate for life by implication s; for the intent of the testator is clearly to postpone the heir till after her death; and, if she does not take it, nobody else can. So also, where a devise is of black-acre to A and of white-acre to B in tail, and if they both die without issue, then to C in fee: here A and B have cross remainders by implication, and on the failure of either's issue, the other or his issue shall take the whole; and C's remainder over shall be postponed till the issue of both shall fail t. But, to avoid confusion, no cross remainders are allowed between more than two devisees u: and, in general, where any implications are allowed, they must be such as necessary (or at least highly probable) and not merely possible implications w. And herein there is no distinction between the rules of law and of equity; for the will, being considered in both courts in the light of a limitation to uses x, is construed in each with equal favour and benignity, and expounded rather on its own particular circumstances, than by any general rules of positive law.

AND thus we have taken a transient view, in this and the three preceding chapters, of a very large and diffusive subject, the doctrine of common assurances: which concludes our observations on the title to things real, or the means by which they may be reciprocally lost and acquired. We have

n Hardr. 94.
o Co. Litt. 112.
q See pag. 108.
r See pag. 115.
s 1 Ventr. 376.
t Freem. 484.
u Cro. Jac. 655. 1 Ventr. 224. 2 Show 139.
before considered the estates which may be had in them, with regard to their duration or quantity of interest, the time of their enjoyment, and the number and connexions of the persons entitled to hold them: we have examined the tenures, both ancient and modern, whereby those estates have been, and are now, holden: and have distinguished the object of all these enquiries, namely, things real, into the corporeal or substantial, and incorporeal or ideal kind; and have thus considered the rights of real property in every light wherein they are contemplated by the laws of England. A system of laws, that differs much from every other system, except those of the same feodal origin, in its notions and regulations of landed estates; and which therefore could in this particular be very seldom compared with any other.

THE subject, which has thus employed our attention, is of very extensive use, and of as extensive variety. And yet, I am afraid, it has afforded the student less amusement and pleasure in the pursuit, than the matters discussed in the preceding volume. To say the truth, the vast alterations which the doctrine of real property has undergone from the conquest to the present time; the infinite determinations upon points that continually arise, and which have been heaped one upon another for a course of seven centuries, without any order or method; and the multiplicity of acts of parliament which have amended, or sometimes only altered, the common law; these cases have made the study of this branch of our national jurisprudence a little perplexed and intricate. It hath been my endeavour principally to select such parts of it, as were of the most general use, where the principles were the most simple, the reasons of them the most obvious, and the practice the least embarrassed. Yet I cannot presume that I have always been thoroughly intelligible to such of my readers, as were before strangers even to the very terms of art, which I have been obliged to make use of: though, whenever those have first occurred, I have generally attempted a short explication of their meaning. These are indeed the more numerous, on account of the different languages which our law has at different periods been taught to speak; the difficulty arising from which will insensibly diminish by use and familiar acquaintance. And therefore I shall close this branch of our enquiries with the words of sir Edward Coke y:albeit the student shall not at any one day,
do what he can, reach to the full meaning of all that is here laid down, yet let him no way discourage himself, but proceed; for on some other day, in some other place,? (or perhaps upon a second perusal of the same) his doubts will be probably removed.

y Proeme to 1 Inst.

CHAPTER THE TWENTY FOURTH.
OF THINGS PERSONAL.

UNDER the name of thins personal are included all sorts of thins moveable, which may attend a man's person wherever he goes; and therefore, being only the objects of the law while they remain within the limits of its jurisdiction, and being also of a perishable quality, are not esteemed of so high a nature, nor paid so much regard to by the law, as things that are in their nature more permanent and immovable, as lands, and houses, and the profits issuing thereout. These being constantly within the reach, and under the protection of the law, were the principal favourites of our first legislators: who took all imaginable care in ascertaining the rights, and directing the disposition, of such property as they imagined to be lasting, and which would answer to posterity the trouble and pains that their ancestors employed about them; but at the same time entertained a very low and contemptuous opinion of all personal estate, which they regarded only as a transient commodity. The amount of it indeed was, comparatively, very trifling, during the scarcity of money and the ignorance of luxurious refinements, which prevailed in the feodal ages. Hence it was, that a tax of the fifteenth, tenth, or sometimes a much larger proportion, of all the moveables of the subject, was frequently laid without scruple, and is mentioned with much unconcern by our ancient historians, though now it would justly alarm our opulent merchants and stockholders. And hence likewise may be derived the frequent forfeitures inflicted by the common law, of all a man's good and chattels, for misbehaviours and inadvertencies that at present hardly seem to deserve so severe a punishment. Our ancient law-books, which are founded upon the feodal provisions, do not therefore often condescend to regulate this species of property. There is not a chapter in Britton or the mirroir, that can fairly be referred to this head; and the little that is to be found in Glanvil, Bracton, and Fleta, seems principally borrowed from the civilians. But of later
years, since the introduction and extension of trade and commerce, which are entirely occupied in this species of property, and have greatly augmented its quantity and of course its value, we have learned to conceive different ideas of it. Our courts now regard a man's personalty in a light nearly, if not quite, equal to his reality: and have adopted a more enlarged and less technical mode of considering the one than the other; frequently drawn from the rules which they found already established by the Roman law wherever those rules appeared to be well-grounded and apposite to the case in question, but principally from reason and conveyance, adapted to the circumstances of the times; preserving withal a due regard to ancient usages, and a certain feodal tincture, which is still to be found in some branches of personal property.

BUT things personal, by our law, do not only include things moveable, but also something more. The whole of which is comprehended under the general name of chattels, catalla; which, sir Edward Coke says a, is a French word signifying goods. And this is true, if understood of the Norman dialect; for in the grand coustumier b, we find the word chattels used and set in opposition to a fief or feud: so that not only goods, but whatever was not a feud, were accounted chattels. And it is, I apprehend, in the same large, extended, negative sense, that not sufficiently comprehensive to take in every thing that our law considers as a chattel interest. For since, as the commentator on the coustumier observes, there are two requisites to make a fief or heritage, duration as to time, and immobility with regard to place; whatever wants either of these qualities is not, according to the Normans, an heritage or fief c; or, according to us, is not a real estate: the consequence of which in both laws is, that it must be a personal estate, or chattel.

CHATTELS therefore are distributed by the law into two kinds; chattels real, and chattels personal.

1. CHATTELS real, faith sir Edward Coke d, are such as concern, or favour of, the reality; as terms for years of land, wardships in chivalry (while the military tenures subsisted) the next presentation to a church, estates by statute-merchant, statute-staple, elegit, or the like; of all which we have

a 1 Inst. 118.
b c. 87.
already spoken. And these are called real chattels, as being interests issuing out of, or annexed to real estates: of which they have one quality, viz. immobility, which denominates them real; but want the other, viz. a sufficient, legal, indeterminate duration: and this want it is, that constitutes them chattels. The utmost period for which they can last is fixed and determinate, either for such a space of time certain, or till such a particular sum of money be raised out of such a particular income; so that they are not equal in the eye of the law to the lowest estate of freehold, a lease for another’s life: their tenants were considered, upon feodial principles, as merely bailiffs or farmers; and the tenant of the freehold might at any time have destroyed their interest, till the reign of Henry VIII. A freehold, which alone is a real estate, and seems (as has been said) to answer to the fief in Normandy, is conveyed by corporal investiture and livery of seisin; which gives the tenant so strong a hold of the land, that it never after can be wrested from him during his life, but by his own act, of voluntary transfer or of forfeiture; or else by the happening of some future contingency, as in estates pur auter vie, and the determinable freeholds mentioned in a former chapter. And even these, being of an uncertain duration, may by possibility last for the owner’s life; for the law will not presuppose the contingency to happen before it actually does, and till then the estate is to all intents and purposes a life estate, and therefore a freehold interest. On the other hand, a chattel interest in lands, which the Normans put in opposition to fief, and we to freehold, is conveyed by no seisin or corporal investiture, but the possession is gained by the mere entry of the tenant himself; and it is sure to expire at a time prefixed and determined, if not sooner. Thus a lease for years must necessarily fail at the end and completion of the term; the next presentation to a church is satisfied and gone the instant it comes into possession, that is, by the first avoidance and presentation to the living; the conditional estates by statutes and elegit are determined as soon as the debt is paid; and so guardianships in chivalry were sure to expire the moment that the heir...
came of age. And if there be any other chattel real, it will be found to correspond with the rest in this essential quality, that its duration is limited to a time certain, beyond which it cannot subsist.

2. CHATTELS personal are, properly and strictly speaking, things moveable; which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another. Such are animals, household-stuff, money, jewels, corn, garments, and every thing else that can properly be put in motion, and transferred from place to place. And of this kind of chattels it is, that we are principally to speak in the remainder of this book; having been unavoidably led to consider the nature of chattels real, and their incidents, in the former chapters which were employed upon real estates: that kind of property being of a mongrel amphibious nature, originally endowed with one only of the characteriftics of each species of things; the immobility of things real, and the precarious duration of things personal.

CHATTEL interests being thus distinguished and distributed, it will be proper to consider, first, the nature of that property, or dominion, to which they are liable; which must be principally, nay solely, referred to personal chattels: and, secondly, the title to that property, or how it may be lost and acquired. Of each of these in its order.

CHAPTER THE TWENTY FIFTH.
OF PROPERTY IN THINGS PERSONAL.

PROPERTY, in chattels personal, may be either in possession; which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing: or else it is in action; where a man hath only a bare right, without any occupation or enjoyment. And of these the former, or property in possession, is divided into two sorts, an absolute and qualified property.

I. FIRST then of property in possession absolute; which is where 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 may be all inanimate things, as goods, plate, money, jewels, implements of war, garments, and the like: such also may be all vegetable productions, as the fruit or other parts, when severed from the plant, or the whole plant itself, when severed from the ground; none of which can be moved out of the owner's possession without his own act or consent, or at least without doing him an injury, which it is the business of the law to prevent or remedy. Of these therefore there remains little to be said.

BUT with regard to animals, which have in themselves a principle and power of motion, and (unless particularly confined) can convey themselves from one part of the world to another, there is a great difference made with respect to their several classes, not only in our law, but in the law of nature and of all civilized nations. They are distinguished into such as are domitae, and such as wild disposition. In such as are of a nature tame and domestic, (as horses, kine, sheep, poultry, and the like) a man may have as absolute a property as in any inanimate beings; because these continue perpetually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property a: in which our law agrees with the laws of France and Holland b. The stealing, or forcible abduction, of such property as this, is also felony; for these are things of intrinsic value, serving for the food of man, or else for the uses of husbandry c. But in animals ferae naturae a man can have no absolute property.

OF all tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil, thatpartus fequitur ventrem? in the brute creation, though for the most part in the human species it disallows that that maxim, and therefore in the laws of England d, as well as Rome e,fiequam meam equus tuus praegnantem fecerit, non eft tuum fedmeum quod natum eft. And, for this, Puffendorf f gives a sensible reason: not only because the male is frequently unknown; but also because the dam, during the time of her pregnancy, is almost useless to the proprietor, and must be maintained with greater expence and care: wherefore as her owner is the loser by her pregnancy, he ought to be the gainer by her brood. An exception to this rule is in the case of young cygnets; which belong equally to the owner of the cock and hen, and shall be divided between them g. But here the reasons of the general rule
II. OTHER animals, that are not of a tame and domestic nature, are either
not the objects of property at all, or else fall under our other division,
namely, that of qualified, limited, or special property: which is such as is
not in its nature permanent, but may sometimes subsist, and at other
times not subsist. In discussing which subject, I shall in the first place
shew, how this species of property may subsist in such animals, as are
ferae naturae, or of a wild nature; and then, how it may subsist in any
other things, when under particular circumstances.

FIRST then, a man may be invested with a qualified, but not an absolute,
property in all creatures that are ferae naturae, either per industriam,
propter impotentiam, or propter privilegium.

1. A QUALIFIED property may subsist in animals ferae naturae, 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.
And under this head some writers have ranked all the former species of
animals we have mentioned, apprehending none to be originally and
naturally tame, but only made so by art and custom: as, horses, swine, and
other cattle; which, if originally left to themselves, would have chosen to
rove up and down, seeking their food at large, and are only made domestic
by use and familiarity, and are therefore, say they, called mansueta, quafi
manui afsueta. But however well this notion may be founded, abstractedly
considered, our law apprehends the most obvious distinction to be,
between such animals as we generally see tame, and are therefore seldom,
if ever, found wandering at large, which it calls domitae naturae; and such creatures as are usually found at liberty, which are therefore supposed to be more emphatically ferae naturae, though it may happen that the latter shall be sometimes tames and confined by the art and industry of man. Such as are deer in a park, hares or rabbets in an enclosed warren, doves in a dovehouse, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond or in trunks. These are no longer the property of a man, than while they continue in his keeping or actual possession: but, if at any time they regain their natural liberty, his property instantly ceases; unless they have animum revertendi, which is only to be known by their usual custom of returning. A maxim which is borrowed from the civil law I; revertendi animum videntur definere habere tune, cum revertendiconsuetudinem deferuerint. The law therefore extends this possession farther than the mere manual occupation; for my tame hawk that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property; for he hath animum revertendi. So are my pigeons, that are flying at a distance from their home (especially those of the carrier kind) and likewise the deer that is chased out of my park or forest, and is instantly pursued by the keeper or forester: all which remain still in my possession, and I still preserve my qualified property in them. But if they stray without my knowledge, and do not return in the usual manne, it is then lawful for any stranger to take them. But if a deer, or any wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleasure; or if a wild swan is taken, and marked and turned loose in the river, the owner's property in him still continues, and it is not lawful for any one else to take him: but otherwise, if the deer has been long absent without returning, or the swan leaves the neighbourhood. Bees also are ferae naturae; but, when hived and reclaimed, a man may have a qualified property in them, by the law of nature, as well as by the civil law. And to the same purpose, not to say in the same

h Bracton. l. 2. c. 1. 7 Rep. 17.
i Inst. 2. 1. 15.
k Finch. L. 177.
l Crompt. of courts. 167. 7 Rep. 16.
m Puff. l. 4. c. 6. 5. Inst. 2. 1. 14.
words, with the civil law, speaks Bracton n: occupation, that is, hiving or including them, gives the property in bees; for, though a swarm lights upon my tree, I have no more property in them till I have hived them, than I have in the birds which make their nests thereon; and therefore if another hives them, he shall be their proprietor: but a swarm, which fly from and out of my hive, are mine so long as I can keep them in sight, and have power to pursue them; and in these circumstances no one else is intitled to take them. But it hath been also said o, that with us the only ownership in bees is ratione foli; and the charter of the forest p, which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found.

IN all these creatures, reclaimed from the wildness of their nature, the property is not absolute, but defeasible: a property, that may be destroyed if they resume their ancient wildness, and are found at large. For if the pheasants escape from the mew, or the fishes from the trunk, and are seen wandering at large in their proper element, they become ferae naturae again; and are free and open to the first occupant that has ability to seise them. But while they thus continue my qualified or defeasible property, they are as much under the protection of the law, as if they were absolutely and indefeasibly mine: and an action will lie against any man that detains them from me, or unlawfully destroys them. It is also as much felony by common law to steal such of them as are fit for food, as it is to steal tame animals q: but not so, if they are only kept for pleasure, curiosity, or whim, as dogs, bears, cats, apes, parrots and singing birds r; because their value is not intrinsic, but depending only on the caprice of the owner s: though it is such an invasion of property as may amount to a civil injury, and be redressed by a civil action t. Yet to steal a reclaimed hawk is felony both by common law and statute u; which seems to be a relick of the tyranny of our ancient sportsmen. And, among our

n l. 2. c. 1. 3.  
q 1 Hal. P. C. 512.  
r Lamb. Eiren. 275.  
s 7 Rep. 18. 3 Inst. 109.  

amount to a civil injury, and be redressed by a civil action t. Yet to steal a reclaimed hawk is felony both by common law and statute u; which seems to be a relick of the tyranny of our ancient sportsmen. And, among our
elder ancestors the ancient Britons, another species of reclaimed animals, viz. cats, were looked upon as creatures of intrinsic value; and the killing or a fine; especially if it belonged to the king's household, and were the cuftos horrei regii, for which there was a very peculiar forfeiture w. And thus much of qualified property in wild animals, reclaimed per industrium.

2. A QUALIFIED property may also subsist with relation to animals ferae naturae, ratione impotentiae, on account of their own inability. As when hawks, herons, or other birds build in my trees, or coneys or other creatures make their nests or burrows in my land, and have young ones there; I have a qualified property in those young ones, till such time as they can fly, or run away, and then my property expires x: but, till then, it is in some cases trespass, and in others felony, for a stranger to take them away y. For here, as the owner of the land has it in his power to do what he pleases with them, the law therefore vests a property in him of the young ones, in the same manner as it does of the old ones if reclaimed and confined: for these cannot through weakness, any more than the others through restraint, use their natural liberty and forsake him.

3. A MAN may, lastly, have a qualified property in animals ferae naturae, propter privilegium: that is, he may have the privilege of hunting, taking, and killing them, in exclusion of other

Persons. Here he has a transient property in these animals, usually called game, so long as they continue within his liberty z; and may restrain any stranger from taking them therein: but the instant they depart into another liberty, this qualified property ceases. The manner, in which this privilege is acquired, will be shewn in a subsequent chapter.
THE qualified property which we have hitherto considered, extends only to animals ferae naturae, when either reclaimed, impotent, or privileged. Many other things may also be the objects of qualified property. It may subsist in the very elements, of fire or light, of air, and of water. A man can have no absolute permanent property in these, as he may in the earth or land; since these are of a vague and fugitive nature, and therefore can admit only of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer. If a man disturbs another, and deprives him of the lawful enjoyment of these; if one obstructs another's ancient windows a, corrupts the air of his house or gardens b, fouls his water c, or unpins and lets it out, or if he diverts an ancient watercourse that used to run to the other's mill or meadow d; the law will animadvert hereon as an injury, and protect the party injured in his possession. But the property in them ceases the instant they are out of possession: for, when no man is engaged in their actual occupation, they become again common, and every man has an equal right to appropriate them to his own use.

THESE kinds of qualification in property depend upon the peculiar circumstances of the subject matter, which is not capable of being under the absolute dominion of any proprietor. But property may also be of a qualified or special nature, on account of the peculiar circumstances of the owner, when the thing itself is very capable of absolute ownership. As in case of bail-

z Cro. Car. 554. Mar. 48. 5 Mod. 376. 12 Mod. 144.
a 9 Rep. 58.
b Ibid. 59. Lutw. 92.
c 9 Rep. 59.
d 1 Leon. 273. Skinn. 389.

ment, or delivery, of goods to another person for a particular use; as to a carrier to convey to London, to an innkeeper to secure in his inn, or the like. Here there is no absolute property in either the bailor or the bailee, the person delivering, or him to whom it is delivered: for the bailor hath only the right, and not the immediate possession; the bailee hath the 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: the bailee on account of his immediate possession; the bailor, because the possession of the bailee is, mediately,
his possession also e. So also in case of goods pledged or pawned upon condition, either to repay money or otherwise; both the pledgor and pledgee have a qualified, but neither of them an absolute, property therein: the pledgor's property is conditional, and depends upon the performance of the condition of re-payment, &c; and so too is that of the pledgee, which depends upon its non-performance f. The same may be said of goods distreined for rent, or other cause of distress: which are in the nature of a pledge, and are not, at the first taking, the absolute property of either the distreinor, or party distreined; but may be redeemed, or else forfeited, by the subsequent conduct of the latter. But a servant, who hath the care of his master's goods or chattels, as a butler of plate, a shepherd of sheep, and the like, hath not any property or possession either absolute or qualified, nut only a mere charge or oversight g.

HAVING thus considered the several divisions of property in possession, which subsists there only, where a man hath both the right and also the occupation of the thing; we will proceed next to take a short view of the nature of property in action, or such where a man hath not the occupation, but merely a bare right to occupy the thing in question; the possession whereof may however be recovered by a suit or action at law: from whence the thing so recoverable is called a thing or chose, in action h. Thus money due on a bond is a chose in action; for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession till recovered by course of law. If a man promises, or covenants with me, to do any act, and fails in it, whereby I suffer damage; the recompense for this damage is a chose in action: for though a right to some recompense vests in me, at the time of the damage done, yet what and how large such recompense shall be, can only be ascertained by verdict; and the possession can only be given me by legal judgment and execution. In the former of these cases the student will observe, that the property, or right of action, depends upon an express contract or obligation to pay a stated sum: and in the latter it depends upon an implied contract, that if the covenantar does not perform the act he engaged to do, he shall pay me the damages I sustain by his breach of covenant. And hence it may be
collected, that all property in action depends entirely upon contracts,
either express or implied; which are the only regular means of acquiring a
chose in action, and of the nature of which we shall discourse at large in a
subsequent chapter.

AT present we have only to remark, that upon all contracts or promises,
either express or implied, and the infinite variety of cases into which they
are and may be spun out, the law gives an action of some sort or other to
the party injured in case of non-performance; to compel the wrongdoer to
do justice to the party with whom he has contracted, and, on failure of
performing the identical thing he engaged to do, to render a satisfaction
equivalent to the damage sustained. But while the thing, or its equivalent,
remains in suspense, and the injured party has only the right and not the
occupation, it is called a chose in action; being a thing rather in potentia
than in effe: though the owner may

The same idea, and the same denomination, of property prevailed in the
civil law. Rem in bonis noferis habere intelligimur, quotiens ad
reciperandam eam actionem habeamus. (Ff. 41. 1. 52.) And again; aeque
bonis adnumerabitur etiam, fi quid eft inactionibus, petitionibus,
persecutionibus. Namet baec in bonis effe evidentur. (Ff. 50. 16. 49.)

have as absolute a property of such things is action, as of things in
possession.

AND, having thus distinguished the different degree or quantity of
dominion or property to which things personal are subject, we may add a
word or two concerning the time of their enjoyment, and the number of
their owners; in conformity to the method before observed in treating of
the property of things real.

FIRST, as to the time of enjoyment. By the rules of the ancient common
law, there could be no future property, to take place in expectancy, created
in personal goods and chattels; because, being things transitory, and by
many accidents subject to be lost, destroyed, or otherwise impaired, and
the exigencies of trade requiring also a frequent circulation thereof, it
would occasion perpetual suits and quarrels, and put a stop to the freedom
of commerce, if such limitations in remainder were generally tolerated and
allowed. But yet in last wills and testaments such limitations of personal
goods and chattels, in remainder after a bequest for life, were permitted I:
though originally that indulgence was only shewn, when merely the use of the goods, and not the goods themselves, was given to the first legatee k; the property being supposed to continue all the time in the executor of the devisor. But now that distinction is disregarded: and therefore if a man either by deed or will limits his books or furniture to A for life, with remainder over to B, this remainder is good. But, where an estate-tail in things personal is given to the first or any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted on such a limitation m. For this, if allowed, would tend to a perpetuity, as the devisee or grantee in tail of a chattel has no method of barring the entail; and therefore the law vests in him at once the entire dominion of the goods, being analogous to the fee simple which a tenant in tail may acquire in a real estate.

I 1 Equ. Caf. abr. 360.
k Mar. 106.
l 2 Freem. 206.
m 1 P. wms. 290.

NEXT, as to the number of owners. Thins personal may belong to their owners, not only in severalty, but also in joint-tenancy, and in common, as well as real estates. They cannot indeed be vested in coparcenary; because they do not descent from the ancestor to the heir, which is necessary to constitute coparceners. But if a horse, or other personal chattel, be given to two or more, absolutely, they are joint-tenants hereof; and, unless the jointure be severed, the same doctrine of survivorship shall take place as in estates of lands and tenements n. And, in like manner, if the jointure be severed, as by either of them selling his share, the vendee and the remaining part-owner shall be tenants in common, without any jus accrefcendi or survivorship o. So also if 100 l. be given by will to two or more, equally to be divided between them, this makes them tenants in common p; as, we have formerly seen q, the same words would have done, in regard to real estates. But, for the encouragement of husbandry and trade, it is held that a stock on a farm, though occupied jointly, and also a stock used in a joint undertaking, by way of partnership in trade, shall always be considered as common and not as joint property; and there shall be no survivorship therein r.

n Litt. 282. 1 Vern. 482.
o Litt. 321.
CHAPTER THE TWENTY SIXTH.
OF TITLE TO THINGS PERSONAL
BY OCCUPANCY.

WE are next to consider the title to things personal, or the various means of acquiring, and of losing, such property as may be had therein: both which considerations of gain and loss shall be blended together in one and the same view, as was done in our observations upon real property; since it is for the most part impossible to contemplate the one, without contemplating the other also. And these methods of acquisition or loss are principally twelve: 1. By occupancy. 2. By prerogative. 3. By forfeiture. 4. By custom. 5. By succession. 6. By marriage. 7. By judgment. 8. By gift. 9. By contract. 10. By bankruptcy. 11. By testament. 12. By administration.

AND, first, a p in goods and chattels may be acquired by occupancy: which, we have more than once a remarked, was the original and only primitive method of acquiring any property at all; but which has since been restrained and abridged, by the positive laws of society, in order to maintain peace and harmony among mankind. For this purpose, by the laws of England, gifts, and contracts, testaments, legacies, and administrations have been introduced and countenanced, in order to transfer and continue that property and possession in things personal, which has once been acquired by the owner. And, where such things are found without any other owner, they for the most part belong to the king by virtue of his prerogative; except in some few instances, wherein the original and natural right of occupancy is still permitted to subsist, and which we are now to consider.

1. THUS, in the first place, it hath been said, that any body may seise to his own use such goods as belong to an alien enemy b. For such enemies, not being looked upon as members of our society, are not entitled during their
state of enmity to the benefit or protection of the laws; and therefore every man that has opportunity is permitted to seise upon their chattels, without being compelled as in other cases to make restitution or satisfaction to the owner. But this, however generally laid down by some of our writers, must in reason and justice be restrained to such captors as are authorized by the public authority of the state, residing in the crown c; and to such goods as are brought into this country by an alien enemy, after a declaration of war, without a safe-conduct or passport. And therefore it hath been held d, that where a foreigner is resident in England, and afterwards a war breaks out between his country and ours, his goods are not liable to be seised. It hath also been adjudged, that if an enemy take the goods of an Englishman, which are afterwards retaken by another subject of this kingdom, the former owner shall lose his property therein, and it shall be indefeasibly vested in the second taker; unless they were retaken the same day, and the owner before sun-set puts in his claim of property e. Which is agreeable to the law of nations, as understood in the time of Grotius f, even with regard to captures made at sea; which were held to be the property of the captors after a possession of twenty four hours: though the modern authorities g require, that before the property can be changed, the goods must have been brought into port, and have continued a night intra praefidia, in a place of safe custody, so that all hope of recovering them is lost.

AND, as in the goods of an enemy, so also in his person, a man may acquire a sort of qualified property, by taking him a prisoner in war h; at least till his ransom be paid j. And this doctrine seems to have been extended to negro-servants I, who are purchased, when captives, of the nations with whom they are at war, and continue therefore in some degree the property of their masters who buy them: though, accurately speaking, that property consists rather in the perpetual service, than in the body or person, of the captive k.
2. Thus again, whatever moveables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor; and, as such, are returned into the common stock and mafs of things: and therefore they belong, as in a state of nature, to the first occupant or fortunate finder, unless they fall within the description of waifs, or estrays, or wreck, or hidden treasure; for these, we have formerly seen, are vested by law in the king, and form a part of the ordinary revenue of the crown.

3. Thus too the benefit of the elements, the light, the air, and the water, can only be appropriated by occupancy. If I have an ancient window overlooking my neighbour's ground, he may not erect any blind to obstruct the light: but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall; for there the first occupancy is rather in him, than in me. If my neighbour makes a tan-yard, so as to annoy

h Pro. Abr. tit. proprietie. 18.
I We meet with a curious writ of trespass in the register (102.) for breaking a man's house, and setting such a prisoner at large. Quare domum ipsius A. apud W. (inqua idem A. quondam H. Scotum per ipsum A. de Guerra captum tanquam prisonem fuum, qucuque fibi de centum libris, per quas idem H. redemptionem fuam cum praefato A. provita sua salvanda ficerat, satisfactum foret, detinuit) fregit, et ipsum H. cepie et abduxit, vel quo voluit abire permiffie, &c.

j 2 Lev. 201.
k Carth. 396. Ld Raym. 147. Salk. 667.
l Book I. ch. 8.

and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and must continue. If a stream be unoccupied, I may erect a mill thereon, and detain the water; yet not so as to injure my neighbour's prior mill, or his meadow: for he hath by the first occupancy acquired a property in the current.

4. With regard likewise to animals feræ naturae, all mankind had by the original grant of the creator a right to pursue and take any fowl or insect of the air, any fish or inhabitant of the waters, and any beast or reptile of the
field: and this natural right still continues in every individual, unless where it is restrained by the civil laws of the country. And when a man has once so seised them, they become while living his qualified property, or, if dead, are absolutely his own: so that to steal them, or otherwise invade this property, is, according to the respective values, sometimes a criminal offence, sometimes only a civil injury. The restrictions which are laid upon this right, by the laws of England, relate principally to royal fish, as whale and sturgeon, and such terrestrial, aerial, or aquatic animals as go under the denomination of game; the taking of which is made the exclusive right of the prince, and such of his subjects to whom he has granted the same royal privilege. But those animals, which are not expressly so reserved, are still liable to be taken and appropriated by any of the king's subjects, upon their own territories; in the same manner as they might have taken even game itself, till these civil prohibitions were issued: there being in nature no distinction between one species of wild animals and another, between the right of acquiring property in a hare or a squirrel, in a partridge or a butterfly; but the difference, at present made, arises merely from the positive municipal law.

5. TO this principle of occupancy also must be referred the method of acquiring a special personal property in corn growing on the ground, or other emblements, by any possessor of the land who hath sown or planted it, whether he be owner of the inheritance in fee or in tail, or be tenant for life, for years, or at will: which emblements are distinct from the real estate in the land, and subject to many, though not all, the incidents attending personal chattels. They were devisable by testaments before the statute of wills m, and at the death of the owner shall vest in his executor and not his heir: they are forfeitable by outlawry in a personal actionn: and by the statute 11 Geo. II. c. 19. though not by the common law o, they may be distreined for rent arrere. The reason for admitting the acquisition of this special property, by tenants who have temporary interests, was formerly given p; and it was extended to tenants in fee, principally for the benefit of their creditors: and therefore, though the emblements are assets in the hands of the executor, are forfeitable upon outlawry, and distreinable for rent, they are not in other respects considered as personal chattels; and, particularly, they are not the object of larceny, before they are severed from the ground q.

6. THE doctrine of property arising from accession is also grounded on the right of occupancy. By the Roman law, if any given corporeal substance
received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was intitled by his right of possession to the property of it under such its state of improvement: but if the thing itself, by such operation, was changed into a different species, as by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction to the former proprietor for the materials, which he had so converted. And these doctrines are implicitly copied and adopted by our Bracton, in the reign of king Henry III; and have since been confirmed by many resolutions of the courts.

m Perk. 512.


o 1 Roll. Abr. 666.

p pag. 122. 146.

q 3 Inst. 109.

r Inst. 2. 1. 25, 26, 31. Ff. 6. 1. 5.

s Inst. 2. 1. 25, 34.

t l. 2. c. 2. & 3.

Courts. It hath even been held, that if one takes away another's wife or son, and cloths them, and afterwards the husband or father retakes them back, the garments shall cease to be the property of him who provided them, being now annexed to the person of the child or woman.

7. BUT in the case of confusion of goods, where those of two persons are so intermixed, that the several portions can be no longer distinguished, the English law partly agrees with, and partly differs from, the civil. If the intermixture be by consent, I apprehend that in both laws the proprietors have an interest in common, in proportion to their respective shares. But, if one willfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting-pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost. But our law, to guard against fraud, allows no remedy in such a case; but gives the entire property, without any account, to him,
whose original dominion is invaded, and endeavoured to be rendered uncertain, without his own consent z.

8. THERE is still another species of property, which, being grounded on labour and invention, is more property reducible to the head of occupancy than any other; since the right of occupancy itself is supposed by Mr. Locke a, and many others b, to be founded on the personal labour of the occupant. And this is the right, which an author may be supposed to have in his own original literary compositions: so that no other person without his leave may publish or make profit of the copies. When a man by the exertion of his rational powers has produced an original work, he has clearly a right to dispose of that identical work as he pleases, and any attempt to take it from him, or vary the disposition he has made of it, is an invasion of his right of property. Now the identity of a literary composition consists entirely in the sentiment and the language; the same conceptions, clothed in the same words, must necessarily be the same composition: and whatever method be taken of conveying that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies or at any period of time, it is always the identical work of the author which is so conveyed; and no other man can have a right to convey or transfer it without his consent, either tacitly or expressly given. This consent may perhaps be tacitly given, when an author permits his work to be published, without any reserve of right, and without stamping on it any marks of ownership: it is then a present to the public, like the building of a church, or the laying out a new highway: but, in case of a bargain for a single impression, or a sale or gift of the copyright, the reversion is plainly continued in the original proprietor, or the whole property transferred to another.

THE Roman law adjudged, that if one man wrote any thing, though never so elegantly, on the paper or parchment of another, the writing should
belong to the original owner of the materials on which it was written c: meaning certainly nothing more thereby, than the mere mechanical operation of writing, for which it directed the scribe to receive a satisfaction; especially as, in works of genius and invention, such as a picture painted on another man's canvas, the same law d gave the canvas to the painter. We find no other mention in the civil law of any property in the works of the understanding, though the sale of literary copies, for the purposes of recital or multiplication, is certainly as ancient as the times of Terence e, Martial f, and Statitus g. Neither with us in England hath there been any direct determination upon the right of authors at the common law.

c Si in chartis membranifve tuis carmen vel historiam vel orationem Titius scripferit, hujus corporis non Titius fed tu dominus esse videris. Inst. 2. 1. 33.
d Ibid. 34.
e Prol. in Eunuch. 20.
f Epigr. i. 67. iv. 72. xiii. 3. xiv. 194.
g Tuv. vii. 83.

But much may be gathered from the frequent injunctions of the court of chancery, prohibiting the invasion of this property: especially where either the injunctions have been perpetual, or have related to unpublished manuscripts, or to such ancient books, as were not within the provisions of the statute of queen Anne k. Much may also be collected from the several legislative recognitions of copyrights l; and from those adjudged cases at common law, wherein the crown hath been considered as invested with certain prerogative copyrights; for, if the crown is capable of an exclusive right in any one book, the subject seems also capable of having the same right in another.

BUT, exclusive of such copyright as may subsist by the rules of the common law, the statute 8 Ann. c. 19. hath protected by additional penalties the property of authors and their assigns for the term of fourteen years; and hath 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 the same duration: and a similar privilege is extended to the inventors of prints and engravings, for the term of fourteen years, by the statute 8 Geo. II. c. 13. Both which appear to have been copied from the exception in the statute of monopolies, 21 Jac. I. c. 3. which allows a royal patent of privilege to be
granted for fourteen years to any inventor of a new manufacture, for the
sole working or making of the same; by virtue whereof a temporary
property becomes vested in the patentee.

Watfon, 6 Dec. 1737.
Walker. 12 May 1739. and 30 Apr. 1752.
l A. D. 1649. c. 60. Scobell. 92. 13 & 14 Car. II. c. 33. 10 Ann. c. 19. 112. 5
m Cart. 89. 1 Mod. 257. 4 Burr. 661.
n 1 Vern. 62.

CHAPTER THE TWENTY SEVENTH.
OF TITLE BY PREROGATIVE, AND FORFEITURE.

A SECOND method of acquiring property in personal chattels is by the
king's prerogative: whereby a right may accrue either to the crown itself, or
to such as claim under the title of the crown, as by grant or by prescription.

SUCH in the first place are all tributes, taxes, and customs; whether
congitutionally inherent in the crown, as flowers of the prerogative and
branches of the census regalis or ancient royal revenue, or whether they be
occasionally created by authority of parliament; of both which species of
revenue we treated largely in the former volume. In these the king acquires
and the subject loses a property the instant they become due: if paid, they
are a chose in possession; if unpaid, a chose in action. Hither also may be
referred all forfeitures, fines, and amercements due to the king, which
accrue by virtue of his ancient prerogative, or by particular modern
statutes: which revenues created by statute do always assimilate, or take
the same nature, with the ancient revenues; and may therefore be looked
upon as arfing from a kind of artificial or secondary prerogative. And, in
either case, the owner of the thing forfeited, and the person fined of
amerced, do lose and part with the property of the forfeiture, fine, or
amercement, the instant the king or his granteet acquires it.
IN these several methods of acquiring property by prerogative there is also this peculiar quality, that the king cannot have a joint property with any person in one entire chattel, or such a one as is not capable of division or separation; but where the titles of the king and a subject concur, the king shall have the whole: in like manner as the king can, neither by grant nor contract, become a joint-tenant of a chattel real with another person a; but by such grant or contract shall become intitled to the whole in severality. Thus, if a horse be given to the king and a private person, the king shall have the sole property: if a bond be made to the king and subject, the king shall have the whole penalty; the debt or duty being one single chattel b: and so, if two persons have the property of a horse between them, or have a joint debt owing them on bond, and one of them assigns his part to the king, or is attainted, whereby his moiety is forfeited to the crown; the king shall have the entire horse, and entire debt c. For, as it is not consistent with the dignity of the crown to be partner with a subject, so neither does the king ever lose his right in any instance; but, where they interfere, his is always preferred to that of another person d: from which two principles it is a necessary consequence, that the innocent, though unfortunate, partner must lose his share in both the debt and the horse, or in any other chattel in the same circumstances.

THIS doctrine has no opportunity to take place in certain other instances of title by prerogative, that remain to be mentioned; as the chattels thereby vested are originally and solely vested in the crown, without any transfer or derivative assignment either by deed or law from any former proprietor. Such is the acquisition of property in wreck, in treasure-trove, in waifs, in estrays, in royal fish, in swans, and the like; which are not transferred to the sovereign from any former owner, but are ori-

a See pag. 184.
c Cro. Eliz. 263. Plowd. 323. Finch. Law. 178. 10 Mod. 245.
d Co. Litt. 30.

ginally inherent in him by the rules of law, and are derived to particular subjects, as royal Franchises, by his bounty. These are ascribed to him, partly upon the particular reasons mentioned in the eighth chapter of the former book; and partly upon the general principle of their being bona vacantia, and therefore vested in the king, as well to preserve the peace of
the public, as in trust to employ them for the safety and ornament of the commonwealth.

WITH regard to the prerogative copyrights, which were mentioned in the preceding chapter, they are held to be vested in the crown upon different reasons. Thus, 1. The king, as the executive magistrate, has the right of promulgating to the people all acts of state and government. This gives him the exclusive privilege of printing, at his own press, or that of his grantees, all acts of parliament, proclamations, and orders of council. 2. As supreme head of the church, he hath a right to the publication of all liturgies and books of divine service. 3. He hath a right by purchase to the copies of such lawbooks, grammars, and other compositions, as were compiled or translated at the expense of the crown. And upon these two last principles the exclusive right of printing the translation of the bible is founded. 4. Almanacks have been said to be parliament-copies, either as things derelict, or else as being substantially nothing more than the calendar prefixed to out liturgy e. And indeed the regulation of time has been often considered as a matter of state. The Roman fa†ti were under the care of the pontifical college: and Romulus, Numa, and Julius Caefar, successively regulated the Roman calendar.

THERE still remains another species of prerogative property, founded upon a very different principle from any that have been mentioned before; the property of such animals ferae naturae, as are known by the denomination of game, with the right of pursuing, taking, and destroying them: which is vested in the king alone, and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren, or free fishery. This may lead us into an enquiry concerning the original of these franchises, or royalties, on which we touched a little in a former chapter f; the right itself being an incorporeal hereditament, though the fruits and profits of it are a personal nature.

IN the first place then we have already shewn, and indeed it cannot be denied, that by the law of nature every man, from the prince to the peasant, has an equal right of pursuing, and taking to his own use, all such creatures as are ferae naturae, and therefore are property of nobody, but
liable to be seised by the first occupant. And so it was held by the imperial law, even so late as Justinian's time: *ferae igitur bestiae, et volucreś, et omnia animalia quae mari, coelo, et terra nafcuntur, fimul atque ab aliquo capta suerint, jure gentium fvatim illius esse incipiunt. Quod enim nullius est, id naturali ratione occupanti conceditur*. But it follows from the very end and constitution of society, that this natural right, as well as many others belonging to man as an individual, may be restrained by positive laws enacted for reasons of state, or for the supposed benefit of the community. This restriction may be either with respect to the place in which this right may, or may not, be exercised; with respect to the animals that are the subject of this right; or with respect to the persons allowed or forbidden to exercise it. And, in consequence of this authority, we find that the municipal laws of many nations have exerted such power of restraint; have in general forbidden the entering on another man's grounds, for any cause, without the owner's leave; have extended their protection to such particular animals as are usually the objects of pursuit; and have invested the prerogative of hunting and taking such animals in the sovereign of the state only, and such as he shall authorize. Many reasons have concurred for making these constitutions: as, 1. For the encouragement of agriculture and improvement of lands, by giving every man an exclusive dominion over

his own soil. 2. For preservation of the several species of these animals, which would soon be extirpated by a general liberty. 3. For prevention of idleness and dissipation in husbandmen, artificers, and others of lower rank; which would be the unavoidable consequence of universal licence. 4. For preventing of popular insurrections and resistance to the government, by disarming the buld of the people: which last is a reason oftener meant, than avowed, by the makers of forest or game laws. Nor, certainly, in these prohibitions is there any natural injustice, as some have weakly enough supposed: since, as Puffendorf observes, the law does not hereby take from any man his present property, or what was already his own, but barely abridges him of one means of acquiring a future property, that of occupancy; which indeed the law of nature would allow him, but of which the laws of society have in most instances very justly and reasonably deprived him.
YEET, however desensible these provisions in general may be, on the footing of reason, or justice, or civil policy, we must notwithstanding acknowledge that, in their present shape, they owe their immediate original to slavery. It is not till after the eruption of the northern nations into the Roman empire, that we read of any other prohibitions, than that natural one of not sporting on any private grounds without the owner's leave; and another of a more spiritual nature, which was rather a rule of ecclesiastical discipline, than a branch of municipal law. The Roman or civil law, though it knew no restriction as to persons or animals, for far regarded the article of place, that it allowed no man to hunt or sport upon another's ground, but by consent of the owner of the soil. Qui alienum fundum ingreditur, venandi aut aucupandi gratia, potest a domino prohiberi ne ingrediatur. For if there can, by the law of nature, by any inchoate imperfect property supposed in wild animals before they are taken, it seems most reasonable to fix it in him upon whose land they are found. And as to the other restriction, which relates to persons and not

i Warburton's alliance. 324.
k Inst. 2, 1. 12.

to place, the pontifical or canon law l interdictvenationes, et fylvaticas vagationes cum canibus, et accipitribus? to all clergymen without distinction; grounded on a saying of St. Jerom m, that it never is recorded that these diversions were used by the saints, or primitive fathers. And the canons of our Saxon church, published in the reign of king Edgar n, concur in the same prohibition: though our secular laws, at least after the conquest, did even in the times of popery dispense with this canonical impediment; and spiritual persons were allowed by the common law to hunt for their recreation, in order to render them fitter for the performance of their duty: as a confirmation whereof we may observe, that it is to this day a branch of the king's prerogative, at the death every bishop, to have his kennel of hounds, or a composition in lieu thereof o.

BUT, with regard to the rise and original of our present civil prohibitions, it will be found that all forest and game laws were introduced into Europe at the same time, and by the same policy, as gave birth to the feodal system; when those swarms of barbarians issued from their northern hive, and laid the foundation of most of the present kingdoms of Europe, on the ruins of the western empire. For when a conquering general came to settle
the economy of a vanquished country, and to part it out among his soldiers or feudatories, who were to render him military service for such donations; it behoved him, in order to secure his new acquisitions, to keep the rustici or natives of the country, and all who were not his military tenants, in as low a condition as possible, and especially to prohibit them the use of arms. Nothing could do this more effectually than a prohibition of hunting and sporting: and therefore it was the policy of the conqueror to reserve this right to himself, and such on whom he should bestow it; which were only his capital feudatories, or greater barons. And accordingly we find, in the feudal constitutions p, one and the same law prohibiting the rustici in general

l Decretal. l. 5. tit. 24. c. 2.
m Decret. part. 1. diff. 34. l. 1.
n cap. 64.
o 4 Inst. 309.
p Feud. l. 2. tit. 27. 5.

from carrying arms, and also proscribing the use of nets, snares, or other engines for destroying the game. This exclusive privilege well suited the martial genius of the conquering troops, who delighted in a sport q which in its pursuit and slaughter bore some resemblance to war. Vita omnis, (says Caesar, speaking of the ancient Germans) in venationibus atque in studiis rei militaris consistit r. And Tacitus in like manner observes, that quotiens bella non ineunt, multum venatibus, plus per otium tranfigunt s. And indeed, like some of their modern successors, they had no other amusement to entertain their vacant hours; they despising all arts as effeminate, and having no other learning, that was couched in such rude ditties, as were sung at the solemn carousals which succeeded these ancient huntings. And it is remarkable that, in those nations where the feudal policy remains the most uncorrupted, the forest or game laws continue in their highest rigor. In France all game is properly the king’s; and in some parts of Germany it is death for a peasant to be found hunting in the woods of the nobility t.

WITH us in England also, hunting has ever been esteemed a most princely diversion and exercise. The whole island was replenished with all sorts of game in the times of the Britons; who lived in a wild and pastoral manner, without inclosing or improving their grounds, and derived much of their subsistence from the chase, which they all enjoyed in common. But when
husbandry took place under the Saxon government, and lands began to be cultivated, improved, and enclosed, the beasts naturally fled into the woody and desart tracts; which were called the forests, and, having never been disposed of in the first distribution of lands, were therefore held to belong to the crown. These were filled with great plenty of game, which our royal sports-

q In the laws of Jenghiz Khan, founder of the Mogul and Tartarian empire, published A. D. 1205. there is one which prohibits the killing of all game from March to October; that the court and soldiery might find plenty enough in the winter, during their recefs from war. (Mod. Univ. Hist. iv. 468.)

r De bell. Gall. l. 6. c. 20.

s c. 15.

mattheus de crimin. c. 3. tit. 1. carpzov. practic. saxonic. p. 2. c. 84.

men reserved for their own diversion, on pain of a pecuniary forfeiture for such as interfered with their sovereign. But every freeholder had the full liberty of sporting upon his own territories, provided he abstained from the king's forests: as is fully expressed in the laws of Canute v, and of Edward the confessor u; fit quilibet homo dignus venatione sua, in fylva, et in agris, fibi propriis, et in dominio su: et abstineat omnis homo a venariis regis, ubicunque pacem eis habere voluerit: which indeed was the ancient law of the Scandinavian continent, from whence Canute probably derived it. Cuique enim in proprio fundo quamlibet feram quoquo modo venari permissum w.

however, upon the Norman conquest, a new doctrine took place; and the right of pursuing and taking all beast of chase or venary, and such other animals as were accounted game, was then held to belong to the king, or to such only as were authorized under hi. And this, as well upon the principles of the feodal law, that the king is the ultimate proprietor of all the lands in the kingdom, they being all held of him as the chief lord, or lord paramount of the fee; and that therefore he has the right of the universal soil, to enter thereon, and to chase and take such creatures at his pleasure: as also upon another maxim of the common law, which we have frequently cited and illustrated, that these animals are bona vacantia, and, having no other owner, belong to the king by his prerogative. As therefore the former reason was held to vest in the king a right to pursue and take
them any where; the latter was supposed to give the king, and such as he should authorize, a sole and exclusive right.

THIS right, thus newly vested in the crown, was exerted with the utmost rigor, at and after the time of the Norman establishment; not only in the ancient forests, but in the new ones which the conqueror made, by laying together vast tract of

v c. 77.
u c. 36.
w Stiernhook, de jure Sueon. l. 2. c. 8.

country, depopulated for that purpose, and reserved solely for the king's royal diversion; in which were exercised the most horrid tyrannies and oppressions, under colour of forest law, for the sake of preserving the beasts of chase; to kill any of which, within the limits of the forest, was as penal as the death of a man. And, in pursuance, of the same principle, king John laid a total interdict upon the winged as well as the fourfooted creation: capturam avium per totam Angliam interdixit. The cruel and insupportable hardships, which these forest laws created to the subject, occasioned our ancestors to be as zealous for their reformation, as for the relaxation of the feodal rigors and the other exactions introduced by the Norman family; and accordingly we find the immunities of carta de foresta as warmly contended for, and extorted from the king with as much difficulty, as those of magna carta itself. By this charter, confirmed in parliament, many forests were disafforested, or stripped of their oppressive privileges, and regulations were made in the regimen of such as remained; particularly/zkilling the king's deer was made no longer a capital offence, but only punished by fine, imprisonment, or abjuration of the realm. And by a variety of subsequent statutes, together with the long acquiescence of the crown without exerting the forest laws, this prerogative is now become no longer a grievance to the subject.

BUT, as the king reserved to himself the forests for his own exclusive diversion, so he granted out from time to time other tracts of land to his subjects under the names of chases or parks; or gave them licence to make such in their own grounds; which indeed are smaller forests, in the hands of a subject, but not governed by the forest laws: and by the common law no person in at liberty to take or kill any beasts of chase, but such as hath an ancient chase or park; unless they be also beasts of prey.
AS to all inferior species of game, called beasts and fowls of warren, the liberty of taking or killing them is another franchise or royalty, derived likewise from the crown, and called free warren; a word, which signifies preservation or custody: as the exclusive liberty of taking and killing fish in a public stream or river is called a free fishery; of which however no new franchise can at present be granted, by the express provision of magna carta, c. 16 b. The principal intention of granting a man these franchises or liberties was in order to protect the game, by giving him a sole and exclusive power of killing it himself, provided he prevented other persons. And no man, but he who has a chase or free warren, by grant from the crown, or prescription which supposes one, can justify hunting or sporting upon another man's soil; nor indeed, in thorough strictness of common law, either hunting or sporting at all.

HOWEVER novel this doctrine may seem, it is a regular consequence from what has been before delivered; that the sole right of taking and destroying game belongs exclusively to the king. This appears, as well from the historical deduction here made, as because he may grant to his subjects an exclusive right of taking them; which he could not do, unless such a right was first inherent in himself. And hence it will follow, that no person whatever, but he who has such derivative right from the crown, is by common law entitled to take or kill any beasts of chase, or other game whatsoever. It is true, that by the acquiescence of the crown, the frequent grants of free warren in ancient times, and the introduction of new penalties of late by certain statutes for preserving the game, this exclusive prerogative of the king is little known or considered; every man, that is exempted from these modern penalties, looking upon himself as at liberty to do what he pleases with the game: whereas the contrary is strictly true, that no man, however well qualified he may vulgarly be esteemed, has a right to encroach on the royal

b Mirr. c. 5. 2. See pag. 39.
prerogative by killing of game, unless he can shew a particular grant of free warren; or a prescription, which presumes a grant; or some authority under an act of parliament. As for the latter, I know but of two instances wherein an express permission to kill game was ever given by statute; the one by 1 Jac. I. c. 27. altered by 7 Jac. I. c. 11. and virtually repealed by 22 & 23 Car. III. c. 25. which gave authority, so long as they remained in force, to the owners of free warren, to lords of manors, and to all freeholders having 40 l. per annum in lands of inheritance, or 80 l. for life or lives, or 400 l. personal estate, (and their servants) to take partridges and pheasants upon their own, or their master's, free warren, inheritance, or freehold: the other by 5 Ann. c. 14. which empowers lords and ladies of manors to appoint gamekeepers to kill game for the use of such lord or lady; which with some alterations still subsists, and plainly supposes such power not to have been in them before. The truth of the matter is, that these game laws (of which we shall have occasion to speak again in the fourth book of these commentaries) do indeed qualify nobody, except in the instance of a gamekeeper, to kill game: but only, to save the trouble and formal process of an action by the person injured, who perhaps too might remit the offence, these statutes inflict additional penalties, to be recovered either in a regular of summary way, by any of the king's subjects, from certain persons of inferior rank who may be found offending in this particular. But it does not follow that persons, excused from these additional penalties, are therefore authorised to kill game. The circumstances, of having 100 l. per annum, and the rest, are not properly qualifications, but exemptions. And these persons, so exempted from the penalties of the game statutes, are not only liable to actions of trespass by the owners of the land; but also, if they kill game within the limits of any royal franchise, they are liable to the actions of such who may have the right of chase or free warren therein.

UPON the whole it appears, that the king, by his prerogative, and such persons as have, under his authority, the royal franchises of chase, park, free warren, or free fishery, are the only persons, who may acquire any property, however fugitive and transitory, in these animals ferae naturae, while living; which is said to be vested in them as was observed in a former chapter, propter privilegium. And it must also be remembered, that such persons as may thus lawfully hunt, fish, or fowl, ratione privilegii, have (as has been said) only a qualified property in these animals; it not being absolute or permanent, but lasting only so long as the creatures remain within the limits of such respective franchise or liberty, and ceasing the
instant they voluntarily pass out of it. It is held indeed, that if a man starts any game within his own grounds, and follows it into another's, and kills it there, the property remains in himself. And this is grounded on reason and natural justice: for the property consists in the possession; which possession commences by the finding it in his own liberty, and is continued by the immediate pursuit. And so, if a stranger starts game in one man's chase or free warren, and hunts it into another liberty, the property continues in the owner of the chase or warren; this property arising from privilege, and not being changed by the act of a mere stranger. Or if a man starts game on another's private grounds and kills it there, the property belongs to him in whose ground it was killed, because it was also started there; this property arising ratione foli. Whereas if, after being started there, it is killed in the grounds of a third person, the property belongs not to the owner of the first ground, because the property is local; nor yet to the owner of the second, because it was not started in his soil; but it vests in the person who started and killed it, though guilty of a trespass against both the owners.

\(c\) 11 Mod. 75.
\(d\) Puff. L. N. l. 4. c. 6.
\(e\) Lord Raym. 251.
\(f\) Ibid.
\(g\) Farr. 18. Lord Raym. Ibid.

III. I PROCEED now to a third method, whereby a title to goods and chattels may be acquired and lost, viz. by forfeiture; as a punishment for some crime or misdemesnor in the party forfeiting, and as a compensation for the offence and injury committed against him to whom they are forfeited. Of forfeitures, considered as the means whereby real property might be lost and acquired, we treated in a former chapter. It remains therefore in this place only to mention, by what means or for what offences goods and chattels become liable to forfeiture.

In the variety of penal laws with which the subject is at present incumbered, it were a tedious and impracticable task to reckon up the various forfeitures, inflicted by special statutes, for particular crimes and misdemesnors: some of which are mala in se, or offences against the divine law, either natural or revealed; but by far the greatest part are mala prohibitae, or such as derive their guilt merely from their prohibition by the laws of the land; such as is the forfeiture of 40 s. per month by the statute
5 Eliz. c. 4, for exercising a trade without having served seven years as an apprentice thereto; and the forfeiture of 10 l. by 9 Ann. c. 23, for printing an almanac without a stamp. I shall therefore confine myself to those offences only, by which all the goods and chattels of the offender are forfeited: referring the student for such, where pecuniary mulcts of different quantities are inflicted, to their proper heads, under which very many of them have been or will be mentioned; or else to the collections of Hawkins and Burn, and other laborious compilers. Indeed, as most of these forfeitures belong to the crown, they may seem as if they ought to have been referred to the preceding method of acquiring personal property, namely, by prerogative. But as, in the instance of partial forfeitures, a moiety often goes to the informer, the poor, or sometimes to other persons; and as one total forfeiture, namely that by a bankrupt who is guilty of felony by concealing his effects, accrues entirely to his creditors. I have therefore made it a distinct head of transferring property.

GOODS and chattels then are totally forfeited by conviction of high treason, or misprison of treason; of petit treason; of felony in general, and particularly of felony de fe, and of manslaughter; nay even by conviction of excusable homicide; by outlaway for treason or felony; by conviction of petit larceny; by slight in treason or felony, even though the party be acquitted of the fact; by standing mute, when arraigned of felony; by drawing a weapon on a judge, or striking any one in the presence of the king’s courts; by praemenire; by pretended prophecies, upon a second conviction; by owling; by the residing abroad of artificers; and by challenging to fight on account of money won at gaming. All these offences, as will more fully appear in the fourth book of these commentaries, induce a total forfeiture of goods and chattels.

AND this forfeiture commences from the time of conviction, not the time of committing the fact, as in forfeitures of real property. For chattels are of so vague and fluctuating a nature, that to affect them, by any relation back, would be attended with more inconvenience than in the case of landed estates: and part, if not the whole of them, must be expended in maintaining the delinquent, between the time of committing the fact and
his conviction. Yet a fraudulent conveyance of them, to defeat the interest of the crown, is made void by statute 13 Eliz. c. 5.

i Co. Litt. 391. 2 Inst. 316. 320.

CHAPTER THE TWENTY EIGHTH.
OF TITLE BY CUSTOM.

A FOURTH method of acquiring property in things personal, or chattels, is by custom: 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. It were endless, should I attempt to enumerate all the several kinds of special customs, which may entitle a man to a chattel interest in different parts of the kingdom: I shall therefore content myself with making some observations on three sorts of customary interests, which obtain pretty generally throughout most parts of the nation, and are therefore of more universal concern; viz. heriots, mortuaries, and heir-looms.

1. HERIOTS, which were slightly touched upon in a former chapter a, are usually divided into two sorts, herio-service, and heriot-custom. The former are such as are due upon a special reservation in a grant or lease of lands, and therefore amount to little more than a mere rent b: the latter arise upon no special reservation whatsoever, but depend merely upon immemorial usage and custom c. Of these therefore we are here principally to speak: and they are defined to be a customary tribute of goods and chattels, payable to the lord of the fee on the decease of the owner of the land.

a pag. 97.
b 2 Saund. 166.
c Co. Cop, 24.

THE first establishment, if not introduction, of compulsory heriots into England, was by the Danes: and we find in the laws of king Canute d the several heregeates or heriots specified, which were then exacted by the king on the death of divers of his subjects, according to their respective dignities; from the highest eorle down to the most inferior thegne or landholder. These, for the most part, consisted in arms, horses, and
habiliments of war; which the word itself, according to sir Henry Spelmane, signifies. These were delivered up to the sovereign of the death of the vasal, who could no longer use them, to be put into other hands for the service and defence of the country. And upon the plan of this Danish establishment did William the conqueror fashion his law of reliefs, as was formerly observed; when he ascertained the precise relief to be taken of every tenant in chivalry, and, contrary to be feodal custom and the usage of his own duchy of Nornany, required arms and implements of war to be paid instead of money.

THE Danish compulsive heriots, being thus transmuted into reliefs, underwent the same several vicissitudes as the feodal tenures, and in foveage estates do frequently remain to this day, in the shape of a double rent payable at the death of the tenant: the heriots which now continue among us, and preserve that name, seeming rather to be of Saxon parentage, and at first to have been merely discretionary. These are now for the most part confined to copyhold tenures, and are due by custom only, which is the life of all estates by copy; and perhaps are the only instance where custom has favored the lord. For this payment was originally a voluntary donation, or gratuitous legacy of the tenant; perhaps in acknowledgement of his having been raised a degree above villenage, when all his goods and chattels were quite at the mercy of the lord: and custom, which has on the

d c. 69.
e of feuds. c. 18.
f pag. 65.
h Lambard. Peramb. of Kent. 492.

one hand confirmed the tenant's interest in exclusion of the lord's will, has on the other hand established this discretionary piece of gratitude into a permanent duty. An heriot may also appertain to free land, that is held by service and suit of court; in which case it is most commonly a copyhold enfranchised, whereupon the heriot is still due of custom. Bractoni speaks of heriots as frequently due on the death of both species of tenants: et quidem alia praefatio quae nominatur heriettum; ubi tenens, liber vel servus, in morte sua dominum fuum, de quo tenuerit, repicit de meliori averio suo, vel de secundo meliori, fecundum diversam locorum consuetudinem. And this, he adds, magis fit de gratia quam de jure; in
which Fletak and Britton lagree: thereby plainly intimating the original of this custom to have been merely voluntary, as a legacy from the tenant; though now the immemorial usage has established it as of right in the lord.

THIS heriot is sometimes the best live beast, or averium, which the tenant dies possessed of, (which is particularly denominated the villein's relief in the twenty ninth law of king William the conqueror) sometimes the best inanimate good, under which a jewel or piece of plate may be included: but it is always a personal chattel, which, immediately on the death of the tenant who was the owner of it, being ascertained by the option of the lord, becomes vested in him as his property; and is no charge upon the lands, but merely on the goods and chattels. The tenant must be the owner of it, else it cannot be due; and therefore on the death of a feme-covert no heriot can be taken; for she can have no ownership in things personal. In some places there is a customary composition in money, as ten or twenty shillings in lieu of a heriot, by which the lord and tenant are both bound, if it be an indisputably ancient custom: but a new composition of this sort will not bind the representatives of either party; for that amounts to the creation of a new custom, which is now impossible.

i l. 2. c. 36. 9.  
k l. 3. c. 18.  
l c. 69.  
m Hob. 60.  
n Keilw. 84. 4 Leon. 239.  
o Co. Cop. 31.  

2. MORTUARIES are a sort of ecclesiastical heriots, being a customary gift claimed by and due to the minister in very many parishes on the death of his parishioners. They seem originally to have been, like lay heriots, only a voluntary bequest to the church; being intended, as Lyndewode informs us from a constitution of archbishop Langham, as king of expiation and amends to the clergy for the personal tithes, and other ecclesiastical duties, which the laity in their life-time might have neglected or forgotten to pay. For this purpose, after the lord's heriot or best good was taken out, the second best chattel was reserved to the church as a mortuary:

\[
\text{fi decedens plura habuerit animalia, optimo cui de jure suerit debitum reservato, eccle\'iae fuae fine dolo, fraude, sue contradictione qualibet, pro recompensatione subtractionis decimarum personalium, necnon et obligationum, fecundum melius animal reservetur, poft obitum, pro salute}
\]
animae fuaeq. And therefore in the laws of king Canuter this mortuary is called soul-scot (raplrcea) or symbolum animae. And, in pursuance of the same principle, by the laws of Venice, where no personal tithes have been paid during the life of the party, they are paid at his death out of his merchantize, jewels, and other move-ables s. So also, by a similar policy, in France, every man that died without bequeathing a part of his estate to the church, which was called dying without confession, was formerly deprived of christian burial: or, if he died intestate, the relations of the deceased, jointly with the bishop, named proper arbitrators to determine what he ought to have given to the church, in case he had made a will. But the parliament, in 1409, redressed the grievance t.

IT was anciently usual in this kingdom to bring the mortuary to church along with the corpse when it came to be buried; and thence u it is sometimes called a corse-present: a term, which

p Co. Litt. 185.
q Provinc. l. 1. tit. 3.
r c. 13.
s Panormitan. ad Decretal. l. 3. t. 20. c. 32.
t Sp. L. b. 28. c. 41.
u Selden. Hist, of tithes. c. 10.

bespeaks it to have been once a voluntary donation. However in Bracton's time, so early as Henry III, we find it riveted into an established custom: insomuch that the bequests of heriots and mortuaries were held to be necessary ingredients in every testament of chattels. Imprimis autem debet quilibet, qui testamentum fecerit, dominum fuum de meliori re quam habuerit cognoscere; et postea ecclesiam de alia meliori: the lord must have the best good left him as an heriot; and the church the second best as a mortuary. But yet this custom was different in different places: in quibusdam locis habet ecclesiam melius animal de consuetudine; in quibusdam fecundum, vel tertium melius; et in quibusdam nihil: et ideo consideranda est consuetudo loci. This custom still varies in different places, not only as to the mortuary to be paid, but the person to whom it is payable. In Wales, a mortuary or corse-present was due upon the death of every clergyman to the bishop of the diocese; till abolished, upon a recompense given to the bishop, by the statute 12 Ann. ft. 2. c. 6. And in the archdeaconry of Chester a custom also prevailed, that the bishop, who is also archdeacon, should have at the death of every clergyman dying
therein, his best horse or mare, bridle, saddle, and spurs, his best gown or cloak, hat, upper garment under his gown, and tippet, and also his best signet or ring x. But by statute 28 Geo. II. c. 6. this mortuary is directed to cease, and the act has settled upon the bishop an equivalent in its room. The king's claim to many goods, on the death of all prelates in England, seems to be of the same nature; though sir Edward Coke/yapprehends, that this is a duty due upon death and not a mortuary: a distinction which seems to be without difference. For not only the king's ecclesiastical character, as supreme ordinary, but also the species of the goods claimed, which bear so near a resemblance to those in the archdeaconry of Chester, which was an acknowledged mortuary, puts the matter out of dispute. The king, according to the record vouched by sir Edward Coke, is entitled to fix things; the bishop's best horse or palfrey, with his furniture: his cloak, or gown, and tippet: his cup, and cover: his bafon, and ewer: his gold ring: and, lastly, his muta canum, his mew or kennel of hounds; as was mentioned in the preceding chapter z.

w Bracton. l. 2. c. 26. Flet. l. 2. c. 57.  
x Cro. Car. 237.  
y 2 Inst. 491.

or gown, and tippet: his cup, and cover: his bafon, and ewer: his gold ring: and, lastly, his muta canum, his mew or kennel of hounds; as was mentioned in the preceding chapter z.

THIS variety of customs, with regard to mortuaries, giving frequently a handle to exactions on the one side, and frauds or expensive litigations on the other; it was thought proper by statute 21 Hen. VIII. c. 6. to reduce them to some kind of certainty. For this purpose it is enacted, that all mortuaries, or corse-presents to parsons of any parish, shall be taken in the following manner; unless where by custom less or none at all is due: viz. for every person who does not leave goods to the value of ten marks, nothing: for every person who leaves goods to the value of ten marks, and under thirty pounds, 3s. 4d. if above thirty pounds, and under forty pounds, 6s. 8d. if above forty pounds, of what value soever they may be, 10 s. and no more. And no mortuary shall throughout the kingdom be paid for the death of any femecovert; nor any child; nor for any one of full age, that is not a housekeeper; nor for any wayfaring man; but such wayfaring man's mortuary shall be paid in the parish to which he belongs. And upon this statute stands the law of mortuaries to this day.

3. HEIR-LOOMS are such goods and personal chattels, as, contrary to the nature of chattels, shall go by special custom to the heir along with the
inheritance, and not to the executor of the last proprietor. The termination, loom, is of Saxon original; in which language it signifies a limb or member a; so that an heirloom is nothing else, but a limb or member of the inheritance. They are generally such things as cannot be taken away without damaging or dismembering the freehold; otherwise the general rule, is that no chattel interest whatsoever shall go to the heir, notwithstanding it be expressly limited to a man and his heirs, but shall vest in the executor b. But deer in a real authorized park, fishes in a pond, doves in a dove-house, &c, though in

z pag. 413.
a Spelm. Gloff. 277.
b Co. Litt. 388.

themselves personal chattels, yet they are so annexed to and so necessary to the well-being of the inheritance, that they shall accompany the land wherever it vests, by either descent or purchase c. For this reason also I apprehend it is, that the ancient jewels of the crown are held to be heir-looms d: for they are necessary to maintain the state, and support the dignity, of the sovereign for the time being. Charters likewise, and deeds, court-rolls, and other evidences of the land, together with the chests in which they are contained, shall pass together with the land to the heir, in the nature of heir-looms, and shall not go to the executor e. By special custom also, in some places, carriages, utensils, and other household implements may be heir-looms f; but such custom must be strictly proved. On the other hand, by almost general custom, whatever is strongly affixed to the freehold or inheritance, and cannot be severed from thence without violence or damage, quod ab aedibus non facile revellitur g,? is become a member of the inheritance, and shall thereupon pass to the heir; as marble chimney-pieces, pumps, old fixed or dormant tables, benches, and the like h. A very similar notion to which prevails in the duchy of Brabant; where they rank certain things moveable among those of the immoveable king, calling them, by a very peculiar appellation, praedia volantia, or volatile estates: such as beds, tables, and other heavy implements of furniture, which (as an author of their own observes)dignitatem iftam nacta funt, ut villis, fylvis, et aedibus, aliifque praediis, comparentur; quod solidiora mobilia ipfis aedibus ex deftinatione patrisfamilias cohaerere videantur, et pro parte ipfarum aedium aeftimentur i.
OTHER personal chattels there are, which also descend to the heir in the nature of heir-looms, as a monument or tombstone in a church, or the coat-armor there hung up,

c Co Litt. 8.
d Ibid. 18.
e Bro. Abr. tit. chatteles. 18.
f Co. Litt. 18. 185.
g Spelm. Gloff. 277.
h 12 Mod. 520.
i Stockmans de jure devolutionis. c. 3. 16.

with the pennons and other ensigns of honor, suited to his degree. In this case, albeit the freehold of the church is in the parson, and these are annexed to that freehold, yet cannot the parson or any other take them away or deface them, but is liable to an action from the heir k. Pews in the church are somewhat of the same nature, which may descend by custom immemorial (without any ecclesiastical concurrence) from the ancestor to the heir.l. But though the heir has a property in the monuments and escutcheons of his ancestors, yet he had none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried. The parson indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it: and, if any one in taking up a dead body steals the shroud or other apparel, it will be felony m; for the property thereof remains in the executor, or whoever was at the charge of the funeral.

BUT to return to heir-looms: these, though they be mere chattels, yet cannot be devised away from the heir by will; but such a devise is void n, even by a tenant in fee-simple. For, though the owner might during his life have sold or disposed of them, as he might of the timber of the estate, since as the inheritance was his own, he might mangle or dismember it as he pleased; yet, they being at his death instantly vested in the heir, the devise (which is subsequent, and not to take effect till after his death) shall be postponed to the custom, whereby they have already descended.

CHAPTER THE TWENTY NINTH.
OF TITLE BY SUCCESSION, MARRIAGE, AND JUDGMENT.

IN the present chapter we shall take into consideration three other species of title to goods and chattels.

V. THE fifth method therefore of gaining a property in chattels, either personal or real, is by succession: which is, in strictness of law, only applicable to corporations aggregate of many, as dean and chapter, mayor and commonalty, master and fellows, and the like; in which one set of men may, by succeeding another set, acquire a property in all the goods, moveables, and other chattels of the corporation. The true reason whereof is, because in judgment of law a corporation never dies; and therefore the predecessors, who lived a century ago, and their successors now in being, are one and the same body corporate. Which identity is a property so inherent in the nature of a body politic, that, even when it is meant to give any thing to be taken in succession by such a body, that succession need not be expressed; but the law will of itself imply it. So that a gift to such a corporation, either of lands, or of chattels, without naming their successors, vests an absolute property in them so long as the corporation subsists. And thus a lease for years, an obligation, a

jewel, a flock of sheep, or other chattel interest, will vest in the successors, by succession, as well as in the identical members, to whom it was originally given.

BUT, with regard to sole corporations, a considerable distinction must be made. For if such sole corporation be the representative of a number of persons; as the master of an hospital, who is a corporation for the benefit of the poor brethren; an abbot, or prior, by the old law before the reformation, who represented the whole convent; or the dean of some ancient cathedrals, who stands in the place of, and represents in his corporate capacity, the chapter; such sole corporations as these have in
this respect the same powers, as corporations aggregate have, to take personal property or chattels in succession. And therefore a bond to such a master, abbot, or dean, and his successors, is good in law; and the successor shall have the advantage of it, for the benefit of the aggregate society, of which he is in law the representative. Whereas 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: and therefore, if a lease for years be made to the bishop of Oxford and his successors, in such case his executors or administrators, and not his successors, shall have it. For the word successors, when applied to a person in his politic capacity, is equivalent to the word heirs in his natural: and as such a lease for years, if made to John and his heirs, would not vest in his heirs, but his executors; so, if it be made to John bishop of Oxford and his successors, who are the heirs of his body politic, it shall still vest in his executors and not in such his successors. The reason of this is obvious: for, besides that the law looks upon goods and chattels as of too low and perishable a nature to be limited either to heirs, or such successors as are equivalent to heirs; it would also follow, that if any such chattel interest (granted to a sole corporation and his successors) were allowed to descend to such successors, the property thereof must be in abeyance from the death of the present owner.

d Co. Litt. 46.

until the successors be appointed: and this is contrary to the nature of a chattel interest, which can never be in abeyance or without an owner e; but a man's right therein, when once suspended, is gone for ever. This is not the case in corporations aggregate, where the right is never is suspense; nor in the other sole corporations before-mentioned, who are rather to be considered as head of an aggregate body, than subsisting merely in their own right: the chattel interest therefore, in such a case, is really and substantially vested in the hospital, convent, chapter, or other aggregate body; though the head is the visible person in whose name every act is carried on, and in whom every interest is therefore said (in point of form) to vest. But the general rule, with regard to corporations merely sole, is this, that no chattel can go or be acquired by right of succession f.

YET to this rule there are two exceptions. One in the case of the king, in whom a chattel may vest by a grant of it formerly made to a preceding king
and his successors g. The other exception is, where, by a particular custom, some particular corporations sole have acquired a power of taking particular chattel interests in succession. And this custom, being against the general tenor of the common law, must be strictly interpreted, and not extended to any other chattel interests than such immemorial usage will strictly warrant. Thus the chamberlain of London, who is a corporation sole, may by the custom of London take bonds and recognizances to himself and his successors, for the benefit of the orphan's fund h: but it will not follow from thence, that he has a capacity to take a lease for years to himself and his successors for the same purpose; for the custom extends not to that: nor that he may take a bond to himself and his successors, for any other purpose than the benefit of the orphan's fund; for that also is not warranted by the custom. Wherefore, upon the whole, we may close this head with laying down this general rule; that such right of succession to chattels is universally inhe-

e Brownl. 132.
f Co. Litt. 46.
g Ibid. 90.

rent by the common law in all aggregate corporations, in the king, and in such single corporations as represent a number of persons; and may, by special custom, belong to certain other sole corporations for some particular purposes: although, generally, in sole corporations no such right can exist.

VI. A SIXTH method of acquiring property in goods and and chattels is by marriage; whereby those chattels, which belonged formerly to the wife, are by act of law vested in the husband, with the same degree of property and with the same powers, as the wife, when sole, had over them.

THIS depends entirely on the notion of an unity of person between the husband and wife; it being held that they are one person in law i, so that the very being and existence of the woman is suspended during the coverture, or entirely merged and incorporated in that of the husband. And hence if follows, that whatever personal property belonged to the wife, before marriage, is by marriage absolutely vested in the husband. In a real estate he only gains a title to the rents and profit during coverture: for that, depending upon feodal principles, remains entire to the wife after
the death of her husband, or to her heirs, if she dies before him; unless, by
the birth of a child, he becomes tenant for life by the curtesy. But, in
chattel interests, the sole and absolute property vests in the husband, to be
disposed of at his reduces them to possession, by exercising some act of
ownership upon them, no property vests in him, but they shall remain to
the wife, or to her representatives, after the coverture is determined.

THERE is therefore a very considerable difference in the acquisition of this
species of property by the husband, according to the subject-matter; viz.
whether it be a chattel real, or a

i See Book I. c. 15.

chattel personal; and, of chattels personal, whether it be in possession, or
in action only. A chattel real vests in the husband, not absolutely, not sub
modo. 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 disposed
of it during the coverture k: if he be outlawed or attainted, it shall be
forfeited to the king l: it is liable to execution for his debts m: and, if he
survives his wife, it is to all intents and purposes his own n. Yet if he has
made no disposition thereof in his lifetime, and dies before his wife, he
cannot disposed of it by will o: for, the husband having made no alteration
in the property during his life, it never was transferred from the wife; but
after his death she shall remain in her ancient possession, and it shall not
go to his executors. So it is also of chattels personal (or choses) in action;
as debts upon bond, contracts, and the like: these the husban
d may have if
he pleases; that is, if he reduces them into possession by receiving or
recovering them at law. And, upon such receipt or recovery, they are
absolutely and entirely his own; and shall go to his executors or
administrators, or as he shall bequeath them by will, and shall not revest
in the wife. But, if he dies before he has recovered or reduced them into
possession, of that at his death they still continue choses in action, they
shall survive to the wife; for the husband never exerted the power he had
of obtaining an exclusive property in them p. And so, if an estray comes
into the wife's franchise, and the husband seises it, it is absolutely his
property: but, if he dies without seising it, his executors are now at liberty
to seise it, but the wife or her heirs q; for the husband never exerted the
right he had, which right determined with the coverture. Thus in both
these species of property the law is the same, in case the wife survives the
husband; but, in case the husband survives the wife, the law is very different with respect to chattels real and choses in action:

k Co. Litt. 46.
l Plowd. 263.
m Co. Litt. 351.
n Ibid. 300.
o Poph. 5. Co. Littt. 351.
p Co. Litt. 351.
q Ibid.

for he shall have the chattel real by survivorship, but not the chose in action; except in the case of arrears of rent, due to the wife before her coverture, which in case of her death are given to the husband by statute 32 Hen. VIII. c. 37. And the reason for the general law is this: that the husband is in absolute possession of the chattel real during the coverture by a kind of joint-tenancy with his wife; wherefore the law will not wrest it out of his hands, and give it to her representatives: though in case he had died first, it would have survived to the wife, unless he thought proper in his lifetime to alter the possession. But a chose in action shall not survive to him, because he never was in possession of it at all, during the coverture; and the only method he had to gain possession of it, was by suing in his wife's right: but as, after her death, he cannot (as husband) bring an action in her right, because they are no longer one and the same person in law, therefore he can never (as such) recover the possession. But he still will be intitled to be her administrator; and may, in that capacity, recover such things in action as became due to her before or during the coverture.

THUS, and upon these reasons, stands the law between husband and wife, with regard to chattels real, and choses in action; but, as to chattels personal (or choses) in possession, which the wife hath in her own right, as ready money, jewels, household goods, and the like, the husband hath therein an immediate and absolute property, devolved to him by the marriage, not only potentially but in fact, which never can again revest in the wife or her representatives.

AND, as the husband may thus, generally, acquire a property in all the personal substance of the wife, so in one particular instance the wife may acquire a property in some of her husband's goods; which shall ramian to
her after his death, and shall not go to his executors. These are called her paraphernalia; which is

r 3 Mod. 186.
s Co. Littt. 351.

a term borrowed from the civil law t, and is derived from the Greek language, signifying something over and above her dower. Our law uses it to signify the apparel and ornaments of the wife, suitable to her rank and degree; which she becomes entitled to at the death of her husband over and above her jointure or dower, and preferably to all other representatives: and the jewels of a peeress, usually worn by her, have been held to be paraphernalia w. Neither can the husband devise by his will such ornaments and jewels of his wife; though during his life perhaps he hath the power (if unkindly inclined to exert it) to sell them or give them away x. But if she continues in the use of them till his death, she shall afterwards retain them against his executors and administrators, and all other persons, except creditors where there is a deficiency of assets y. And her necessary apparel is protected even against the claim of creditors z.

VII. A JUDGMENT, in consequence of some suit or action in a court of justice, is frequently the means of vesting the right and property of chattel interests in the prevailing party. And here we must be careful to distinguish between property, the right of which is before vested in the party, and of which only possession is recovered by suit or action; and property, to which a man before had no determinate title or certain claim, but he gains as well the right as the possession by the process and judgment of the law. Of the former sort are all debts and choses in action; as if a man gives bond for 20 l, or agrees to buy a horse at a stated sum, or takes up goods of a tradesman upon an implied stated sum, or takes up goods of a tradesman upon an implied contract to pay as much as they are reasonably worth: in all these cases the right accrues to the creditor, and is completely vested in him at the time of the bond being sealed, and the contract or agreement made; and the law only gives him a remedy to reco-

t Ff. 23. 3. 9. 3.
u Cro. Car. 343. 1 Roll. Abr. 911. 2 Leon. 166.
w Moor. 213.
y 1 P. Wms. 730.
ver the possession of that right, which already in justice belongs to him. But there is also a species of property to which a man has not any claim or title whatsoever, till after suit commenced and judgment obtained in a court of law: where the right and the remedy do not follow each other, as in common cases, but accrue at one and the same time; and where, before judgment had, no man can say that he has any absolute property, either in possession or in action. Of this nature are,

1. SUCH penalties as are given by particular statutes, to be recovered on an action popular; or, in other words, to be recovered by him or them that will sue for the same. Such as the penalty of 500 l, which those persons are by several acts of parliament made liable to forfeit, that, being in particular offices or situations in life, neglect to take the oaths to the government; which penalty is given to him or them that will sue for the same. Now here it is clear that no particular person, A or B, has any right, claim, or demand, in or upon this penal sum, till after action brought a; for he that brings his action and can bona fide obtain judgment first, will undoubtedly secure a title to it, in exclusion of every body else. He obtains an inchoate imperfect degree of property, by commencing his suit; but it is not consummated till judgment, for if any collusion appears, he loses the priority he had gained b. But, otherwise, the right so attaches in the first informer, that the king (who before action brought may grant a pardon which shall be a bar to all the world) cannot after suit commenced remit any thing but his own part of the penalty c. For by commencing the suit the informer has made the popular action his own private action, and it is not in the power of the crown, or of any thing but parliament, to release the informer's interest. This therefore is one instance, where a suit and judgment at law are not only the means of re-

b Stat. 4 Hen. VII. c. 20.

covering, but also of acquiring, property. And what is said of this one penalty is equally true of all others, that are given thus at large to a common informer, or to any person that will sue for the same. They are placed as it were in a state of nature, accessible by all the king's subjects, but the acquired right of none of them: open therefore to the first
occupant, who declares his intention to possess them by bringing his action; and who carries that intention into execution, by obtaining judgment to recover them.

2. ANOTHER species of property, that is acquired and lost by suit and judgment at law, is that of damages given to a man by a jury, as a compensation and satisfaction for some injury sustained; as for a battery, for imprisonment, for slander, or for trespass. Here the plaintiff has no certain demand till after verdict; but, when the jury has assessed his damages, and judgment is given thereupon, whether they amount to twenty pounds or twenty shillings, he instantly acquires, and the defendant loses at the same time, a right to that specific sum. It is true, that this is not an acquisition so perfectly original as in the former instance: for here the injured party has unquestionably a vague and indeterminate right to some damages or other, the instant he receives the injury; and the verdict of the jurors, and judgment of the court thereupon, do not in this case so properly vest a new title in him, as fix and ascertain the old one; they do not give, but define, the right. But however, though strictly speaking the primary right to a satisfaction for injuries is given by the law of nature, and the suit is only the means of ascertaining and recovering that satisfaction; yet, as the legal proceedings are the only visible means of this acquisition of property, we may fairly enough rank such damages, or satisfaction assessed, under the head of property acquired by suit and judgment at law.

3. HITHER also may by referred, upon the same principle, all title to costs and expenses of suit; which are often arbitrary, and rest entirely in the determination of the court, upon weighing all circumstances, both as to the quantum, and also (in the courts of equity especially, and upon motions in the courts of law) whether there shall be any costs at all. These costs therefore, when given by the court to either party, may be looked upon as an acquisition made by the judgment of law.

CHAPTER THE THIRTIETH.
OF TITLE BY GIFT, GRANT, AND CONTRACT.

WE are now to proceed, according to the order marked out, to the discussion of two of the remaining methods of acquiring a title to property in thins personal, which are much connected together, and answer in some
measure to the conveyances of real estates; being those by gift of grant, and by contract: whereof the former vests a property in possession, the latter a property in action.

VIII. GIFTS then, or grants, which are the eighth method of transferring personal property, are thus to be distinguished from each other, that gifts are always gratuitous, grants are upon some consideration or equivalent: and they may be divided, with regard to their subject-matter, into gifts or grants of chattels real, and gifts or grants of chattels personal. Under the head of gifts or grants of chattels real may be included all leases for years of land, assignments, and surrenders of those leases; and all the other methods of conveying an estate less than freehold, which were considered in the twentieth chapter of the present book, and therefore need not be here again repeated: though these very seldom carry the outward appearance of a gift, however freely bestowed; being usually expressed to be made in consideration of blood, or natural affection, or of five or ten shillings nominally paid to the grantor; and, in case of leases, always reserving a rent, though it be but a peppercorn: any of which considerations will, in the eye of the law, convert the gift, if executed, into a grant; if not executed, into a contract.

GRANTS or gifts, of chattels personal, are the act of transferring the right and the possession of them; whereby one man renounces, and another man immediately acquires, all title and interest therein: which may be done either in writing, or by word of mouth attested by sufficient evidence, of which the delivery of possession is the strongest and most essential. But this conveyance, when merely voluntary, is somewhat suspicious: and is usually construed to be fraudulent, if creditors or others become sufferers thereby. And, particularly, by statute 3 Hen. VII. c. 4. all deeds of gift of goods, made in trust to the use of the donor, shall be void; because otherwise persons might be tempted to commit treason or felony, without danger of forfeiture; and the creditors of the donor might also be defrauded of their rights. And by statute 13 Eliz. c. 5. every grant or gift of chattels, as well as lands, with intent to defraud creditors or others b, shall be void as against such persons to whom such fraud would be prejudicial; but, as against the grantor himself, shall stand good and judicial; but, as against the grantor himself, shall stand good and effectual: and all persons partakers in, or privy to, such fraudulent grants, shall forfeit the whole
value of the goods, one moiety to the king, and another moiety to the party 
grieved; and also on conviction shall suffer imprisonment for half a year.

A TRUE and proper gift or grant is always accompanied with delivery of 
possession, and takes effect immediately; as if A gives to B 100 l, or a flock 
of sheep, and puts him in possession of them directly, it is then a gift 
executed in the donee; and it is not in the donor's power to retract it; 
though he did it without any consideration or recompense: unless it be 
prejudicial to creditors; or the donor were under any legal incapacity, as 
infancy, converture, duress, or the like; or if he were drawn in, 
circumvented, or imposed upon, by false pretences, ebriety, or surprize. 
But if the gift does not take effect, by delivery of immediate possession, it 
is then not properly a gift, but a contract: and this

a Perk. 57.
b See 3 Rep. 82.
c Jenk. 109.

a man cannot be compelled to perform, but upon good and sufficient 
consideration; as we shall see under our next division.

IX. A CONTRACT, which usually conveys an interest merely in action, is 
thus defined: an agreement, upon sufficient consideration, to do or not to 
do a particular thing. From which definition there arise three points to be 
contemplated in all contract; 1. The agreement: 2. The consideration: and 
3. The thing to be done or omitted, or the different species of contracts.

FIRST then it is an agreement, a mutual bargain or convention; and 
therefore there must at least be two contracting parties, of sufficient ability 
to make a contract: as where A contracts with B to pay him 100 l. and 
thereby transfers a property in such sum to B. Which property in however 
not in possession, it could not be transferred to another person by the 
strict rules of the ancient common law: for no chose in action could be 
assigned or granted over d, because it was thought to be a great 
encouragement to litigiousness, if a man were allowed to make over to a 
stranger his right of going to law. But this nicety is now disregarded: 
though, in compliance with the ancient principle, the form of assigning a 
chose in action is in the nature of a declaration of trust, and an agreement 
to permit the assignee to make use of the name of the assignor, in order to 
recover the possession. And therefore, when in common acceptation a
debt or bond is said to be assigned over, it must still be sued in the original creditor's name; the person, to whom it is transferred, being rather an attorney than an assignee. But the king is an exception to this general rule; for he might always either grant or receive a chose in action by assignemente: and our courts of equity, considering that in a commercial country almost all personal property must necessarily lie in contract, will protect the assignment of a chose in action, as much as the law will that of a chose in possession.

d Co. Litt. 214.
f 3 P. Wms. 199.

THIS contract or agreement 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 ten load of timber, or to pay a stated price for certain goods. Implied are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform. As, if I employ a person to do any business for me, or perform any work; the law implies that I undertook or contracted, to pay him as much as his labour deserves. If I take up wares from a tradesman, without any agreement of price, the law concludes that I contracted to pay their real value. And there is also one species of implied contracts, which runs through and is annexed to all other contracts, conditions, and covenants; viz. that if I fail in my part of the agreement, I shall pay the other party such damages as he has sustained by such my neglect or refusal. In short, almost all the rights of personal property (when not in actual possession) do in great measure depend upon contracts of one kind or other, or at least might be reduced under some of them: which indeed is the method taken by the civil law; it having referred the greatest part of the duties and rights, which it treats of, to the head of obligations ex contractu and quasi ex contractug.

A CONTRACT may also be either executed, as if A agrees to change horses with B, and they do it immediately; in which case the possession and the right are transferred together: or in 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: for a contract executed (which differs nothing from a grant) conveys a chose in possession; a contract executory conveys only a chose in action.
HAVING thus shewn the general nature of a contract, we are, secondly to proceed to the consideration upon which it is founded; or the reason which moves the party contracting to enter

Into the contract. It is an agreement, upon sufficient consideration. The civilians hold, that in all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal. This thing, which is the price or motive of the contract, we call the consideration: and it must be a thing lawful in itself, or else the contract is void. A good consideration, we have before seen, is that of blood or natural affection between near relations; the satisfaction accruing from which the law esteems an equivalent for whatever benefit may move from one relation to another. This consideration may sometimes however be set aside, and the contract become void, when it tends in its consequences to defraud creditors or other third persons of their just rights. But a contract for any valuable consideration, as for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached at law; and, if it be of a sufficient adequate value, is never set aside in equity: for the person contracted with has then given an equivalent in recompense, and is therefore as much an owner, or a creditor, as any other person.

These valuable considerations are divided by the civilians into four species. 1. Do, ut des: as when I give money or goods, on a contract that I shall be repaid money or goods for them again. Of this kind are all loans of money upon bond, or promise of repayment; and all sales of goods, in which there is either an express contract to pay so much for them or else the law implies a contract to pay so much as they are worth. 2. The second species is, facio, ut facias: as when I agree with a man to do his work for him, if he will do mine for me; or if two persons agree to marry together; or to do any other positive acts on both sides. Or, it may be to forbear on one side in consideration of something done on the other; as, that in consideration A, the tenant, will repay his house, B, the landlord, will not sue him for waste. Or, it may be for mutual forbearance on both

h In omnibus contractibus, five nominatibus, five innominatis, permutatio continetur. Gravin. l. 2. 12.
fides; as, that in consideration that A will not trade Lisbon, B will not trade to Marseilles; so as to avoid interfering with each other. 3. The third species of considerations is, facio, ut des: when a man agrees to perform anything for a price, either specifically mentioned, or left to the determination of the law to set a value on it. As when a servant hires himself to his master, for certain wages or an agreed sum of money: here the servant contracts to do his master's service, in order to earn that specific sum. Otherwise, if he be hired generally; for then he is under an implied contract to perform this service for what it shall be reasonably worth. 4. The fourth species is, do, ut facias: which is the direct counterpart of the other. As when I agree with a servant to give him such wages upon his performing such work: which, we see, is nothing else but the last species inverted; for servus facit, ut herus det, and herus dat, ut servus faciat.

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 cannot be compelled to perform it l. As if one man promises to give another 100 l. here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. And, however a man may or may not be bound to perform it, in honor or conscience, which the municipal laws do not take upon them to decide; certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for: and therefore our law has adopted the maxim of civil law n, that ex nudo pacto non oritur action. But any degree of reciprocity will prevent the pact from being nude: nay, even if the thing 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. And as this rule was principally established, to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could

l D. & t. d. 2. c. 24.
m Bro. Abr. tit. uette. 79. Salk. 129.
 n Cod. 2. 3. 10 & 5. 14. 1.
be assigned o, it therefore does not hold in some cases, where such promise is authentically proved by written documents. For if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of a consideration in order to evade the payment: for every bond from the solemnity of the instrument p, and every note from the subscription of the drawer q, carries with it an internal evidence of a good consideration. Courts of justice will therefore support them both, as against the contractor himself; but not to the prejudice of creditors, or strangers to the contract.

WE are next to consider, thirdly, the thing agreed to be done or omitted. A contract is an agreement, upon sufficient consideration, to do or not to do a particular thing. The most usual contracts, whereby the right of chattels personal may be acquired in the laws of England, are, 1. That of sale or exchange. 2. That of bailment. 3. That of hiring and borrowing. 4. That of debt.

1. SALE or exchange is a transmutation of property from one man to another, in consideration of some recompense in value: for there is no sale without a recompense; there must be quid pro quo r. If it be a commutation of goods for goods, it is more properly an exchange; but, if it be a transferring of goods for money, it is called a sale: which is a method of exchange introduced for the convenience of mankind, by establishing an universal medium, which may be exchanged for all sorts of other property; whereas if goods were only to be exchanged for goods, by way of barter, it would be difficult to adjust the respective values, and the carriage would be intolerably cumbersome. All civilized nations adopted therefore very early the use of money; for we find Abraham giving four hundred shekels of silver, current money with the merchant, s for the field of Machpelah s; though the practice of exchanges still subsists among several of the savage nations. But with regard to the law of sales and exchanges,
first place where the vendor hath in himself, and secondly where he hath not, the property of the thing sold.

WHERE the vendor hath in himself the property of the goods sold, he hath the liberty of disposing of them to whomever he pleases, at any time, and in any manner: unless judgment has been obtained against him for a debt or damages, and the writ of execution is actually delivered to the sheriff. For then, by the statute of frauds, the sale shall be looked upon as fraudulent, and the property of the goods shall be bound to answer the debt, from the time of delivering the writ. Formerly it was bound from the teste, or issuing, of the writ, and any subsequent sale was fraudulent; but the law was thus altered in favour of purchasers, though it still remains the same between the parties: and therefore, if a defendant dies after the awarding and before the delivery of the writ, his goods are bound by it in the hands of his executors.

IF a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them; for it is no sale without payment, unless the contrary be expressly agreed. And therefore, if the vendor says, the price of a beast is four pounds, and the vendee says he will give four pounds, the bargain is struck; and they neither of them are at liberty to be off, provided immediate possession be tendered by the other side. But if neither the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract, and the owner may dispose of the goods as he pleases. But if any part of the price is paid down, if it be but a penny, or any portion of the goods delivered by way of earnest (which the civil law calls arrha, and interprets to beemptionis-vendi-

29 Car. II. c. 3.
t 8 Rep. 171. 1 Mod. 188.
vComb. 33. 12 Mod. 5. 7 Mod. 95.
u Hob 41. Ney's Max. c. 42.

...tionis contractae argumentum w,... the property of the goods is absolutely bound by it: and the vendee may recover the goods by action, as well as the vendor may the price of them x. And such regard does the law pay to earnest as an evidence of a contract, that, by the same statute 29 Car. II. c. 3. no contract for the sale of goods, to the value of 10 l. or more, shall be valid, unless the buyer actually receives part of the goods sold, by way of
earnest on his part; or unless he gives part of the price of the vendor by way of earnest to bind the bargain, or in part of payment; or unless some note in writing be made and signed by the party, or his agent, who is to be charged with the contract. And, with regard to goods under the value of 10 l, no contract of agreement for the sale of them shall be valid, unless the goods are to be delivered within one year, or unless the contract be made in writing, and signed by the party who is to be charged therewith. Anciently, among all the northern nations, shaking of hands was held necessary to bind the bargain; a custom which we still retain in many verbal contracts. A sale thus made was called handsale, venditio per mutuum manuum complexionem y;? till in process of time the same word was used to signify the price or earnest, which was given immediately after the shaking of hands, or instead thereof.

AS soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor; but the vendee cannot take the goods, until he renders the price agreed on z. But if he tenders the money to the vendor, and he refuses it, the vendee may seise the goods, or have an action against the vendor for detaining them. And by a regular sale, without delivery, the property is so absolutely vested in the vendee, that if A sells a horse to B for 10 l, and B pays him earnest, or signs a note in writing of the bargain; and afterwards, before the delivery of the horse or money paid, the horse dies in the vendor's custody; still he is entitled to the money, because by

w Inst. 3. tit. 24.
x Noy. ibid.
y Stiernehook de jure Gotl. l. 2. c. 5.
z Hob. 41.

the contract, the property was in the vendee a. Thus may property in goods be transferred by sale, where the vendor hath such property in himself.

BUT property may also in some cases be transferred by sale, though the vendor hath none at all in the goods: for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must soon be at an end. And therefore the general rule of law is b, that all sales and contracts of any thing vendible, in fairs or markets overt, (that is, open) shall not only be good between the parties, but also be binding on all those that have any
right or property therein. And for this purpose, the mirroir informs us c, were tools established in markets, viz. to testify the making of contract; for every private contract was discountenanced by law. Wherefore our Saxon ancestors prohibited the sale of any thing above the value of twenty pence, unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnessesd. Market overt in the country is only held on the special days, provided for particular towns by charter or prescription; but in London every day, except Sunday, is market day c. The market place, of spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt f; but in London every shop in which goods are exposed publicly to sale, is market overt, for such things only as the owner professes to trade in g. But if my goods are stolen from me, and sold, out of market overt, my property is not altered, and I may take them wherever I find them. And it is expressly provided by statute 1 Jac. I. c. 21. that the sale of any goods wrongfully taken, to any pawnbroker in London or within two miles thereof, shall not alter the property. For this, being usually a clandestine trade, is therefore made an

a Noy, c. 42.
b 2 Inst. 713.
c c. 1. 3.
d LL. Ethel. 10, 12. LL. Eadg. Wilk. 80.
e Cro. Jac. 68.
f Godb. 131.
g 5 Rep. 83. 12 Mod. 521.

exception to the general rule. And, even in market overt, if the goods be the property of the king, such sale (though regular in all other respect) will in no case bind him; though it binds infants, feme coverts, ideots or lunatics, and men beyond sea or in prison: or if the goods be stolen from a common person, and then taken by the king’s officer from the felon, and sold in open market; still, if the owner has used due diligence in prosecuting the thief to conviction, he loses not his property in the goods h. So likewise, if the buyer knoweth the property not to be in the seller; or there be any other fraud in the transaction; if he knoweth the seller to be an infant, or feme covert, not usually trading for herself; if the sale be not originally and wholly made in the sir or market, or not at the usual hours; the owner’s property is not bound thereby i. If a man buys his own goods
in a fair or market, the contract of sale shall not bind him so as that he shall render the price, unless the property had been previously altered by a former sale k. And, notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into possession of the goods, the original owner may take them, when found in his hands who was guilty of the first breach of justice l. By which wise regulations the common law has secured the right of the proprietor in personal chattels from being devested, so far as was consistent with that other necessary policy, that purchasors, bona side, in a fair, open, and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller.

BUT there is one species of personal chattels, in which the property is not easily altered by sale, without the express consent of the owner, and those are horses; the sale of which, even in fairs or market sovert, is void in many instances, where that of other property is valid: because a horse is so fleet an animal, that the stealers of them may flee far off in a short spacem, and

h Bacon's use of the law. 158.
i 2 Inst. 713, 714.
k Perk.  93.
l 2 Inst. 713.
m Ibid. 714.

be out of the reach of the most industrious owner. All persons therefore that have occasion to deal in horses, and are therefore liable sometimes to buy stolen ones, would do well to observe, that whatever price they may give, or how long soever they may keep possession before it be claimed, they gain no property in a horse that has been stolen, unless it be bought in a fair or market overt: nor even then, unless the directions be pursued that are laid down in the statute 2 P. & M. c. 7. and 31 Eliz. c. 12. By which it is enacted, that every horse, so to be sold, shall be openly exposed, in the time of such fair or market, for one whole hour together, between ten in the morning and sunset, in the open and public place used for such sales, and not in any private yard or stable: that the horse shall be brought by both the vendor and vendee to the tollgatherer or bookkeeper of such fair or market: that toll be paid, if any be due; and if not, one penny to the bookkeeper, who shall enter down the price, colour, and marks of the horse, with the names additions, and abode of the vendee and the vendor;
the latter either upon his own knowledge, or the testimony of some credible witness. And, even if all these points be fully complied with, yet such sale shall not take away the property of the owner, if within six months after the horse if stolen he puts in his claim before the mayor, or some justice, of the district in which the horse shall be found; and within forty days after that, proves such his property by the oath of two witnesses before such mayor or justice; and also tenders to the person in possession such price as he bona side paid for him in market overt. But in case any one of the points beforementioned be omitted, or not observed in the sale, such sale is utterly void; and the owner shall not lose his property, but at any distance of time may seise or bring an action for his horse, wherever he happens to find him. Wherefore sir Edward Coke observes n, that, both by the common law and these two statutes, the property of horses is so well preserved, that if the owner be of capacity to understand them, and be vigilant and industrious to pursue the same, it is almost impossible that the property of any horse, either

stolen or not stolen, should be altered by any sale in market overt by him that is malae sidei possessor.

BY the civil law o an implied warranty was annexed to every sale, in respect to the title of the vendor: and so too, in our law, a purchasor of goods and chattels may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purposep. But, with regard to the goodness of the wares so purchased, the vendor is not bound to answer; unless he expressly warrants them to be found and goodq, or unless he knew them to be otherwise and hath used any art to disguise them r, or unless they turn out to be different from what he represented to the buyer.

2. BAILMENT, from the French bailer, to deliver, is a delivery of goods in trust, upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee. As if cloth be delivered, or (in our legal dialect) bailed, to a taylor to make a suit of cloths, he has it upon an implied contract to render it again when made, and that in workmanly manner s. If money or goods be delivered to a common carrier, to convey from Oxford to London, he is under a contract in law to pay, or carry, them to the person appointed t. If a horse, or other goods, be delivered to an
inn-keeper or his servants, he is bound to keep them safely, and restore them when his guest leaves the house u. If a man takes in a horse, or other cattle, to graze and depasture in his grounds, which the law calls agiftment, he takes them upon an implied contract to return them safe to the owner w. if a pawnbroker receives plate or jewels as a pledge, or security, for the repayment of money lent thereon at a day certain, he has them upon an express contract or condition to restore them, if the pledgor performs his part by redeeming them in due time x: for the due execution of which

o Ff. 21. 2. 1.
p Cro. Jac. 474. 1 Roll. Abr. 90.
q F. N. B. 94.
r 2 Roll. Rep. 5.
s 1 Vern. 268.
t 12 Mod. 482.
u Cro. Eliz. 622.
w Cro. Car. 271.
x Cro. Jac. 245. Yelv. 178.

c many useful regulations are made by statute 30 Geo. II. c. 24. And so if a landlord distreins goods for rent, or a parish officer for taxes, these for a time are only a pledge in the hands of the distreinors, and they are bound by an implied contract in law to restore them on payment of the debt, duty, and expenses, before the time of sale; or, when sold, to render back the overplus. If a friend delivers any thing to his friend to keep for him, the receiver is bound to restore it on demand: and it was formerly held that in the mean time he was answerable for any damage or loss it might sustain, whether by accident or otherwise y; unless he expressly undertook/zto keep it only with the same care as his own goods, and then he should not be answerable for theft or other accidents. But now the law seems to be settled upon a much more rational footing a; that such a general bailment will not charge the bailee with any loss, unless it happens by gross neglect, which is construed to be an evidence of fraud: but, if the bailee undertakes specially to keep the goods safely and securely, he is bound to answer all perils and damages, that may befall them for want of the same care with which a prudent man would keep his ownb.

In all these instances there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute
property in the bailee, because of his contract for restitution; and the bailor hath nothing left in him but the right to a chose in action, grounded upon such contract, the possession being delivered to the bailee. And, on account of this qualified property of the bailee, he may (as well as the bailor) maintain an action against such as injure or take away these chattels. The taylor, the carrier, the innkeeper, the agifting farmer, the pawnbroker, the distreinor, and the general bailee, may all

y Co. Litt. 89.
z 4 Rep. 84.
a Lord Raym. 909. 12 Mod. 487.
b By the laws of Sweden, the depositary or bailee of goods is not bound to restitution, in case of accident by fire or theft; provided his own goods perished in the same manner: jura enim nostri, says Stiernhook, dolum pracsumunt, fi una non pereant. (De jure Sueon. l. 2. c. 5.)

of them vindicate, in their own right, this their possessory interest, against any stranger or third person c. For, as such bailee is responsible to the bailor, if the goods are lost damaged by his willful default or gross negligence, or if he do not deliver up the chattels on lawful demand, it is therefore reasonable that he should have a right to recover either the specific goods, or else a satisfaction in damages, against all other persons, who may have purloined or injured them; that he may always be ready to answer the call of the bailor.

3. HIRING and borrowing are also contract by which a qualified property may be transferred to the hirer or borrower: in which there is only this difference, that hiring is always for a price, a stipend, or additional recompense; borrowing is merely gratuitous. But the law in both cases is the same. They are both contracts, whereby the possession and a tranient property is transferred for a particular time or use, on condition and agreement to restore the goods so hired or borrowed, as soon as the time is expired or use performed; together with the price or stipend (in case of hiring) either expressly agreed on by the parties, or left to be implied by law according to the value of the service. By this mutual contract, the hirer or borrower gains a temporary property in the thing hired, accompanied with an implied condition to use in with moderation and not abuse it; and the owner or lender retains a reversionary interest in the same, and acquires a new property in the price or reward. 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 case of hiring) intitled to the premium or price, for which the horse was hired d.

THERE is one species of this price or reward, the most usual of any, but concerning which many good and learned men have

c 13 Rep. 69.

in former times very much perplexed themselves and other people, by raising doubts about its legality in foro conscientiae. That is, when money is lent on a contract to receive not only the principal sum again, but also an increase by way of compensation for the use; which is generally called interest by those who think it lawful, and usury by those who do not so. It may not be amiss therefore to enter into a short enquiry, upon what footing this matter of interest or usury does really stand.

THE enemies to interest in general make no distinction between that and usury, holding any increase of money to be indefensibly usurious. And this they ground as well on the prohibition of it by the law of Moses among the Jews, as also upon what is laid down by Aristotle e, that money is naturally barren, and to make it breed money is preposterous, and a perversion of the end of its institution, which was only to serve the purposes of exchange, and not of increase. Hence the school divines have branded the practice of taking interest, as being contrary to the divine law both natural and revealed; and the canon law f, has proscribed the taking any, the least, increase for the loan of money as a mortal sin.

BUT, in answer to this, it may be observed, that the mosaical precept was clearly a political, and not a moral precept. It only prohibited the Jews from taking usury from their brethren the Jews; but in express words permitted them to take it of a stranger g: which proves that the taking of moderate usury, or a reward for the use, for so the word signifies, is not malum in se, since it was allowed where any but an Israelite was concerned. And as to Aristotle's reason, deduced from the natural barrenness of money, the same may with equal force be alleged of houses, which never breed houses; and twenty other things, which nobody doubts it is lawful to make profit of, by letting them to
hire. And though money was originally used only for the purposes of exchange, yet the laws of any state may be well justified in permitting it to be turned to the purposes of profit, if the convenience of society (the great end for which money was invented) shall require it. And that the allowance of moderate interest tends greatly to the benefit of the public, especially in a trading country, will appear from that generally acknowledged principle, that commerce cannot subsist without mutual and extensive credit. Unless money therefore can be borrowed, trade cannot be carried on: and if no premium were allowed for the hire of money, few persons would care to lend it; or at least the case of borrowing at a short warning (which is the life of commerce) would be entirely at an end. Thus, in the dark ages of monkish superstition and civil tyranny, when interest was laid under a total interdict, commerce was also at its lowest ebb, and fell entirely into the hands of the Jews and Lombards: but when men's minds began to be more enlarged, when true religion and real liberty revived, commerce grew again into credit; and again introduced with itself its inseparable companion, the doctrine of loans upon interest.

AND, really, considered abstractedly from this its use, since all other conveniences of life may either be bought or hired, but money can only be hired, there seems no greater impropriety in taking a recompense or price for the hire of this, than of any other convenience. If I borrow 100 l. to employ in a beneficial trade, it is but equitable that the lender should have a proportion of my gains. To demand an exorbitant price is equally contrary to conscience, for the loan of a horse, or the loan of a sum of money: but a reasonable equivalent for the temporary inconvenience the owner may feel by the want of it, and for the hazard of his losing it entirely, if not more immoral in one case than it is in the other. And indeed the absolute prohibition of lending upon any, even moderate interest, introduces the very inconvenience which it seems meant to remedy. The necessity of individuals will make borrowing unavoidable. Without some profit allowed by law there will be but few lenders: and those principally bad men, who will break through the law, and take a profit; and then will endeavour to indemnify themselves from the danger of the penalty, by making that
profit exorbitant. Thus, while all degrees of profit were discountenanced, we find more complaints of usury, and more flagrant instances of oppression, than in modern times, when money may be easily had at a low interest. A capital distinction must therefore be made between a moderate and exorbitant profit; to the former of which we usually give the name of interest, to the latter the truly odious appellation of usury: the former is necessary in every civil state, if it were but to exclude the latter, which ought never to be tolerated in any well-regulated society. For, as the whole of this matter is well summed up by Grotiush, if the compensation allowed by law does not exceed the proportion of the hazard run, or the want felt, by the loan, its allowance is neither repugnant to the revealed nor the natural law: but if it exceeds those bounds, it is then oppressive usury; and though the municipal laws may give it impunity, they never can make it just.

WE see, that the exorbitance or moderation of interest, for money lent, depends upon two circumstances; the inconvenience of parting with it for the present, and the hazard of losing it entirely. The inconvenience to individual lenders can never be estimated by laws; the rate therefore of general interest must depend upon the usual or general inconvenience. This results entirely from the quantity of specie or current money in the kingdom: for, the more specie there is circulating in any nation, the greater superfluity there will be, beyond what is necessary to carry on the business of exchange and the common concerns of life. In every nation or public community there is a certain quantity of money thus necessary; which a person well skilled in political arithmetic might perhaps calculate as exactly, as a private banker can the demand for running cash in his own shop: all above this necessary quantity may be spared, or lent, without much inconvenience to the respective lenders; and the greater this national superfluity is, the more numerous will be lenders, and the lower ought the rate of the national interest to be: but where there is not enough, or barely enough, circulating cash, to answer the ordinary uses of the public, interest will be proportionably high; for lenders will be but few, as few can submit to the inconvenience of lending.
SO also the hazard of an entire loss has its weight in the regulation of interest: hence, the better the security, the lower will the interest be; the rate of interest being generally in a compound ratio, formed out of the inconvenience and the hazard. And as, if there were no inconvenience, there should be no interest, but what is equivalent to the hazard; so, if there were no hazard, there ought to be no interest, save only what arises from the mere inconvenience of lending. Thus, if the quantity of specie in a nation be such, that the general inconvenience of lending for a year is computed to amount to three per cent: a man that has money by him will perhaps lend it upon good personal security at five per cent, allowing two for the hazard run; he will lend it upon landed security, or mortgage, at four per cent, the hazard being proportionably less; but he will lend it to the state, on the maintenance of which all his property depends, at three per cent, the hazard being none at all.

BUT, sometimes the hazard may be greater, than the rate of interest allowed by law will compensate. And this give rise to the practice, 1. Of bottomry, or respondentia. 2. Of policies of insulance.

AND first, bottomry (which originally arose from permitting the master of a ship, in a foreign country, to hypothecate the ship in order to raise money to refit) is in the nature of a mortgage of a ship; when the owner takes up money to enable him to carry on his voyage, and pledges the keel or bottom of the ship (pars pro toto) as a security for the repayment. In which case it is understood, that, if the ship be lost, the lender loses also his whole money; but, if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest. And this is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reason of the extraordinary hazard run by the lender. And in this case the ship and tackle, if brought home, are answerable (as well as the person of the borrower) for the money lent. But if the loan is not upon the vessel, but upon the goods and merchandize, which must necessarily be sold or exchanged in the course of the voyage, then only the borrower, personally, is bound to answer the contract; who therefore in this case is said to take up money at respondentia. These terms are also applied to contracts for the repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself; when a man lends a merchant 1000 l. to be employed in a beneficial trade, with condition to be repaid with extraordinary interest, in case such
a voyage be safely performed: which kind of agreement is sometimes called fœnus nauticum, and sometimes usura maritime. But, as this gave an opening for usurious and gaming contracts, especially upon long voyages, it was enacted by the statute 19 Geo. II. c. 37. that all monies lent on bottomry or at respondentia, on vessels bound to or from the East Indies, shall be expressly lent only upon the ship or upon the merchandize; that the lender shall have the benefit of salvage; and that, if the borrower has not on board effects to the value of the sum borrowed, he shall be responsible to the lender for so much of the principal as hath not been laid out, with legal interest and all other charges, though the ship and merchandize be totally lost.


SECONDLY, a policy of insurance is a contract between A and B, that, upon A's paying a premium equivalent to the hazard run, B will indemnify or insure him against a particular event. This is founded upon one of the principles as the doctrine of interest upon loans, that of hazard; but not that of inconvenience. For if I calculate the chance that she performs her voyage to be twenty to one against her being lost: and, if she be lost, I lose 100 l. and get 5 l. Now this is much the same as if I lend the merchant, whose whole fortunes are embarked in this vessel, 100 l. at the rate of eight per cent. For by a loan I should be immediately out of my money, the inconvenience of which we have computed equal to three per cent: if therefore I had actually lent him 100 l, I must have added 3 l. on the score of inconvenience, to the 5 l. allowed for the hazard; which together would have made 8 l. But as, upon an insurance, I am never out of my money till the loss actually happens, nothing is therein allowed upon the principle of inconvenience, but all upon the principle of hazard. Thus too, in a loan, if the chance of repayment depends upon the borrower's live, it is frequent (besides the the usual rate of interest) for the borrower to have his life insured till the time of repayment; for which he is loaded with an additional premium, suited to his age and constitution. Thus, if Sempronius has only an annuity for his life, and would borrow 100 l. of Titius for a year; the inconvenience and general hazard of this loan, we have seen, are equivalent 10 5 l. which is therefore the legal interest: but there is also a special hazard in this case; for, if Sempronius dies within
the year, Titius must lose the whole of his 100 l. Suppose this chance to be as one to ten: it will follow that the extraordinary hazard is worth 10 l. more; and therefore that the reasonable rate of interest in this case would be fifteen per cent. But this the law, to avoid abuses, will not permit to be taken: Sempronius therefore gives Titius the lender only 5 l, the legal interest; but applies to Gaius an insurer, and gives him the other 10 l. to indemnify Titius against the extraordinary hazard. And in this manner may any extraordinary or particular hazard be provided against, which the established rate of interest will not reach; that being calculated by the state to answer only the ordinary and general hazard, together with the lender's inconvenience in parting with his specie for the time.

THE learning relating to marine insurances hath of late years been greatly improved by a series of judicial decisions, which have now established the law in such a variety of cases, that (if well and judiciously collected) they would form a very complete title in a code of commercial jurisprudence. But, being founded on equitable principles, which chiefly result from the special circumstances of the case, it is not easy to reduce them to any general heads in mere elementary institutes. Thus much may however be said; that, being contracts, the very essence of which consists in observing the purest good faith and integrity, they are vacated by any the least shadow of fraud or undue concealment: and, on the other hand, being much for the benefit and extension of trade, by distributing the loss or gain among a number of adventurers, they are greatly encouraged and protected both by common law and acts of parliament. But, as a practice had obtained of insuring large sums without having any property on board, which were called insurances, interest or no interest; and also of insuring the same goods several times over; both of which were a species of gaming, without any advantage to commerce, and were denominated wagering policies: it is therefore enacted by the statute 19 Geo. II. c. 37. that all insurances, interest or no interest, or without farther proof of interest than the policy itself, or by way of gaming or wagering, or without benefit of salvage to the insurer, (all which had the same pernicious tendency) shall be totally null and void, except upon privateers, or ships in the Spanish and Portuguese trade, for reasons sufficiently obvious; and that no re-assurance shall be lawful, except the former insurer shall be involvent, a bankrupt, or dead; and lastly that, in the East India trade, the lender of money on bottomry, or at respondentia, shall
alone have a right to be insured for the money lent, and the borrower shall (in case of a loss) recover no more upon any insurance that the surplus of his property, above the value of his bottomry or respondentia bond. But, to return to the doctrine of common interest on loans:

UPON the two principles of inconvenience and hazard, compared together, different nations have at different times established different rates of interest. The Romans at one time allowed centesimae, or twelve per cent, to be taken for common loans; but Justinianm reduced it to trientes, or one third of the as or centesimae, that is, four per cent; but allowed higher interest to

m Cod. 4. 32. 26. Nov. 33, 34, 35.

n A short explication of these terms, and of the division of the Roman as, will be useful to the student, not only for understanding the civilians, but also the more classical writers, who perpetually refer to this distribution. Thus Horace, ad Pifones. 325.

Romani pueri longis rationibus affem
Difcunt in partes centum diducere. Dicat
Filius Albini, fi de quincunce remota eft
Uncia, quid superetpoterat dixiffe, triens: eu,
Rem poteris servare tuam ! redit uncia, quid fit Semis.

It is therefore to be observed, that, in calculating the rate of interest, the Romans divided the principal sum into an hundred parts; one of which they allowed to be taken monthly: and this, which was the highest rate of interest permitted, they called usurae centefimae, amounting yearly to twelve per cent. Now as the as, or Roman pound, was commonly used to express any integral sum, and was divisible into twelve parts or unciae, therefore these twelve monthly payments or unciae were held to amount annually to one pound, or as usurarius; and so the usurae affes were synonymous to the usurae centefimae. And all lower rates of interest were denominated according to the relation they bore to this centesimal usury, or usurae affes: for the several multiples of the unciae, or duodecimal parts of the as, were known by different names according to their different combinations; sextans, quadrans, triens, quincunx, semis, septunx, bes, dodrans, dextrans, deunx, containing respectively 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, unciae or duodecimal parts of an as. (Pf. 28. 5. 50.  2. Gravin. orig. jur.
This being premised, the following table will clearly exhibit at once the subdivisions of the as, and the denominations of the rate of interest.

be taken of merchants, because there the hazard was greater. So too Grotius informs us, that in Holland the rate of interest was then eight per cent in common loans, but twelve to merchants. Our law establishes one standard for all alike, where the pledge or security itself is not put in jeopardy; lest, under the general pretence of vague and indeterminate hazards, a door should be opened to fraud and usury: leaving specific hazards to be provided against by specific insurances, or by loans upon respondentia, or bottomry. But as to the rate of legal interest, it has varied and decreased for two hundred years past, according as the quantity of specie in the kingdom has increased by accessions of trade, the introduction of paper credit, and other circumstances. The statute 37 Hen. VIII. c. 9. confined interest to ten per cent, and so did the statute 13 Eliz. c. 8. But as, through the encouragements given in her reign to commerce, the nation grew more wealthy, so under her successors the statute 21 Jac. I. c. 17. reduced it to eight per cent; as did the statute 12 Car. II. c. 13. to six: and lastly by the statute 12 Ann. ft. 2. c. 16. it was brought down to five per cent yearly, which is now the extremity of legal interest that can be taken.

But yet, if a contract, which carries interest, be made in a foreign country, our courts will direct the payment of interest according to the law of that country in which the contract was made. Thus Irish, American,

USURAE

PARTES ASSIS.

PER ANNUM.

Affes, five centesimae

integer

?
12 per cent.

Deunces

? 11/12
? 11

Dextances, vel decunces
? 5/6
? 10

Dodrantes

? 3/4
? 9

Beffes

? 2/3
? 8
Septunces

?  
7/12  
?  
7

Semiffes

?  
1/2  
?  
6

Quincunces

?  
5/12  
?  
5

Trientes

?  
1/3  
?  
4

Quadrantes

?
Turkish, and Indian interest, have been allowed in our courts, to the amount of even twelve per cent. For the moderation or exorbitance of interest depends upon local circumstances; and the refusal to enforce such contracts would put a stop to all foreign trade.

4. THE last general species of contracts, which I have to mention, is that of debt; whereby a chose in action, or right to a certain sum of money, is mutually acquired and lost q. This may be the counterpart of, and arise from, any of the other species of contracts. As, in case of a sale, where the price is not paid in ready money, the vendee becomes, indebted to the vendor for the sum agreed on; and the vendor has a property in this price, as a chose in action, by means of this contract of debt. In bailment, if the bailee loses or detains a sum of money bailed to him for any special purpose, he becomes indebted to the bailor in the same numerical sum,
upon his implied contract, that he shall execute the trust reposed in him, or repay the money to the bailor. Upon hiring or borrowing, the hirer or borrower, at the same time that he acquires a property in the thing lent, may also become indebted to the lender, upon his contract to restore the money borrowed, to pay the price or premium of the loan, the hire so the horse, or the like. Any contract in short whereby a determinate sum of money becomes due to any person, and is not paid but remains in action merely, is a contract of debt. And, taken in this light, it comprehends a great variety of acquisition; being usually divided into debts of record, debts by special, and debts by simple contract.

A DEBT of record is a sum of money, which appears to be due by the evidence of a court of record. Thus, when any specific sum is adjudged to be due from the defendant to the plaintiff, on an action or suit at law; this is a contract of the highest nature, being established by the sentence of a court of judicature. Recognizances also are a sum of money, recognized or acknowledged to be due to the crown or a subject, in the presence of some court or magistrate, with a condition that such acknowledgement shall be void upon the appearance of the party, his good behaviour, or the like: and these, together with statutes merchant and statutes staple, &c, it forfeited by non-performance of the condition, are also ranked among this first and principal class of debts, viz. debts or record; since the contract, on which they are founded, is witnessed by the highest kind of evidence, viz. by matter of record.

q F. N. B. 119.

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DEBTS by specialty, or special contract, are such whereby a sum of money becomes, or is acknowledged to be, due by deed or instrument under seal. Such as by deed of covenant, by deed of sale, by lease reserving rent, or by bond or obligation: which last we took occasion to explain in the twentieth lecture of the present book; and then shewed that it is an acknowledgement or creation or a debt from the obligor to the obligee, unless the obligor performs a condition thereunto usually annexed, as the payment of rent or money borrowed, the observance of a covenant, and the like; on failure of which the bond becomes forfeited and the debt becomes due in law. These are looked upon as the next class of debts after those of record, being confirmed by special evidence, under seal.
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, which are capable of a more easy proof, and (therefore only) better, than a verbal promise. It is easy to see into what a vast variety of obligations this last class may be branched out, through the numerous contracts for money, which are not only expressed by the parties, but virtually implied in law. Some of these we have already occasionally hinted at; and the rest, to avoid repetition, must be referred to those particular heads in the third book of these commentaries, where the breach of such contracts will be considered. I shall only observe at present, that by the statute 29 Car. II. c. 3. no executor or administrator shall be charged upon any special promise to answer damages out of his own estate, and no person shall be charged upon any promise to answer for the debt of default of another, or upon any agreement in consideration of marriage, or upon any contract or sale of any real estate, or upon any agreement that is not be performed within one year from the making, unless the agreement or some memorandum thereof be in writing, and signed by the party himself or by his authority.

BUT there is one species of debts upon simple contract, which, being a transaction now introduced into all sorts of civil life, under the name of paper credit, deserves a more particular regard. These are debts by bills of exchange, and promissory notes.

A BILL of exchange is a security, originally invented among merchants in different countries, for the more easy remittance of money from the one to the other, which has since spread itself into almost all pecuniary transactions. It is an open letter of request from one man to another, desiring him to pay a sum named therein to a third person on his account; by which means a man at the most distant part of the world may have money remitted to him from any trading country. If A lives in Jamaica, and owes B who lives in England 1000 l, now if C be going from England of Jamaica, he may pay B this 1000 l, and take a bill of exchange drawn by B in England upon A in Jamaica, and receive it when he comes thither. Thus does B receive his debt, at any distance of place, by transferring it to C; who carries over his money in paper credit, without danger of robbery or loss. This method is said to have been brought into general use by the Jews and Lombards, when banished for their usury and other vices; in order the more easily to draw their effects out of France and England, into those
countries in which they had chosen to reside. The invention of them was a little earlier: for the Jews were banished out Guienne in 1287, and out of England in 1290; and in 1236 the use of paper credit was introduced into the Mogul empire in China. In common speech such a bill is frequently called a draught, but a bill of exchange is the more legal as well as mercantile expression. The person however, who writes this letter, is called in law the drawer, and he to whom it is written the drawee; and the third person, or negotiator, to whom it is payable (whether specially named, or the bearer generally) is called the payee.

THESE bills are either foreign, or inland: foreign, when drawn by a merchant residing abroad upon his correspondent in England, or vice versa; and inland, when both the drawer and the drawee reside within the kingdom. Formerly foreign bills of exchange were much more regarded in the eye of the law than inland ones, as being thought of more public concern in the advancement of trade and commerce. But now by two statutes, the one 9 & 10 W. III. c. 17. the other 3 & 4 Ann. c. 9. inland bills of exchange are put upon the same footing as foreign ones; what was the law and custom of merchants with regard to the one, and taken notice of merely as such, being by those statutes expressly enacted with regard to the other. So that there is now in law no manner of difference between them.

PROMISSORY notes, or notes of hand, are a plain and direct engagement in writing, to pay a sum specified at the time therein limited to a person therein named, or sometimes to his order, or often to the bearer at large. These also by the same statute 3 & 4 Ann. c. 9. are made assignable and indorsable in like manner as bills of exchange.

THE payee, we may observe, either of a bill of exchange or promissory note, has clearly a property vested in him (not indeed in possession but in action) by the express contract of the drawer in the case of a promissory note, and, in the case of a bill of exchange, by his implied contract; viz. that, provided the drawee

r 2 Carte. 203. 206.
t 1 Roll. Abr. 6.
does not pay the bill, the drawer will: for which reason it is usual, in bills of exchange, to express that the value thereof hath been received by the drawer; in order to shew the consideration, upon which the implied contract of repayment arises. And this property, so vested, may be transferred and assigned from the payee to any other man; contrary to the general rule of the common law, that no chose in action is assignable: which assignment is the life of paper credit. It may therefore be of some use, to mention a few of the principal incidents attending this transfer or assignment, in order to make it regular, and thereby to change the drawer with the payment of the debt to other persons, than those with whom he originally contracted.

IN the first place then the payee, or person to whom or whose order such bill of exchange or promissory note is payable, may by indorsement, or writing his name in dorso or on the back of it, assign over his whole property to the bearer, or else to another person by name, either of whom is then called the indorsee; and he may assign the same to another, and so on in infinitum. And a promissory note, payable to A or bearer, is negotiable without any indorsement, and payment thereof may be demanded by any bearer of it v. But, in case of a bill of exchange, the payee, or the indorsee, (whether it be a general or particular indorsement) is to go to the drawee, and offer his bill for acceptance; which acceptance (so as to charge the drawer with costs) must be in writing, under or on the back of the bill. If the drawee accepts the bill, either verbally or in writing w, he then makes himself liable to pay it; this being now a contract on his side, grounded on an acknowledgement that the drawer has effects in his hands, or at least credit sufficient to warrant the payment. If the drawee refuses to accept the bill, and it be of the value of 20 l. or upwards, and expressed to be for value received, the payee or indorsee may protest if for non-acceptance: which protest must be made in writing, under a copy of such bill

uStra. 1212.
w Stra. 1000.

of exchange, by some notary public; or, if no such notary be resident in the place, then by any other substantial inhabitant in the presence of two credible witnesses; and notice of such protest must, within fourteen days after, be given to the drawer.
BUT, in case such bill be accepted by the drawee, and after acceptance he fails or refuses to pay it within three days after it becomes due (which three days are called days of grace) the payee or indorsee is then to get in protested for non-payment, in the same manner and by the same persons who are to protest it in case of non-acceptance: and such protest must also be notified, within fourteen days after, to the drawer. And he, on producing such protest, either of non-acceptance or non-payment, is bound to make good to the payee, or indorsee, not only the amount of the said bills, (which he is bound to do within a reasonable time after non-payment, without any protest, by the rules of the common law x) but also interest and all charges, to be computed from the time of making such protest. But if no protest be made or notified to the drawer, and any damage accrues by such neglect, it shall fall on the holder of the bill. The bill, when refused, must, be demanded of the drawer as soon as conveniently may be: for though, when one draws a bill of exchange, he subjects himself to the payment, if the person on whom it is drawn refuses either to accept or pay, yet that is with this limitation, that if the bill be not paid, when due, the person to whom it is payable shall in convenient time give the drawer notice thereof; for otherwise the law will imply it paid: since it would be prejudicial to commerce, if a bill might rife up to charge the drawer at any distance of time; when in the mean time all reckonings and accounts may be adjusted between the drawer and the drawee y.

IF the bill be an indorsed bill, and the indorsee cannot get the drawee to discharge it, he may call upon either the drawer or the indorsor, or if the bill has been negotiated through many

x Lord Raym. 993.
y Salk. 127.

hands, upon any of the indorsors; for each indorsor is a warrantor for the payment of the bill, which is frequently taken in payment as much (or more) upon the credit of the indorser, as of the drawer. And if such indorsor, so called upon, has the names of one or more indorsors prior to his own, to each of whom he is properly an indorsee, he is also at liberty to call upon any of them to make him satisfaction; and so upwards. But the first indorsor has nobody to resort to, but the drawer only.
WHAT has been said of bills of exchange is applicable also to promissory notes, that are indorsed over, and negotiated from one hand to another; only that, in this case, as there is no drawee, there can be no protest for non-acceptance; or rather, the law considers a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing. And, in case of non-payment by the drawer, the several indorsees of a promissory note have the same remedy, as upon bills of exchange, against the prior indorsors.

CHAPTER THE THIRTY FIRST.
OF TITLE BY BANKRUPTCY.

THE preceding chapter having treated pretty largely of the acquisition of personal property by several commercial methods, we from thence shall be easily led to take into our present consideration a tenth method of transferring property, which is that of

X. BANKRUPTCY; a title which we before lightly touched upon a, so far as it related to the transfer of the real estate of the bankrupt. At present we are to treat of it more minutely, as it principally relates to the disposition of chattels, in which the property of persons concerned in trade more usually consists, than in lands or tenements. Let us therefore first of all consider, 1. Who may become a bankrupt: 2. What acts make a bankrupt: 3. The proceedings on a commission of bankrupt: and, 4. In what manner an estate in goods and chattels may be transferred by bankruptcy.

1. WHO may become a bankrupt. A bankrupt was before b defined to be a trader, who secretes himself, or does certain other acts, tending to defraud his creditors. He was formerly considered merely in the light of a criminal or offender c; and in this spirit we are told by sir Edward Coke d, that we have fetched as well the name, as the wickedness, of bankrupts from foreign

a See pag. 285.
b Ibid.
c Stat. 1 Jac. I. c. 15. 17.
d 4 Inst. 277.
nations e. But at present the laws of bankruptcy are considered as laws calculated for the benefit of trade, and founded on the principles of humanity as well as justice; and to that end they confer some privileges, not only on the creditors, but also on the bankrupt or debtor himself. On the creditors; by compelling the bankrupt to give up all his effects to their use, without any fraudulent concealment: on the debtor; by exempting him from the rigor of the general law, whereby his person might be confined at the discretion of his creditor, though in reality he has nothing to satisfy the debt; whereas the law of bankrupts, taking into consideration the sudden and unavoidable accidents to which men in trade are liable, has given them the liberty of their persons, and some pecuniary emoluments, upon condition they surrender up their whole estate to be divided among their creditors.

In this respect our legislature seems to have attended to the example of the Roman law. I mean not the terrible law of the twelve tables; whereby the creditors might cut the debtor’s body into pieces, and each of them take his proportionable share: if indeed that law, de debito in partes fecando, is to be understood in so very butcherly a light; which many learned men have with reason doubted. Nor do I mean those less inhuman laws (if they may be called so, as their meaning is indisputably certain) of imprisoning the debtor’s person in chains; subjecting him to stripes and hard labour, at the mercy of his rigid creditor; and sometimes felling him, his wife, and children, to perpetual foreign slavery. An oppression, which produced so

e The word itself is derived from the word bancus or banque, which signifies the table or counter of a tradesman (Dufrefne. I. 969.) and ruptus, broken; denoting thereby one whose shop or place of trade is broken and gone; though others rather cause to adopt the word route, which in French signifies a trace or track, and tell us that a bankrupt is one who hath removed his banque, leaving but a trace behind. (4 Inst. 277.) And it is observable that the title of the first English statute concerning this offence, 34 Hen. VIII. c. 4. against such persons as do make bankrupt, is a literal translation of the French idiom, qui sont banque route.  

g In Pegu, and the adjacent countries in East India, the creditor is entitled to disposed of the debtor himself, and likewise of
many popular insurrections, and feceffions to the mons facer. But I mean
the law of cession, introduced by the christian emperors; whereby if a
debtor ceded, or yielded up, all his fortune to his creditors, he was secured
from being dragged to a goal, omni quoque corporali cruciatu femoto h.
For, as the emperor justly observes i, inhumanum erat fpoliatum fortunes
fuis in solidum damnari. Thus far was just and reasonable: but, as the
departing from one extreme is apt to produce its opposite, we find it
afterwards enacted, that if the debtor by any unforeseen accident was
reduced to low circumstances, and would swear that he had not sufficient
left to pay his debts, he should not be compelled to cede or give up even
that which he had in his possession: a law, which under a false notion of
humanity, seems to be fertile of perjury, injustice, and absurdity.

THE laws of England, more wisely, have steered in the middle between
both extremes: providing at once against the inhumanity of the creditor,
who is not suffered to confine an honest bankrupt after his effects are
delivered up; and at the same time taking care that all his just debts shall
be paid, for far as the effects will extend. But still they are cautious of
encouraging prodigality and extravagance by this indulgence to debtors;
and therefore they allow the benefit of the laws of bankruptcy to none but
actual traders; since that set of men are, generally speaking, the only
persons liable to accidental losses, and to an inability of paying their debts,
without any fault of their own. If persons in other situations of life run in
debt without the power of payment, they must take the consequences of
their own indiscretion, even though they meet with sudden accidents that
may reduce their fortunes: for the law holds it to be an unjustifiable
practice, for any person but a tradesman to encumber himself with debts
of any considerable value. If a gentleman, or one in a

his wife and children; informuch that he may even violate with impunity
the chastity of the debtor's wife: but then, by so doing, the debt is
understood to be discharged. (Mod. Un. Hist. vii. 128.)
/h Cod. 7. 71. per tot.
/i Inst. 4. 6. 40.
/k Nov. 135. c. 1.

liberal profession, at the time of contracting his debts, has a sufficient fund
to pay them, the delay of payment is a species of dishonesty, and a
temporary injustice to his creditor: and if, at such time, he has no
sufficient fund, the dishonesty and injustice is the greater. He cannot
therefore murmur, if he suffers the punishment which he has voluntarily
drawn upon himself. But in mercantile transactions the case is far
otherwise. Trade cannot be carried on without mutual credit on both sides:
the contracting of debts is therefore here not only justifiable, but
necessary. And if by accidental calamities, as by the loss of a ship in a
tempest, the failure of brother traders, or by the non-payment of persons
out of trade, a merchant or tradesman becomes incapable of discharging
his own debts, it is his misfortune and not his fault. To the misfortunes
therefore of their faults: since, at the same time that it provides for the
security of commerce, by enacting that every considerable trader may be
declared a bankrupt, for the benefit of his creditors as well as himself, it
has also to discourage extravagance declared, that no one shall be capable
of being made a bankrupt, but only a trader; nor capable of receiving the
full benefit of the statutes, but only an industrious trader.

THE first statute made concerning any English bankrupts, was 32 Hen.
VIII. c. 4. when trade began first to be properly cultivated in England:
which has been almost totally altered by statute 13 Eliz. c. 7. whereby
bankruptcy is confined to such persons only as have used the trade of
merchandize, in gross or by retail, by way of bargaining, exchange,
rechange, bartering, chevifance I, or otherwise; or have fought their living
by buying and felling. And by statute 21 Jac. I. c. 19. persons using the
trade or profession of forivener, receiving other mens monies and estates
into their trust and custody, are also made liable to the statutes of
bankruptcy: and the benefits, as well as the penal parts of the law, are
extended as well to aliens and denizens as to

natural born subjects; being intended entirely for the protection of trade,
in which aliens are often as deeply concerned as natives. By many
subsequent statutes, but lastly by statute 5 Geo. II. c. 30. m bankers,
brokers, and factors, are declared liable to the statutes of bankruptcy; and
this upon the same reason that scriveners are included by the statute of
James I. viz. for the relief of their creditors;) whom they have otherwise
more opportunities of defrauding than any other set of dealers: and they
are properly to be looked upon as traders, since they make merchandize of
money, in the same manner as other merchants do of goods and other
moveable chattels. But by the same act n, no farmer, grazier, or drover,
shall (as such) be liable to be deemed a bankrupt: for, though they buy and
fell corn, and hay, and beasts, in the course of husbandry, yet trade is not
their principal, but only a collateral, object; their chief concern being to
manure and till the ground, and make the best advantage of its produce.
And, besides, the subjecting them to the laws of bankruptcy might be a
means of defeating their landlords of the security which the law has given
them above all others, for the payment of their reserved rents: wherefore
also, upon a similar reason, a receiver of the king’s taxes is not capable o,
as such, of being a bankrupt; lest the king should be defeated of those
extensive remedies against his debtors, which are put into his hands by the
prerogative. By the same statute p, no person shall have a commission of
bankrupt awarded against him, unless at the petition of some one creditor,
to whom he owes 100 l; or of two, to whom he is indebted 150 l; or of
more, to whom all together he is indebted 200 l. For the law does not look
upon persons, whose debts amount to less, to be traders considerable
enough, either to enjoy the benefit of the statutes, themselves, or to entitle
the creditors, for the benefit of public commerce, to demand the
distribution of their effects.

m 39.
n 49.
o eod.
p 23.

IN the interpretation of these several statutes, it hath been held, that
buying only, or felling only, will not qualify a man to be a bankrupt; but it
must be both buying and felling, and also getting a livelyhood by it. As, by
exercising the calling of a merchant, a grocer, a mercer, or, in one general
word, a chapman, who is one that buys and sells any thing. But no
handicraft occupation (where nothing is bought and sold, and therefore an
extensive credit, for the stock in trade, is not necessary to be had) will
make a man a regular bankrupt; as that of a husbandman, a gardener, and
the like, who are paid for their work and labourq. Also an inn-keeper
cannot, as such, be a bankrupt: for his gain or livelyhood does not arise
from buying and felling in the way of merchandize, but greatly from the
use of his rooms and furniture, his attendance, and the like: and though he
may buy corn and victuals, to fell again at a profit, yet that no more makes
him a trader, than a schoolmaster or other person is, that keeps a boarding
house, and makes considerable gains by buying and selling what he spends
in the house, and such a one is clearly not within the statutes s. But where
persons buy goods, and make them up into saleable commodities, as shoe-
makers, smiths, and the like, here, though part of the gain is by bodily labour, and not by buying and felling, yet they are within the statutes of bankruptst; for the labour is only in melioration of the commodity, and rendering it more fit for sale.

ONE single act of buying and felling will not make a man a trader; but a repeated practice, and profit by it. Buying and felling bank-stock, or other government securities, will not make a man a bankrupt; they not being goods, wares, or merchandize, within the intent of the statute, by which a profit may be fairly made u. Neither will buying and felling under particular restraints, or for particular purposes; as if a commissioner of the navy uses to buy victuals for the fleet, and dispose of the surplus and rufuse, he is not thereby made a trader within the statutes w. An infant, though a trader, cannot be made a bankrupt: for an infant can owe nothing but for necessaries; and the statutes of bankruptcy create no new debts, but only give a speedier and more effectual remedy for recovering such as were before due: and no person can be made a bankrupt for debts, which he is not liable at law to payx. But a feme-covert in London, being a sole trader according to the custom, is liable to a commission of bankrupt y.

2. HAVING thus considered, who may, and who may not, be made a bankrupt, we are to inquire, secondly, by what acts a man may become a bankrupt. A bankrupt isa trader, who secretes himself, or does certain other acts, tending to defraud his creditors. We have hitherto been employed in explaining the former part of this description, a trader:? let us now attend to the latter, who secretes himself, or does certain other acts, tending to defraud his creditors. And, in general, whenever such a trader, as is before described, hath endeavoured to avoid his creditors or evade their just demands, this hath been declared by the legislature to be an act of bankruptcy, upon which a commission may be sued out. For in this extrajudicial method of proceeding, which is allowed merely for the benefit of commerce, the law is extremely watchful to detect a man, whose circumstances are declining, in the first instance, or at least as early as...
possible: that the creditors may receive as large a proportion of their debts as may be; and that a man may not go on wantonly wasting his substance, and then claim the benefit of the statutes, when he has nothing left to distribute.

TO learn what the particular acts of bankruptcy are, which render a man a bankrupt, we must consult the several statutes, and the resolutions formed by the courts thereon. Among these

w 1 Salk. 110. Skin. 292.
x Lord Raym. 443.

may therefore be reckoned, 1. Departing from the realm, whereby a man withdraws himself from the jurisdiction and coercion of the law, with intent to defraud his creditors. 2. Departing from his own house, with intent to secrete himself, and avoid his creditors. 3. Keeping in his own house, privately, so as not to be seen or spoken with by his creditors, except for just and necessary cause; which is likewise construed to be an intention to defraud his creditors, by avoiding the process of the law. 4. Procuring or suffering himself willingly to be arrested, or outlawed, or imprisoned, without just and lawful cause; which is likewise deemed an attempt to defraud his creditors. 5. Procuring his money, goods, chattels, and effects to be attached or sequestered by any legal process; which is another plain and direct endeavour to disappoint his creditors of their security. 6. Making any fraudulent conveyance to a friend, or secret trustee, of his lands, tenements, goods, or chattels; which is an act of the same suspicious nature with the last. 7. Procuring any protection, not being himself privileged by parliament, in order to screen his person from arrests; which also is an endeavour to elude the justice of the law. 8. Endeavouring or desiring, by any petition to the king, or bill exhibited in any of the king’s courts against any creditors, to compel them to take less than their just debts; or to procrastinate the time of payment, originally contracted for; which are an acknowledgement of either his poverty or his knavery. 9. Lying in prison for two months, or more, upon arrest or other detention for debt, without finding bail, in order to obtain his liberty. For the inability to procure bail argues a strong deficiency in his credit, owing either to his suspected poverty, or ill character; and his neglect to do it, if able, can arise only from a fraudulent intention: in either of which cases it is high time for his creditors to look to
themselves, and compel a distribution of his effects. 10. Escaping from prison after an arrest for a just debt of 100 l. or upwards. For no man would break prison, that was able and desirous to procure bail; which brings it within the reason of the last case. 11. Neglecting to make satisfaction for any just debt to the amount of 100 l. within two months after service of legal process, for such debt, upon any trader having privilege of parliament.

THESE are the several acts of bankruptcy, expressly defined by the statutes relating to this title: which being so numerous, and the whole law of bankrupts being an innovation on the common law, our courts of justice have been tender so extending or multiplying acts of bankruptcy by any construction, or implication. And therefore sir John Holt held, that a man's removing his goods privately, to prevent their being seised in execution, was no act of bankruptcy. For the statutes mention only fraudulent gifts to third persons, and procuring them to be seised by sham process, in order to defraud creditors: but this, though a palpable fraud, yet falling within neither of those cases, cannot be adjudged an act of bankruptcy. So also it has been determined expressly, that a banker's stopping or refusing payment is no act of bankruptcy; for it is not within the description of any of the statutes, and there may be good reasons for his so doing, as, suspicion of forgery, and the like: and if, in consequence of such refusal, he is arrested, and puts in bail, still it is not act of bankruptcy: but if he goes to prison, and lies there two months, then, and not before, is he become a bankrupt.

WE have seen who may be a bankrupt, and what acts will make him so: let us next consider,
3. THE proceedings on a commission of bankrupt; so far as they affect the bankrupt himself. And these depend entirely on

k Stat. 4 Geo. III. c. 33.
l Lord Raym. 725.
m 7 Mod. 139.

the several statutes of bankruptcy n; all which shall endeavour to blend together, and digest into a concise methodical order.

And, first, there must be a petition to the lord chancellor by one creditor to the amount of 100 l, or by two to the amount of 150 l, or by three or more to the amount of 200 l; upon which he grants a commission to such discreet persons as to him shall seem good, who are then styled commissioners of bankrupt. The petitioners, to prevent malicious applications, must be bound in a security of 200 l, to make the party amends in case they do not prove him a bankrupt. And, if on the other hand they receive any money or effects from the bankrupt, as a recompense for suing out the commission, so as to receive more than their ratable dividends of the bankrupt's estate, they forfeit not only what they shall have so received, but their whole debt. These provisions are made, as well to secure persons in good credit from being damnified by malicious petitions, as to prevent knavish combinations between the creditors and bankrupt, in order to obtain the benefit of a commission. When the commission is a warded and issued, the commissioners are to meet, at their own expense, and to take an oath for the due execution of their commission, and to be allowed a sum not exceeding 20 s. per diem each, at every fitting. And no commission of bankrupt shall abate, or be void, upon any demise of the crown.

When the commissioners have received their commission, they are first to receive proof of the person's being a trader, and having committed some act of bankruptcy; and then to declare him a bankrupt, if proved so; and to give notice thereof in the gazette, and at the same time to appoint three meetings. At the first of these meetings an election must be made of assignees, or persons to whom the bankrupt's estate shall be assigned, and in whom it shall be vested for the benefit of the creditors; which assignees are to be first named by the commissioners, and after-
wards to be approved or rejected at the said meeting by the major part, in
value, of the creditors who shall then prove their debts: but no creditor
shall be admitted to vote in the choice of assignees, whose debt on the
balance of accounts does not amount to 10 l. At the second meeting any
farther business relating to the commission may be proceeded on. And at
the third meeting, at farthest, which must be on the forty second day after
the advertisement in the gazette, the bankrupt, upon notice also personally
served upon him or left at his usual place of abode, must surrender himself
personally to the commissioners, and must thenceforth in all respects
conform to the directions of the statutes of bankruptcy; or, in default
thereof, shall be guilty of felony without benefit of clergy, and shall suffer
death, and his goods and estate shall be distributed among his creditors.

In case the bankrupt absconds, or is likely to run away, between the time
of the commission issued, and the last day of surrender, the may by
warrant from any judge or justice of the peace be committed to the county
goal, in order to be forthcoming to the commissioners; who are also
compounded immediately to grant a warrant for seising his goods and
papers.

When the bankrupt appears, the commissioners are to examine him
touching all matters relating to his trade and effects. They may also
summon before them, and examine, the bankrupt's wife and any other
person whatsoever, as to all matters relating to the bankrupt's affairs. And
in case any of them shall refuse to answer, or shall not answer fully, any
lawful question, or shall refuse to subscribe such their examination, the
commissioners may commit them to prison without bail, till they make
and sign a full answer; the commissioners specifying in their warrant of
commitment the question so refused to be answered. And any goaler,
permitting such persons to escape, or go out of prison, shall forfeit 500 l.
to the creditors.

THE bankrupt, upon this examination, is bound upon pain of death to
make a full discovery of all his estate and effects, as well in expectancy as
possession, and how he has disposed of the same; together with all books and writings relating thereto: and is to deliver up all in his own power to the commissioners; (except the necessary apparel of himself, his wife, and his children) or, in case he conceals or embezzles any effects to the amount of 20 l, or withholds any books or writings, with intent to defraud his creditors, he shall be guilty of felony without benefit of clergy o.

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

HITHERTO every thing is in favour of the creditors; and the law seems to be pretty rigid and severe against the bankrupt: but, in case he proves honest, it makes him full amends for all this rigor and severity. For if the bankrupt hath made an ingenuous discovery, hath conformed to the directions of the law, and hath acted in all points to the satisfaction of his creditors; and if they, or four parts in five of them in number and value, (but none of them creditors for less than 20 l.) will sign a certificate to that purport; the commissioners are then to authenticate such certificate under their hands and seals, and to transmit it to the lord chancellor: and he, or two judges whom he shall ap-

o By the laws of Naples all fraudulent bankrupts, particularly such as do not surrender themselves within four days, are punished with death: also all who conceal the effects of a bankrupt, or set up a pretended debt to defraud his creditors. (Mod. Un. Hist. xxviii. 320.)

point, on oath made by the bankrupt that such certificate was obtained without fraud, may allow the same; or disallow it, upon cause shewn by any of the creditors of the bankrupt.

IF no cause be shewn to the contrary, the certificate is allowed of course; and then the bankrupt is entitled to a decent and reasonable allowance out of his effects, for his future support and maintenance, and to put him in a way of honest industry. This allowance is also in proportion of his former good behaviour, in the early discovery of the decline of his affairs, and
thereby giving his creditors a larger dividend. For, if his effects will not pay one half of his debts, or ten shillings in the pound, he is left to the discretion of the commissioners and assignees, to have a competent sum allowed him, not exceeding three per cent: but if they pay ten shillings in the pound, he is to be allowed five per cent; if twelve shillings and sixpence, then seven and a half per cent; and if fifteen shillings in the pound, then the bankrupt shall be allowed ten per cent: provided, that such allowance do not in the first case exceed 200 l, in the fecund 250 l, and in the third 300 l.

BESIDES this allowance, he has also an indemnity granted him, of being free and discharged for ever from all debts owing by him at the time he became a bankrupt; even though judgment shall have been obtained against him, and he lies in prison upon execution for such debts; and, for that among other purposes, all proceedings on commissions of bankrupt are, on petition, to be entered of record, as a perpetual bar against actions to be commenced on this account: though, in general, the production of the certificate properly allowed shall be sufficient evidence of all previous proceedings. Thus the bankrupt becomes a clear man again; and, by the assistance of his allowance and his own industry, may become a useful member of the commonwealth: which is the rather to be expected, as he cannot be entitled to these benefits, but by the testimony of his creditors themselves of his honest and ingenuous disposition; and unless his failures have been owing to misfortunes, rather than to misconduct and extravagance.

FOR no allowance or indemnity shall be given to a bankrupt, unless his certificate be signed and allowed, as before-mentioned; and also, if any creditor produces a fictitious debt, and the bankrupt does not make discovery of it, but suffers the fair creditors to be imposed upon, he lose all title to these advantages. Neither can he claim them, if he has given with
any of his children above 100 l. for a marriage portion, unless he had at that time sufficient left to pay all his debts; or if he has lost at any one time 5 l, or in the whole 100 l, within a twelvemonth before he became bankrupt, by any manner of gaming or wagering whatsoever; or, within the same time, has lost to the value of 100 l. by stockjobbing. Also, to prevent the too common practice of frequent and fraudulent or careless breaking, a mark is set upon such as have been once cleared by a commission of bankrupt, or have compounded with their creditors, or have been delivered by an act of insolvency: which is an occasional act, frequently passed by the legislature; whereby all persons whatsoever, who are either in too low a way of dealing to become bankrupts, or not being in a mercantile state of life are not included within the laws of bankruptcy, are discharged from all suits and imprisonment, upon delivering up all their estate and effects to their creditors upon oath, at the sessions or assises; in which case their perjury or fraud is usually, as in case of bankrupts, punished with death. Persons who have been once cleared by this, or either of the other methods, (of composition with their creditors, or bankruptcy) and afterwards become bankrupts

q Stat. 28 Geo. II. c. 13. 32 Geo. II. c. 28. 1 Geo. III. c. 17. 5. Geo. III. c. 41.

again, unless they pay full fifteen shillings in the pound, are only thereby indemnified as to the confinement of their bodies; but any future estate they shall acquire remains liable to their creditors, excepting their necessary apparel, household goods, and the tools and implements of their trades.

THUS much for the proceedings on a commission of bankrupt, so far as they affect the bankrupt himself personally. Let us next consider,

4. HOW such proceedings affect or transfer the estate and property of the bankrupt. The method whereby a real estate, in lands, tenements, and hereditaments, may be transferred by bankruptcy, was shewn under its proper head, in a former chapter. At present therefore we are only to consider the transfer of things personal by this operation of law.

BY virtue of the statutes before-mentioned all the personal estate and effects of the bankrupt are considered as vested, by the act of bankruptcy, in the future assignees of his commissioners, whether they be goods in actual possession, or debts, contracts, and other choses in action; and the
commissioners by their warrant may cause any house or tenement of the bankrupt to be broken open, in order to enter upon the seize the same. And, when the assignees are chosen or approved by the creditors, the commissioners are to assign every thing over to them; and the property of every part of the estate is thereby as fully vested in them, as it was in the bankrupt himself, and they have the same remedies to recover it s.

THE property vested in the assignees is the whole that the bankrupt had in himself, at the time he committed the first act of bankruptcy, or that has been vested in him since, before his debts are satisfied or agreed for. Therefore it is usually said, that once a bankrupt, and always a bankrupt: by which is meant,

r pag. 285.
s 12 Mod. 324.

that a plain direct act of bankruptcy once committed cannot be purged, or explained away, by any subsequent conduct, as a dubious equivocal act may be u; but that, if a commission is afterwards awarded, the commission and the property of the assignees shall have a relation, or reference, back to the first and original act of bankruptcy u. Insomuch that all transactions of the bankrupt are from that time absolutely null and void, either with regard to the alienation of his property, or the receipt of his debts from such as are privy to his bankruptcy; for they are no longer his property, or his debts, but those of the future assignees. And, if an execution be sued out, but not served and executed on the bankrupt's effects till after the act of bankruptcy, it is void as against the assignees. But the king is not bound by this fictitious relation, nor is within the statutes of bankrupts w; for if, after the act of bankruptcy committed and before the assignment of his effects, an extent issues for the debt of the crown, the goods are bound thereby x. In France this doctrine of relation is carried to a very great length; for there every act of a merchant, for ten days precedent to the act of bankruptcy, is presumed to be fraudulent, and is therefore void y. But with us the law stands upon a more reasonable footing: for, as these acts of bankruptcy may sometimes by secret to all but a few, and it would be prejudicial to trade to carry this notion to its utmost length, it is provided by statute 19 Geo. II. c. 32. that no money paid by a bankrupt to a bona side or real creditor, in a course of trade, even after an act of bankruptcy done, shall be liable to be refunded. Nor, by statute 1 Jac. I. c. 15. shall any debtor of a bankrupt, that pays him his debt, without knowing of his
bankruptcy, be liable to account for it again. The intention of this relative power being only to reach fraudulent transactions, and not to distress the fair trader.

THE assignees may pursue any legal method of recovering this property so vested in them, by their own authority; but cannot

t Salk. 110.
u 4 Burr. 32.
w Atk. 262.
x Viner. Abr. t. creditor and bankr. 104.
y Sp. L. b. 29. c. 16.

commence a suit in equity, nor compound any debts owing to the bankrupt, nor refer any matters to arbitration, without the consent of the creditors, or the major part of them in value, at a meeting to be held in pursuance of notice in the gazette.

WHEN they have got in all the effects they can reasonably hope for, and reduced them to ready money, the assignees must, within twelve months after the commission issued, give one and twenty days notice to the creditors of a meeting for a dividend or distribution; at which time they must produce their accounts, and verify them upon oath, if required. And then the commissioners shall direct a dividend to be made, at so much in the pound, to all creditors who have before proved, or shall then prove, their debts. This dividend must be made equally, and in a ratable proportion, to all the creditors, according to the quantity of their debts; no regard being had to the quality of them. Mortgages indeed, for which the creditor has a real security in his own hands, are entirely safe; for the commission of bankrupt reaches only the equity of redemption z. So are also personal debts, where the creditor has a chattel in his hands, as a pledge or pawn for the payment, or has taken the debtor's lands or goods in execution. And, upon the equity of the statute 8 Ann. c. 14. (which directs, that, upon all executions of goods being on any premises demised to a tenant, one year's rent and no more shall, if due, be paid to the landlord) it hath also been held, that under a commission of bankrupt, which is in the nature of a statute-execution, the landlord shall be allowed his arrears of rent to the same amount, in preference to other creditors, even though he hath neglected to distrein, while the goods remained on the premises; which he is otherwise intitled to do for his entire rent, be the
On a level with debts by mere simple contract, and all paid pari passu. Nay, so far is this matter carried, that, by the express provision of the statutes, debts not due at the time of the dividend made, as bonds or notes of hand payable at a future day, shall be paid equally with the rest, allowing a discount or drawback in proportion. And insurances, and obligations upon bottomry or respondentia, bona side made by the bankrupt, though forfeited after the commission is awarded, shall be looked upon in the same light as debts contracted before any act of bankruptcy.

Within eighteen months after the commission issued, a second and final dividend shall be made, unless all the effects were exhausted by the first. And if any surplus remains, after paying every creditor his full debt, if shall be restored to the bankrupt. This is a case which sometimes happens to men in trade, who involuntarily, or at least unwarily, commit acts of bankruptcy, by absconding and the like, while their effects are more than sufficient to pay their creditors. And, if any suspicious or malevolent creditor will take the advantage of such acts, and sue out a commission, the bankrupt has no remedy, but must quietly submit to the effects of his own imprudence; except that, upon satisfaction made to all the creditors, the commission may be superseded. This case may also happen, when a knave is desirous of defrauding his creditors, and is compelled by a commission to do them that justice, which otherwise he wanted to evade. And therefore, though the usual rule is, that all interest on debts carrying interest shall cease from the time of issuing the commission, yet, in case of a surplus left after payment of every debt, such interest shall again revive, and be chargeable on the bankrupt, or his representatives.
CHAPTER THE THIRTY SECOND.
OF TITLE BY TESTAMENT, AND ADMINISTRATION.

THERE yet remain to be examined, in the present chapter, two other methods of acquiring personal estates, viz. by testament and administration. And there I propose to consider in one and the same view; they being in their nature so connected and blended together, as makes it impossible to treat of them distinctly, without manifest tautology and repetition.

XI. XII. IN the pursuit then of this joint subject, I shall, first, enquire into the original and antiquity of testaments and administrations; shall, secondly, shew who is capable of making a last will and testament; shall, thirdly, consider the nature of a testament and its incidents; shall, fourthly, shew what an executor and administrator are, and how they are to be appointed; and, lastly, shall select some few of the general heads of the office and duty of executors and administrators.

FIRST, as to the original of testaments and administrations. We have more than once observed, that, when property came to be vested in individuals by the right of occupancy, it became necessary for the peace of society, that this occupancy should be continued, not only in the present possessor, but in those persons to whom he should think proper to transfer it; which introduced the doctrine and practice of alienations, gifts, and contracts. But these precautions would be very short and imperfect, if they were confined to the life only of the occupier; for then upon his death all his goods would again become common, and create an infinite variety of strife and confusion. The law of very many societies has therefore given to the proprietor a right of continuing his property after his death, in such persons as he shall name; and, in defect of such appointment or nomination, the law of every society has directed the goods to be vested in certain particular individuals, exclusive of all other persons a. The former method of acquiring personal property, according to the express directions of the deceased, we call a testament: the latter, which is also according to the will of the deceased, not expressed indeed but presumed by the law b, we call in England an administration; being the same which the civil lawyers term a succession ab inteflato, and which answers to the descent or inheritance of real estates.
TESTAMENTS are of very high antiquity. We find them in use among the ancient Hebrews; though I hardly think the example usually given c, of Abraham's complaining d that, unless he had some children of his body, his steward Eliezer of Damascus would be his heir, is quite conclusive to shew that he had made him so by will. And indeed a learned writer e has adduced this very passage to prove, that in the patriarchal age, on failure of children or kindred, the servants born under their master's roof succeeded to the inheritance as heirs at law f. But, (to omit what Eusebins and others have related of Noah's testament, made in writing and witnessed under his seal, whereby he disposed of the whole world g) I apprehend that a much more authentic instance of the early use of testaments may be found in the sacred writings h, wherein Jacob bequeathes to his son Jo-

a Puff. L. of N. b. 4. c. 10.
b Ibid. b 4. c. 11.
d Gen. c. 15.
e Taylor's elem, civ. law. 517.
f See pag. 12.
g Selden. De fuce. Ebr. c. 24.
h Gen. c. 48.

seph a portion of his inheritance double to that of his brethren: which will we find carried into execution many hundred years afterwards, when the posterity of Joseph were divided into two distinct tribes, those of Ephraim and Manasseh, and had two several inheritances assigned them; whereas the descendents of each of the other patriarchs formed only one single tribe, and had only one lot of inheritance. Solon was the first legislator that introduced wills into Athens i; but in many other parts of Greece they were totally discountenanced k. In Rome they were unknown, till the laws of the twelve tables were compiled, which first gave the right of bequeathing l: and, among the northern nations, particularly among the Germans m, testaments were not received into use. And this variety may serve to evince, that the right of making wills, and disposing of property after death, is merely a creature of the civil state n; which has permitted it in some countries, and denied it in others: and, even where it is permitted by law, it is subjected to different formalities and restrictions in almost every nation under heaven o.
WITH us in England this power of bequeathing is co-eval with the first rudiments of the law: for we have no traces or memorials of any time when it did not exist. Mention is made of intestacy, in the old law before the conquest, as being merely accidental; and the distribution of the intestate's estate, after payment of the lord's heriot, is then directed to go according to the established law. Sive quis incuria, five morte repentina, suerit inteftatus mortuus, dominus amen nullam rerum fuarum partem (praeter eam quae jure debetur hereoti nomine) fibi asumito. Verum possessiones uxori, liberis, et cognatione proximis, pro fuo cuique jure, distribuantur. But we are not to imagine, that the power of bequeathing extended originally to all a man's personal estate. On the contrary, Glanvil will inform us q, that by the

common law, as it flood in the reign of Henry the second, a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal: or if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so e converso, if he had no children, the wife was entitled to one moiety, and he might bequeath the other: but, if he died without either wife or issue, the whole was at his own disposal r. The shares of the wife and children was called their reasonable part; and the writ de rationabili parte bonorum was given to recover it s.

THIS continued to be the law of the land at the time of magna carta, which provides, that the king's debts shall first of all be levied, and then the residue of the goods shall go to the executor to perform the will of the deceased: and, if nothing be owing to the crown, omnia catalla cedant defuncto; falvis uxori ipsius et pueris fuis rationabilibus partibus suis t. In the reign of king Edward the third this right of the wife and children was still held to be the universal or common law u; though frequently pleaded
as the local custom of Berks, Devon, and other counties; and Sir Henry Finch lays it down expressly, in the reign of Charles the first, to be the general law of the land. But this law is at present altered by imperceptible degrees, and the deceased may now by will bequeath the whole of his goods and chattels; though we cannot trace out when first this alteration began. Indeed Sir Edward Coke is of opinion, that this never was the general law, but only obtained in particular places by special custom: and to establish that doctrine he relies on a passage in Bracton, which in truth, when compared with the context, makes directly against his opinion. For Bracton lays down the doctrine of the reasonable part to be the common law; but mentions that as a particular exception, which Sir Edward Coke has hastily cited for the general rule. And Glanvil, Magna Carta, Fleta, the year-books, Fitzherbert, and Finch, do all agree with Bracton, that this right to the pars rationabilis was by the common law: which also continues to this day to be the general law of our sister kingdom of Scotland. To which we may add, that, whatever may have been the custom of later years in many parts of the kingdom, or however it was introduced in derogation of the old common law, the ancient method continued in use in the province of York, the principality of Wales, and the city of London, till very modern times: when, in order to favour the power of bequeathing, and to reduce the whole kingdom to the same standard, three statutes have been
provided; the one 4 & 5 W. & M. c. 2. explained by 2 & 3 Ann. c. 5. for the province of York; another 7 & 8 W. III. c. 38. for Wales; and a third, 11 Geo. I. c. 18. for London: whereby it is enacted, that persons within those districts, and liable to those customs, may (if they think proper) dispose of all their personal estates by will; and the claims of the widow, children, and other relations, to the contrary, are totally barred. Thus is the old common law now utterly abolished throughout all the kingdom of England, and a man may devise the whole of his chattels as freely, as he formerly could his third part or moiety. In disposing of which, he was bound by the custom of many places (as was stated in a former chapter b) to remember his lord and the church, by leaving them his two best chattels, which was the original of heriots and mortuaries; and afterwards he was left at his own liberty, to bequeath the remainder as he pleased.

/y 2 Inst. 33.
z l. 2. c. 26. 2.
a Dahymp. Of fead. property. 145.
b pag. 426.

IN case a person made no disposition of such of his goods as were testable, whether that were only part or the whole of them, he was, and is, said to die intestate; and in such cases it is said, that by the old law the king was entitled to seise upon his goods, as the parens patriae, and general trustee of the kingdom c. This prerogative the king continued to exercise for some time by his own ministers of justice; and probably in the county court, where matters of all kinds were determined: and it was granted as a franchise to many lords of manors, and others, who have to this day a prescriptive right to grant administration to their intestate tenants and suitors, in their own courts baron and other courts, or to have their wills there proved, in case they made any disposition d. Afterwards the crown, in favour of the church, invested the prelates with this branch of the prerogative; which was done, faith Perkins e, because it was intended by the law, that spiritual men are of better conscience than laymen, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased. The goods therefore of intestates were given to the ordinary by the crown; and he might seise them, and keep them without wafting, and also might give, alien, or fell them at his will, and dispose of the money in pios ufus: and, if he did otherwise, he broke the confidence which the law reposed in him f. So that properly the whole interest and power, which were granted to the ordinary, were only those of being the
king's almoner within his diocese; in trust to distribute the intestate's goods in charity to the poor, or in such superstitious uses as the mistaken zeal of the times had denominated pious g. And, as he had thus the disposition of intestates' effects, the probate of wills of course followed: for it was thought just and natural, that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby.

c 9 Rep. 38.
d Ibid. 37.
e 486.
f Finch, Law. 173, 174.
g Plowd. 277.

THE goods of the intestate being thus vested in the ordinary upon the most solemn and conscientious trust, the reverend prelates were therefore not accountable to any, but to God and themselves, for their conduct h. But even in Fleta's time it was complained i, quod ordinarii, bujufmodi bona nomine ecclefiae occupantes, nullam vel faltem indebitam faciunt distributionem. And to what a length of iniquity this abuse was carried, most evidently appears from a gloss of pope Innocent IV k, written about the year 1250; wherein he lays it down for established canon law, that in Britannia tertia pars bonorum decedentium ab inteftato in opus ecclefiae et pauperum dispensanda est. Thus the popish clergy took to themselves l (under the name of the church and poor) the whole residue of the deceased's estate, after the partes rationabiles, or two thirds, of the wife and children were deducted; without paying even his lawful debts, or other charges thereon. For which reason it was enacted by the statute of Westm. 2. m that the ordinary shall be bound to pay the debts of the intestate so far as his goods will extend, in the same manner that executors were bound in case the deceased had left a will: a use more truly pious, than any requiem, or mass for his soul. This was the first check given to that exorbitant power, which the law had entrusted with ordinaries. But, though they were now made liable to the creditors of the intestate for their just and lawful demands, yet the residuum, after payment of debts, remained still in their hands, to be applied to whatever purposes the conscience of the ordinary should approve. The flagrant abuses of which power occasioned the legislature again to interpose, in order to prevent the ordinaries from keeping any longer the administration in their own hands, or those of their immediate de-
The proportion given to the priest, and to other pious uses, was different in different counties. In the archdeaconry of Richmond in Yorkshire, this proportion was settled by a papal bull A.D. 1254. (Regist. Bonoris de Richm. 101.) and was observed till abolished by the statute 26 Hen. VIII. c. 15.

m 13 Edw. I. c. 19.

pendents: and therefore the statute 31 Edw. III. c. 11. provides, that, in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods; which administrators are put upon the same footing, with regard to suits and to accounting, as executors appointed by will. This is the original of administrators, as they at present stand; who are only the officers of the ordinary, appointed by him in pursuance of this statute, which singles out the next and most lawful friend of the intestate; who is interpreted n to be the next of blood that is under no legal disabilities. The statute 21 Hen. VIII. c. 5. enlarges a little more the power of the ecclesiastical judge; and permits him to grant administration either to the widow, or the next of kin, or to both of them, at his own discretion; and, where two or more persons are in the same degree of kindred, gives the ordinary his election to accept whichever he pleases.

UPON this footing stands the general law of administrations at this day. I shall, in the farther progress of this chapter, mention a few more particulars, with regard to who may, and who may not, be administrator; and what he is bound to do when he has taken this charge upon him: what has been hitherto remarked only serving to shew the original and gradual progress of testaments and administrations; in what manner the latter was first of all vested in the bishops by the royal indulgence; and how it was afterwards, by authority of parliament, taken from them in effect, by obliging them to commit all their power to particular persons nominated expressly by the law.

I PROCEED now, secondly, to enquire who may, or may not make a testament; or what persons are absolutely obliged by law to die intestate. And this law o is entirely prohibitory; for, regularly, every person hath full
power and liberty to make a will, that is not under some special
prohibition by law or custom: which prohibitions are principally upon
three accounts; for want

n 9 Rep. 39.

of sufficient discretion; for want of sufficient liberty and free will; and on
account of their criminal conduct.

1. IN the first species are to be reckoned infants under the age of fourteen
if males, and twelve if females; which is the rule of the civil law p. For,
though some of our common lawyers have held that an infant of any age
(even four years old) might make a testament q, and others have denied
that under eighteen he is capable r, yet as the ecclesiastical court is the
judge of every testator's capacity, this case must be governed by the rules
of the ecclesiastical law. So that no objection can be admitted to the will of
an infant of fourteen, merely for want of age: but, if the testator was not of
sufficient discretion, whether at the age of fourteen or four and twenty,
that will overthrow his testament. Madmen, or otherwise non compotes,
idots or natural fools, persons grown childish by reason of old age or
distemper, such as have their senses besotted with drunkenness, --- all
these are incapable, by reason of mental disability, to make any will so
long as such disability lasts. To this class also may be referred such
persons as are born deaf, blind, and dumb; who, as they want the common
inlets of understanding, are incapable of having animum testandi, and
their testaments are therefore void.

2. SUCH persons, as are intestable for want of liberty or freedom of will,
are by the civil law of various kinds; as prisoners, captives, and the like s.
But the law of England does not make such persons absolutely intestable;
but only leaves it to the discretion of the court of judge, upon the
consideration of the particular circumstances of duerefs, whether or no
such persons could be supposed to have liberum animum testandi. And,
with regard to feme-covets, our laws differ still more materially from the
civil. Among the Romans t

q Perkins. 503.
a married woman is not only utterly incapable of devising lands, being excepted out of the statute of wills, 34 & 35 Hen. VIII. c. 5. but also she is incapable of making a testament of chattels, without the licence of her husband. For all her personal chattels are absolutely his own; and he may dispose of her chattels real, or shall have them of himself if he survives her: it would be therefore extremely inconsistent, to give her a power of defeating that provision of the law, by bequeathing those chattels to another. Yet by her husband's licence she may make a testament; and the husband, upon marriage, frequently covenants with her friends to allow her that licence: but such licence is more properly his assent; for, unless it be given to the particular will in question, it will not be a complete testament, even though the husband beforehand hath given her permission to make a will. Yet it shall be sufficient to repel the husband from his general right of administring his wife's effects; and administration shall be granted to her appointee, with such testamentary paper annexed. So that in reality the woman makes no will at all, but only something like a will; operating in the nature of an appointment, the execution of which the husband by his bond, agreement, or covenant, is bound to allow. A distinction similar to which, we meet with in the civil law. For, though a son who was in potestate parentis could not by any means make a formal and legal testament, even though his father permitted it, yet he might, with the like permission of his father, make what was called a donatio mortis causa. The queen consort is an exception to this general rule, for she may dispose of her chattels by will, without the consent of her lord: and any feme-covert may make her will of goods, which are in her possession in auter droit, as executrix or administratix; for these can never be the property of the husband: and, if she has any pinmoney or separate maintenance, it is said the may dispose of her savings thereout by testament, without the control of
her husband d. But, if a feme-sole makes her will, and afterwards marries, such subsequent marriage is esteemed a revocation if law, and entirely vacates the will e.

3. PERSONS incapable of making testaments, on account of their criminal conduct, are in the first place all traitors and felons, from the time of conviction; for then their goods and chattels are no longer at their own disposal, but forfeited to the king. Neither can a felo de fe make a will of goods and chattels, for they are forfeited by the act and manner of his death; but he may make a devise of his lands, for they are not subjected to any forfeiture f. Outlaws also, though it be but for debt, are incapable of making a will, so long as the outlawry subsists, for their goods and chattels are forfeited during that time g. As for persons guilty of other crimes, short of felony, who are by the civil law precluded from making testaments, (as usurers, libellers, and others of a worse stamp) at the common law their testaments may be good h. And in general the rule is, and has been so at least ever since Glanvil's time j, quod libera fit cujufcunque ultima voluntas.

LET us next, thirdly, consider what this last will and testament is, which almost every one is thus at liberty to make; or the nature and incidents of a testament. Testaments both Justinian i and sir Edward Coke k agree to be so called, because they are testatio mentis; an etymon, which seems to favour too much of the conceit; it being plainly a substantive derived from the verb teftari, in like manner as juramentum, incrementum, and others, from other verbs. The definition of the old Roman lawyers is much better than their etymology; voluntatis noftrae justa sententia de eo, quod quis post mortem suam suri velit l: which may be thus rendered into English, the legal declaration of a man's intentions, which he wills to be performed af-

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d Prec. Chan. 44.
e 4 Rep. 60. 2 p. Wms. 624.
f Plowd. 261.
g Fitzh. Abr. t. descent. 16.
h Godolph. p. 1. c. 12.
ter his death. It is called *sententia* to denote the circumspection and prudence with which it is supposed to be made: it is *voluntatis nostrae sententia*, because its efficacy depends on its declaring the testator's intention, whence in England it is emphatically styled his will: it is *justa sententia*; that is, drawn, attested, and published with all due solemnities and forms of law: It is *de eo, quod quis post mortem suam fieri valit*, because a testament is of no force till after the death of the testator.

THESE testaments are divided into two sorts; written, and verbal or nuncupative; of which the former is committed to writing, the latter depends merely upon oral evidence, being declared by the testator in extremis before a sufficient number of witnesses, and afterwards reduced to writing. A *codicil*, *codicillus*, a little book or writing, is a supplement to a will; or an addition made by the testator, and annexed to, and to be taken as part of, a testament: being for its explanation from, the former dispositions of the testator m. This may also be either written or nuncupative.

BUT, as nuncupative wills and codicils, (which were formerly more in use that at present, when the art of writing is become more universal) are liable to great impositions, and may occasion many perjuries, the statute of frauds, 29 Car. II. c. 3. enacts; 1. That no written will shall be revoked or altered by a subsequent nuncupative one, except the same be in the lifetime of the testator reduced to writing, and read over to him, and approved; and unless the same be proved to have been so done by the oaths of three witnesses at the least; who, by statute 4 & 5 Ann. c. 16. must be such as are admissible upon trials at common law. 2. That no nuncupative will shall in any wise be good, where the estate bequeathed exceeds 30 l, unless proved by three such witnesses, present at the making thereof (the Roman law requiring seven n) and unless they or some of them were specially required to bear

m Godolph. p. 1. c. 1. 3.
n Inst. 2. 10. 14.
witness thereto by the testator himself, and unless it was made in his last sickness, in his own habitation or dwelling-house, or where he had been previously resident ten days at the least, except he be surprized with sickness on a journey, or from home, and dies without returning to his dwelling. 3. That no nuncupative will shall be proved by the witnesses after six months from the making, unless it were put in writing within six days. Nor shall it be proved till fourteen days after the death of the testator, nor till process hat first issued to call in the widow, or next of kin, to contest it if they think proper. Thus has the legislature provided against any frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself is fallen into disuse; and hardly ever heard of, but in the only instance where favour ought to be shewn to it, when the testator is surprized by sudden and violent sickness. The testamentary words must be spoken with an intent to bequeath, not any loose idle discourse in his illness; for he must require the by-standers to bear witness of such his intention: the will must be made at home, or among his family or friends, unless by unavoidable accident; to prevent impositions from strangers: it must be in his last sickness; for, if he recovers, he may alter his dispositions, and has time to make a written will: it must not be proved at too long a distance from the testator's death, lest the words should escape the memory of the witnesses; nor yet too hastily and without notice, lest the family of the testator should be put to inconvenience, or surprized.

AS to written wills, they need not any witness of their publication. I speak not here of devises of lands, which are entirely another thing, a conveyance by statute, unknown to the feudal or common law, and not under the same jurisdiction as personal testaments. But a testament of chattels, written in the testator's own hand, though it has neither his name nor seal to it, nor witnesses present at its publication, is good; provided sufficient proof can be had that it is his hand-writing o. And though written in another man's hand, and never signed by the testator, yet


if proved to be according to his instructions and approved by him, it hath been held a good testament of the personal estate p. Yet it is the safer, and more prudent way, and leaves less in the breast of the ecclesiastical judge, if it be signed or sealed by the testator, and published in the presence of witnesses; which last was always required in the time of Bracton q; or, rather, he in this respect has implicitly copied the rule of the civil law.
NO testament is of any effect till after the death of the testator. Nam omne testamentum morte consummatum est; et voluntas testatoris est ambulatoria usque ad mortem. And therefore, if there be many testaments, the last overthrows all the former: but the republication of a former will revokes one of a later date, and establishes the first again.

HENCE it follows, that testaments may be avoided three ways: 1. If made by a person labouring under any of the incapacities before-mentioned: 2. By making another testament of a later date: and, 3. By cancelling or revoking it. For, though I make a last will and testament irrevocable in the strongest words, yet I am at liberty to revoke it: because my own act or words cannot alter the disposition of law, so as to make that irrevocable, which is in its own nature revocable. For this, faith lord Bacon, would be for a man to deprive himself of that, which of all other things is most incident to human condition; and that is, alteration or repentance. It hath also been held, that, without an express revocation, if a man, who hath made his will, afterwards marries and hath a child, this is a presumptive or implied revocation of his former will, which he made in his state of celibacy. The Romans were also wont to set aside testaments as being inofficio, deficient in natural duty, if they disinherited or totally passed by (without assigning a true and sufficient reason) any of the children of the testator. But if the child had any legacy, though ever so small, it was a proof that the testator had not lost his memory or his reason, which otherwise the law presumed; but was then supposed to have acted thus for some substantial cause: and in such case no querela inofficio testamenti was allowed. Hence probably has arisen that groundless vulgar error, of the necessity of leaving the heir a shilling or some other express legacy, in order to disinherit him effectually: whereas the law of England makes no such wild suppositions of
forgetfulness or insanity; and therefore, though the heir or next of kin be
totally omitted, it admits no querela inofficioft, to set aside such a
testament.

WE are next to consider, fourthly, what is an executor, and what is an
administrator; and how they are both to be appointed.

AN executor is he to whom another man commits by will the execution of
that his last will and testament. And all persons are capable of being
executors, that are capable of making wills, and many others besides; as
feme-coverts, and infants: nay, even infants unborn, or in ventre fa mere,
may be made executors a. But no infant can act as such till the age of
seventeen years; till which time administration must be granted to some
other, durante minore aetate b. In like manner as it may be granted
durante absentia, or pendente lite; when the executor is out of the realm c,
or when a suit is commenced in the ecclesiastical court touching the
validity of the will d. This appointment of an executor is essential to the
making of a will e: and it may be performed either by express words, or
such as strongly imply the same. But if the testator makes his will, without
naming any executors, or if he names incapable persons, or if the
executors names refuse to act; in any of these cases, the ordinary must

y See Book I. ch. 16.
z Inst. 2. 18. 1.
a West. Symb. p. 1.  635.
b Went. Off. Ex. c. 18.
c 1 Lutw. 342.
d 2 P. Wms. 589, 590.
e Wentw. c. 1. Plowd. 281.

grant administration cum testamento annexo f to some other person; and
then the duty of of the administrator, as also when he is constituted only
durante minore aetate, a c, of another, is very little different from that of
an executor. And this was law so early as the reign of Henry II, when
Glanvil g informs us, thattestamenti executores esse debent ii, quos
testator ad hoc elegerit, et curam ipfe commiferit: fi vero testator nullos ad
hoc nominaverit, poffunt propinqui et confanguinei ipfius defuncti ad id
faciendum se ingerere.
BUT if the deceased died totally intestate, without making either will or executors, then general letters of administration must be granted by the ordinary to such administrator as the statutes of Edward the third, and Henry the eighth, before-mentioned, direct. In consequence of which we may observe; 1. That the ordinary is compellable to grant administration of the goods and chattels of the wife, to the husband, or his representatives h: and, of the husband's effects, to the widow, or next of kin; but he may grant it to either, or both, at his discretion i. 2. That, among the kindred, those are to be preferred that are the nearest in degree to the intestate; but, of persons in equal degree, the ordinary may take which he pleases k 3. That this nearness or propinquity of degree shall be reckoned according to the computation of the civilians l; and not of the canonists, which the law of England adopts in the descent of real estates m: because in the civil computation the intestate himself is the terminus, a quo the several degrees are numbered; and not the common ancestor, according to the rule of the canonists. And therefore in the first place the children, or (on failure of children) the parents of the deceased, are intitled to the administration: both which are indeed in the first degree; but with us n the children are allowed the preference o. Then follow brothers p, grandfathers q, uncles of nephews r, (and the females of each class respectively) and lastly cousins. 4. The half blood is admitted to the administration as well as the whole: for they are of the kindred of the intestate, and only excluded from inheritances of land upon feodal reasons. Therefore the brother of the half blood shall exclude the uncle of the whole blood s: and the ordinary may grant administration to the sister of the half, or the brother of the whole blood, at his own discretion t. 5. If none of the kindred will take out administration, a creditor may, by custom, do it u. 6. If the executor refuses, or dies intestate, the administration may be granted to the residuary legatee, in exclusion of the next of kin w. And, lastly, the
ordinary may, in defect of all these, commit administration (as he might have done/ before the statute Edw. III.) to such discreet person as he approves of: or may grant him letters ad colligendum bona defuncti, which neither make him executor nor administrator; his only business being to keep the goods in his safe custody, and to do other acts for the benefit of such as are entitled to the property of the deceased. If a bastard, who has no kindred, being nullius filius, or any one else that has no kindred, dies intestate and without wife or child, it hath formerly been held a that the ordinary might seise his goods, and dispose of them in pois ufus. But the

0 In Germany there was long a dispute, whether a man's children should inherit his effects during the life of their grandfather; which depends (as we shall see hereafter) on the same principles as the granting of administrations. At last it was agreed at the diet of Arensberg, about the middle of the tenth century, that the point should be decided by combat. Accordingly, an equal number of champions being chosen on both sides, those of the children obtained the victory; and so the law was established in their favour, that the issue of a person deceased shall be intitled to his goods and chattels in preference to his parents. (Mod. Un. Hist. xxix. 28.)

p Harris in Nov. 118. c. 2.
q Prec. Chanc. 527. 1 P. Wms. 41.
r Atk. 455.
s 1 Ventr. 425.
t Aleyn. 36. Styl. 74.
u Salk. 38.
w 1 Sid. 281. 1 Ventr. 219.
x Plowd. 278.
y Went. ch. 14.
z 2 Inst. 398.
a Salk. 37.

usual course now is for some one to procure letters patent, or other authority, from the king; and then the ordinary of course grants administration of such appointee of the crownb.

THE interest, vested in an executor by the will of the deceased, may be continued and kept alive by the will of the same executor: so that the executor as A's executor is to all intents and purposes the executor and representative a A himself c: but the executor of A's administrator, or the administrator of A's executor, is not the representative Ad. For the power
of an executor is founded upon the Special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence: but the administrator of A is merely the officer of the ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust at all; and therefore, on the death of that officer, it results back to the ordinary to appoint another. And, with regard to the administrator of A's executor, he has clearly no provity or relation to A; being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore, in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the ordinary to commit administration afreth, of the goods of the deceased not administered by the former executor or administrator. And this administrator, de boins non, is the only legal representative of the deceased in matters of personal property e. But he may, as well as an original administrator, have only a limited or special administration committed to his care, viz. of certain specific effects, such as a term of years and the like; the rest being committed of others f.

b 3 P. Wms. 33.
c Stat. 25 Edw. III. ft. 5. c. 5. 1 Leon. 275.
d Bro. Abr. tit. administrator. 7.
e Styl. 225.

HAVING thus shewn what is, and who may be, an executor or administrator, I proceed now, fifthly and lastly, to enquire into some few of the principal points of their office and duty. These in general are very much the same in both executors and administrators; excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration, and then he differs still less from an executor: and, secondly, that an executor may do many acts before he proves the will, but an administrator may do nothing till letters of administration are issued; for the former derives his power from the will and not from the probate h, the latter owes his entirely to the appointment of the ordinary. If a stranger takes upon him to act as executor, without any just authority (as by intermeddling with the goods of the deceased i, and many other transactions k) he is called in law an executor of his own wrong, de son tort, and is liable to all the trouble of an
executorship, without any of the profits or advantages: but merely doing
acts of necessity or humanity, as locking up the goods, or burying the
corpse of the deceased, will not amount to such an intermeddling, as will
charge a man as executor of his own wrong l. Such a one cannot bring an
action himself in right of the deceased m, but actions may be bought
against him. And, in all actions by creditors against such an officious
intruder, he shall be named an executor, generally n; for the most obvious
conclusion, which strangers can form from his conduct, is that he hath a
will of the deceased, wherein he is named executor, but hath not yet taken
probate thereof. He is chargeable with the debts of the deceased, so far as
assets come to his hands p: and, as against creditors in general, shall be
allowed all payments made to any other creditor in the same or a superior
degree q, himself

 g Wentw. ch. 3.
h Comyns. 151.
I 5 Rep. 33, 34.
l Dyer. 166.
m Bro. Abr. t. administrator. 8.
n 5 Rep. 31.
o 12 Mod. 471.
p Dyer. 166.
q 1 Chan Caf. 33.

only excepted r. And though, as against the rightful executor or
administrator, he cannot plead such payment, yet it shall be allowed him
in mitigation of damages s; unless perhaps upon a deficiency of assets,
whereby the rightful executor may be prevented from satisfying his own
debt t. But let us now see what are the power and duty of a rightful
executor or administrator.

1. HE must bury the deceased in a manner suitable to the estate which he
leaves behind him. Necessary funeral expences are allowed, previous to all
other debts and charges; but if the executor or administrator be
extravagant, it is a species of devastation or waste of the substance of the
deceased, and shall only be prejudicial to himself, and not to the creditors
or legatees of the deceased u.
2. THE executor, or the administrator durante minore aetate or durante absentia, or cum testamento annexo, must prove the will of the deceased: which is done either in common form, which is only upon his own oath before the ordinary, or his surrogate; or per testes, in more solemn form of law, in case the validity of the will be disputed. When the will is so proved, the original must be deposited in the registry of the ordinary; and a copy thereof in parchment is made out under the seal of the ordinary, and delivered to the executor or administrator, together with a certificate of its having been proved before him: all which together is usually styled the probate. In defect of any will, the person entitled to be administrator must also at this period take out letters of administration under the seal of the ordinary; whereby an executorial power to collect and administer, that is, dispose of the goods of the deceased, is vested in him: and he must, by statute 22 & 23 Car. II. c. 10. enter into a bond with sureties, faithfully to execute his trust. If all the goods of the deceased lie within the same jurisdiction, a probate before the ordinary, or an administration granted by him, are the only proper ones: but if the deceased had bona notabilia, or chattels to the value of a hundred shillings, in two distinct dioceses or jurisdictions, then the will must be proved, or administration taken out, before the metropolitan of the province, by way of special prerogative; whence the court where the validity of such wills is tried, and the office where they are registered, are called the prerogative court, and the prerogative office, of the provinces of Canterbury and York. Lyndewode, who flourished in the beginning of the fifteenth century, and was official to arch-bishop Chichele, interprets these hundred shillings to signify solidos legales; of which he tells us seventy two amounted to a pound of gold, which in his time was valued at fifty nobles or 16 l. 13 s. 4 d. He therefore computes that the hundred shillings, which constituted bona notabilia, were then equal in current money to 23 l. 3 s. 0¼ d. This will account for what is said in our ancient books, that bona notabilia in the diocese of London, and indeed every where else, were of the value of ten pounds by composition: for, if we pursue the calculations of Lyndewode to their full extent, and consider that a pound
of gold is now almost equal in value to an hundred and fifty nobles, we shall extend the present amount of bona notabilia to nearly 70 l. But the makers of the canons of 1603 understood this ancient rule to be meant of the shillings current in the reign of James I, and have therefore directed that five pounds shall for the future be the standard of bona notabilia, so as to make the probate fall within the archiepiscopal prerogative. Which prerogative (properly understood) is grounded upon this reasonable foundation: that, as the bishops were themselves originally the administrators to all intestates in their own diocese, and as the present administrators are in effect no other than their officers or substitutes, it was impossible for the bishops, or those who acted under them, to collect any goods of the deceased, other than such as lay within their own dioceses, beyond which their episcopal authority extends not. But it would be extremely troublesome, if as many administrations were to be granted, as there are dioceses within which the deceased had bona notabilia; besides the uncertainty which creditors and legatees would be at, in case different administrators were appointed, to ascertain the fund out of which their demands are to be paid. A prerogative is therefore very prudently vested in the metropolitan of each province, to make in such cases one administration serve for all. This accounts very satisfactorily for the reason of taking out administration to intestates, that have large and diffusive property, in the prerogative court: and the probate of wills naturally follows, as was before observed, the power of granting administrations; in order to satisfy the ordinary that the deceased has, in a legal manner, by appointing his own executor, excluded him and his officers from the privilege of administering the effects.

3. 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 in the ordinary upon oath, if thereunto lawfully required.

4. HE is to collect all the goods and chattels so inventoried; and to that end he has very large powers and interests conferred on him by law; being the
representative of the deceased d, and having the same property in his goods as the principal had when living, and the same remedies to recover them. And, if there be two or more executors, a sale or release by one of them shall be good against all the rest e; but in case of administrators it is otherwise f. Whatever is so recovered, that is of a saleable nature and may be converted into ready money, is called assets in the hands of the executor or administrator g; that is, sufficient or enough (from the French assez) to make him chargeable to a creditor or legatee, so far as such goods and chattels extend.

d Co. Litt. 209.
e Dyer. 23.
f Atk. 460.
g See pag. 244.

Whatever assets so come to his hands he may convert into ready money, to answer the demands that may be made upon him: which are the next thing to be considered; for,

5. THE executor of administrator must pay the debts of the deceased. In payment of debts he must observe the rules of priority; otherwise, on deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate. And, first, he may pay all funeral charges, and the expense of proving the will, and the like. Secondly, debts due to the king on record or specialty h. Thirdly, such debts as are by particular statutes to be preferred to all others; as the forfeitures for not burying in woolen i, money due on poors rates k, for letters to the post-office l, and some others. Fourthly, debts of record; as judgments (docketted according to the statute 4 & 5 W. & M. c. 20.) statutes, and recognizances m. Fifthly, debts due on special contracts; as for rent, (for which the lessor has often a better remedy in his own hands, by distraining) or upon bonds, covenants, and the like, under seal n. Lastly, debts on simple contracts, viz. upon notes unsealed, and verbal promises. Among these simple contracts, servants wages are by some o with reason preferred to any other: and so stood the ancient law, according to Bractonp and Flcta q, who reckon, among the first debts to be paid, servitia servientium ct stipendia famulorum. Among debts of equal degree, the executor or administrator is allowed to pay himself first; by retaining in his hands so much as his debt amounts to r. But an executor of his own
wrong is not allowed to retain: for that would tend to encourage creditors
to strive who should first take possession of the goods of the deceased; and
would besides be taking advantage of their own wrong, which is contrary
to the rule of law s. If a

h 1 And. 129.  
i Stat. 30. Car. II. c. 3.  
k Stat. 17 Geo. II. c. 38.  
l Stat. 9 Ann. c. 10.  
n Wentw. ch. 12.  
o 1 Roll. Abr 927.  
p l. 2. c. 26.  
q l. 2. c. 57. 10.  
r 10 Mod. 496.  
s 5 Rep. 30.

creditor constitutes his debtor his executor, this is a release or discharge of
the debt, whether the executor acts or no r; provided there be assets
sufficient to pay the testator's debts: for, though this discharge of the debt
shall take place of all legacies, yet it were unfair to defraud the testator's
creditors of their just debts by a release which is absolutely voluntary u.
Also, if no suit is commenced against him, the executor may pay any one
creditor in equal degree his whole, debt, though he has nothing left for the
rest: for, without a suit commenced, the executor has no legal notice of the
debt w.

6. WHEN the debts are all discharged, the legacies claim the next regard;
which are to be paid by the executor so far as his assets will extend: but he
may not give himself the preference herein, as in the case of debts x.

A LEGACY is a bequest, or gift, of goods and chattels by testament; and
the person to whom it is given is styled the legatee: which every person is
capable of being, unless particularly disabled by the common law or
statutes, as traitors, papists, and some others. This bequest transfers an
inchoate property to the legatee; but the legacy is not perfect without the
assent of the executor: for if I have a general or pecuniary legacy of 100 l,
or a specific one of a piece of plate, I cannot in either case take it without
the consent of the executor y. For in him all the chattels are vested; and it
is his business first of all to see whether there is 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 of
our ancient law, de bonis defuncti primo deducenda sunt ea quae sunt
necessitatis, et postea quae sunt utilitatis, et ultimo quae sunt voluntatis.
And in case of a deficiency of assets, all the general legacies must abate
proportionally, in order to pay the debts;

\[ t \text{ Plowd. 184. Salk. 299.} \\
\text{u Salk. 303. 1 Roll. Abr. 921.} \\
\text{w Dyer. 32. 2 Leon. 60.} \\
\text{x 2 Vern 434. 2 P. Wms. 25.} \\
\text{y Co. Litt. 111. Aleyn. 39.} \\
\text{z l. 2. c. 26.} \]

but a specific legacy (of a piece of plate, a horse, or the like) is not to abate
at all, or allow anything by way of abatement, unless there be not
sufficient without it. Upon the same principle, if the legatees have been
paid their legacies, they are afterwards bound to refund a ratable part, in
case debts come in, more than sufficient to exhaust the residuum after the
legacies paid. And this law is as old as Bracton and Fleta, who tell us, si
plura sunt debita, vel plus legatum suerit, ad quae catalla defuncti non
sufficient, fiat ubique defalcatio, excepto regis privilegio.

IF the legatee dies before the testator, the legacy is a lost or lapsed legacy,
and shall sink into the residuum. And if a contingent legacy be left to any
one; as, when he attains, or if he attains, the age of twenty one; and he dies
before that time; it is a lapsed legacy. But a legacy to one, to be paid
when he attains the age of twenty one years, is a vested legacy: an interest
which commences in praesentia, although it be solvendum in futuro: and, if
the legatee dies before that age, his representatives shall receive it out of
the testator's personal estate, at the same time that it would have become
payable, in case the legatee had lived. This distinction is borrowed from
the civil law; and its adoption in our courts is not so much owing to its
intrinsic equity, as to its having been before adopted by the ecclesiastical
courts. For, since the chancery has a concurrent jurisdiction with them, in
regard to the recovery of legacies, it was reasonable that there should be a
conformity in their determinations; and that the subject should have the
same measure of justice in whatever court he sued. But if such legacies be
charged upon a real estate, in both cases they shall lapse for the benefit of
the heir; for, with regard to devises affecting lands, the ecclesiastical
court hath no concurrent jurisdiction. And, in case of a vested legacy, due immediately, and charged on land or money in the funds, which yield an im-

a 2 Vern. 11.
b Ibid. 205.
c Bract. l. 2. c. 26. Flet. l. 2. c. 57. 11.
e Ff. 35. 1 1& 2.
f 1 Equ. Caf. abr. 295.
g 2 P. Wms. 601.

mediate profit, interest shall be payable thereon from the testator's death; but if charged only on the personal estate, which cannot be immediately got in, it shall carry interest only from the end of the year after the death of the testator h.

BESIDES these formal legacies, contained in a man's will and testament, there if also permitted another death-bed disposition of property; which is called a donation causa mortis. And that is, when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods, (under which have been included bonds, and bills drawn by the deceased upon his banker) to keep in case of his decease. This gift, if the donor dies, needs not the assent of his executor: yet it shall not prevail against creditors; and is accompanied with this implied trust, that, if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death, or mortis causa i. This method of donation might have subsisted in a state of nature, being always accompanied with delivery of actual possession k; and so far differs from a testamentary disposition: but seems to have been handed to us from the civil lawyers l, who themselves borrowed it from the Greeks m.

7. WHEN all the debts and particular legacies are discharged, the surplus or residuum must be paid to the residuary legatee, if any be appointed by the will, and, if there be none, it was long a settled notion that it devolved to the executor's own use, by virtue of his executorship n. But, whatever ground there might have been formerly for this opinion, it seems now to be understood o with this restriction; that, although where the executor has no legacy at all the residuum shall in general be his own, yet where-
ever there is sufficient on the face of a will, (by means of a competent legacy or otherwise) to imply that the testator intended his executor should not have the residue, the undesived surplus of the estate shall go to the next of kin, the executor then standing upon exactly the same footing as an administrator: concerning whom indeed there formerly was much debate, whether or no he could be compelled to make any distribution of the intestate's estate. For though (after the administration was taken in effect from the ordinary, and transferred to the relations of the deceased) the spiritual court endeavoured to compel a distribution, and took bonds of the administrator for that purpose, they were prohibited by the temporal courts, and the bonds declared void at law. And the right of the husband not only to administer, but also to enjoy exclusively, the effect of his deceased wife, depends still on this doctrine of the common law: the statute 29 Car. II. declaring only that the statute of distributions does not extend to this case. But now these controversies are quite at an end; for by the statute 22 & 23 Car. II. c. 10. it is enacted, that the surplusage of intestates' estates, except of femes covert, shall (after the expiration of one full year from the death of the intestate) be distributed in the following manner. One third shall go to the widow of the intestate, and the residue in equal proportions to his children, or, if dead, to their representatives; that is, their lineal descendants: if there are no children or legal representatives subsisting, 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 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, here referred to, are to be investigated by the
same rules of consanguinity, as those who are intitled to letters of administration; of whom we have sufficiently spoken t. And therefore by this statute

p Godolph. p. 2. c. 32.
q 1 Lev. 233. Cart. 125. 2 P. Wms. 447.
r Stat. 29 Car. II. c. 3. 25.
s Raym. 496. Lord Raym. 571.
t pag. 504.

the mother, as well as the father, succeeded to all the personal effects of their children, who died intestate and without wife or issue: in exclusion of the other sons and daughters, the brothers and sisters of the deceased. And so the law still remains with respect to the father; but by statute 1 Jac. II. c. 17. if the father be dead, and any of the children die intestate without wife or issue, in the lifetime of the mother, she and each of the remaining children, or their representatives, shall divide his effects in equal portions.

IT is obvious to observe, how near a resemblance this statute or distributions bears to our ancient English law, de rationabili parte bonorum, spoken of at the beginning of this chapter u; and which sir Edward Coke w himself, though he doubted the generality of its restraint on the power of devising by will, held to be universally binding upon the administrator or executor, in the case of either a total or partial intestacy. It also bears some resemblance to the Roman law of successions ab intestato x: which, and because the the act was also penned by an eminent civilian y, has occasioned a notion that the parliament of England copie it from the Roman praetor: though indeed it is little more than a restoration, with some refinements and regulations, of out old constitutional law; which prevailed as an established right and custom from the time of king Canute downwards, many centuries before Justinian's laws were known or hears of in the western parts of Europe. So likewise there is another part of the statute of distributions, where directions are given, that no child of the intestate, (except his heir at law) on whom he settled in his lifetime any estate in lands, or 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 the estates fo

u pag. 492.
The general rule of such successions was this: 1. The children or lineal descendants in equal portions. 2. On failure of these, the parents or lineal ascendants, and with them the brethren or sisters of the whole blood; or, if the parents were dead, all the brethren and sisters, together with the representatives of a brother or sister deceased. 3. The next collateral relations in equal degree. 4. The husband or wife of the deceased. (Ff. 38. 15. 1. Nov. 118. c. 1, 2, 3, 127. c. 1.)

Sir Walter Walker. Lord Raym. 574.

given them, by way of advancement, are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them equal. This just and equitable provision hath been also said to be derived from the collation bonorum of the imperial law: which is certainly resembles in some points, though it differs widely in others. But it may not be amiss to observe, that, with regard to goods and chattels, this is part of the ancient custom of London, of the province of York, and of our sister kingdom of Scotland: and, with regard to lands descending in coparcenary, that it hath always been, and still is, the common law of England, under the name of hotchpot.

BEFORE I quit this subject, I must however acknowledge, that the doctrine and limits of representation, laid down in the statute of distributions, seem to have been principally borrowed from the civil law: whereby it will sometimes happened, that personal estates are divided per capita, and sometimes per stirpes; whereas the common law knows no other rule of succession but that per stirpes only. They are divided per capita, to every man an equal share, when all the claimants claim in their own rights, as in equal degree of kindred, and not jure repraesentationis, in the right of another person. As if the next of kin be the intestate's three brothers, A, B, and C; here his estate is divided into three equal portions, and distributed per capita, one to each: but if one of these brothers, A, had been dead leaving three children, and another, B, leaving two; then the distribution must have been per stirpes; viz. one third to A's three children, another third to B's two children, and the remaining third to C the surviving brother: yet if C had also been dead, without issue, then A's and B's five children, being all in equal degree to the intestate, would take in their own rights per capita, viz. each of them of fifth part.
THE statute of distributions expressly excepts and reserves the customs of
the city of London, of the province of York, and

z Ff. 37. 6. 1.
a See ch. 12. pag. 191.
c Prec. Chanc. 54.

of all other places having peculiar customs of distributing intestates
effects. So that, though in those places the restraint of devising is removed
by the statutes formerly mentioned d, their ancient customs remain in full
force, with respect to the estates of intestates. I shall therefore conclude
this chapter, and with it the present book, with a few remarks on those
customs.

IN the first place we may observe, that in the city of London c, and
province of York f, as well as in the kingdom of Scotland g, and therefore
probably also in Wales, (concerning which there is little to be gathered, but
from the statute 7 & 8 W. III. c. 38.) the effects of the intestate, after
payment of his debts, are in general divided according to the ancient
universal doctrine of the pars rationabilis. If the deceased leaves a widow
and children, his substance (deducting the widow's apparel and furniture
of her bed-chamber, which in London is called the widow's chamber) is
divided into three parts; one of which belongs to the widow, another to the
children, and the third to the administrator: if only a widow, or only
children, they shall respectively, in either case, take one moiety, and the
administrator the other h: if neither case, take one moiety, and the
administrator shall have the whole i. And this portion, or dead man's part,
the administrator was wont to apply to his own use k, till the statute 1 Jac.
II. c. 17. declared that the same should be subject to the statutes of
distribution. So that if a man dies worth 1800 l. leaving a widow and two
children, the estate shall be divided into eighteen parts; whereof the widow
shall have eight, six by the custom and two by the statute; and each of the
children five, three by the custom and two by the statute: if he leaves a
widow and one child, they shall each have a moiety of the whole, or nine
such eighteenth parts, six by the custom and three by the statute: if he
leaves a widow and no child, the widow shall have three fourths of the
whole, two by the custom and one by the statute; and the

d pag. 493.
remainig fourth shall go by the statute to the next of kin. It is also to be observed, that if the wife be provided for by a jointure before marriage, in bar of her customary part, in puts her in a state of non-entity, with regard to the custom only l; but she shall be intitled to her share of the dead man's part under the statute of distributions, unless barred by special agreement m. And if any of the children are advanced by the father in his lifetime with any sum of money (not amounting to their full proportionable part) they shall bring that portion into hotchpot with the rest of the brothers and sisters, but not with the widow, before they are intitled to any benefit under the customn: but, if they are fully advanced, the custom intitles them to no farther dividend o.

THUS far in the main the customs of London and of York agree: but, besides certain other less material variations, there are two principal points in which they considerably differ. One is, that in London the share of the children (or orphanage part) is not fully vested in them till the age of twenty one, before which they cannot dispose of it by testament p: and, if they die under that age, whether sole or married, their share shall survive to the other children; but, after the age of twenty one, it is free from any orphanage custom, and, in case of intestacy, shall fall under the statute of distributions q. The other, that in the province of York, the heir at common law, who inherits any lands either in fee or in tail, is excluded from any filial portion or reasonable part r. But, notwithstanding these provincial variations, the customs appear to be substantially one and the same. And, as a similar policy formerly prevailed in the every part of the island, we may fairly conclude the whole to be of British original; or, if derived from the Roman law of successions, to have been drawn from that fountain much earlier than the time of

l 2 Vern. 665. 3 P. Wms. 16.
m 1 Vern. 15. 2 Chan. Rep. 252.
n 2 Freem. 279. 1 Equ. caf. abr. 155. 2 P. Wms. 526.
o 2 P. Wms. 527.
Justinian, from whose constitutions in many points (particularly in the advantages given to the widow) it very considerably differs: though it is not improbable that the resemblances which yet remain may be owing to the Roman usages; introduced in the time of Claudius Caesar, (who established a colony in Britain to instruct the natives in legal knowledges) inculcated and diffused by Papinian (who presided at York as praefectus praetorio under the emperors Severus and Caracallat) and continued by his successors till the final departure of the Romans in the beginning of the fifth century after Christ.

s Tacit. Annal. L. 12. c. 32.
t Selden in Fletam. cap. 4. 3.

THE END OF THE SECOND BOOK.

CHAPTER THE FIRST.
OF THE REDRESS OF PRIVATE WRONGS.

AT the opening of these commentaires a municipal law was in general defined to be, a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong. From hence therefore it followed, that the primary objects of the law are the establishment of rights, and the prohibition of wrongs. And this occasioned the distribution of these collections into two general heads; under the former of which we have already considered the rights that were defined and established, and under the latter are now to consider the wrongs that are forbidden and redressed, by the laws of England.

a Introd. 2.
IN the prosecution of the first of these enquiries, we distinguished rights into two sorts: first, such as concern or are annexed to the persons of men, and are then called jura personarum, or the rights of persons; which, together with the means of acquiring and losing them, composed the first book of these commentaries: and, secondly, such as a man may acquire over external objects, or things unconnected with his person, which are called jura rerum, or the rights of things; and these, with the means of transferring them from man to man, were the subject of the second book. I am now therefore to proceed to the consideration of wrongs; which for the most part convey to us an idea merely negative, as being nothing else but a privation of right. For which reason it was necessary, that, before we entered at all into the discussion of wrongs, we should entertain a clear and distinct notion of rights: the contemplation of what is jus being necessarily prior to what may be termed injuria, and the definition of fas precedent to that of nefas.

WRONGS are divisible into two sorts or species; private wrongs, and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed civil injuries: the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of crimes and misdemeanors. To investigate the first of these species of wrongs, with their legal remedies, will be our employment in the present book; and the other species will be reserved till the next or concluding volume.

THE more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined, and wrongs prohibited. This remedy is therefore principally to be fought by application to these courts of justice; that is, by civil suit or action. for which reason our chief employment in this volume will be to consider the redress of private wrongs, by suit or action in courts. But as some injuries are of such a nature, that they furnish or require a
more speedy remedy, than can be had in the ordinary forms of justice, there is allowed in those cases an extrajudicial or eccentrical kind of remedy; of which I shall first of all treat, before I consider the several remedies by suit: and, to that end, shall distribute the redress of private wrongs into three several species; first, that which is obtained by the mere act of the parties themselves; secondly, that which is effected by the mere act and operation of law; and, thirdly, that which arises from suit or action in courts; which consists in a conjunction of the other two, the act of the parties co-operating with the act of law.

AND, first, of that redress of private injuries, which is obtained by the mere act of the parties. This is of two sorts; first, that which arises from the act of the injured party only; and, secondly, that which arises from the joint act of all the parties together: both which I shall consider in their order.

OF the first fort, or that which arises from the sole act of the injured party, is,

I. THE defence of one's self, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace, which happens, is chargeable upon him only who began the affray. For the law, in this case, respects the passions of the human mind; and (when external violence is offered to a man himself, or those to whom he bears a near connection) makes it lawful in him to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say, to what wanton lengths of reaping or cruelty outrages of this fort might be carried, unless it were permitted a man immediately to oppose one violence with another. Self-defence therefore as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away be the law of society. In the English law particularly it is held an excuse for breaches of the peace, nay
even for homicide itself: but care must be taken that the resistance does not exceed the bounds of mere defence and prevention; for then the defender would himself become an aggressor.

II. RECAPTION or reprisal is another species of remedy by the mere act of the party injured. This happens, when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant; in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them, wherever he happens of find them; so it be not in a riotous manner, or attended with a breach of the peace. The reason for this is obvious; since it may frequently happen that the owner may have this only opportunity of doing himself justice: his goods may be afterwards conveyed away or destroyed; and his wife, if he had no speedier remedy than the ordinary process of law. If therefore he can so contrive it as to gain possession of his property again, without force or terror, the law favours and will justify his proceeding. But, as the public peace is a superior consideration to any one man's private property; and as, if individual were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons


it is provided, that this natural right of recaption shall never be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seise him to my own use: but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen; but must have recourse to an action at law.

III. AS recaption is a remedy given to the party himself, for an injury to his personal property, so, thirdly, a remedy of the same kind for injuries to real property is by entry on lands and tenements, when another person without any right has taken possession thereof. This depends in some measure on like reasons with the former; and, like that too, must be peaceable and without force. There is some nicety required to define and distinguish the cases, in which such entry is lawful or otherwise: it will
therefore be more fully considered in a subsequent chapter; being only mentioned in this place for the sake of regularity and order.

IV. A FOURTH species of remedy by the mere act of the party injured, is the abatement, or removal, of nuisances. What nuisances are, and their several species, we shall find a more proper place to enquire under some of the subsequent divisions. At present I shall only observe, that whatsoever unlawfully annoys or doth damage to another is a nuisance; and such nuisance may be abated, that is, taken away or removed, by the party aggrieved thereby, so as he commits no riot in the doing of it. If a house or wall is erected so near to mine that it stops my ancient lights which is a private nuisance, I may enter my neighbour's land, and peaceably pull it down. Or if a new gate be erected across the public highway, which is a common nuisance, any of the king's subjects passing that way may cut it down, and destroy it. And

f 2 Roll. Rep. 55, 56. 2 Roll Abr. 565, 566.
g 5 Rep. 101. 9 Rep. 55.
h Salk. 459.
j Cro. Car. 184.

the reason why the law allows this private and summary method of doing one's self justice, is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy; and cannot wait for the slow progress of the ordinary forms of justice.

V. A FIFTH case, in which the law allows a man to be his own avenger, or to minister redress to himself, is that of distreining cattle or goods for nonpayment of rent, or other duties; or, distreining another's cattle damage-feasant, that is, doing damage, or trespassing, upon his land. The former intended for the benefit of landlords, to prevent tenants from secreting or withdrawing their effects to his prejudice; the latter arising from the necessity of the thing itself, as it might otherwise be impossible at a future time to ascertain, whose cattle they were that committed the trespass or damage.

AS the law of distresses is a point of great use and consequence, I shall consider it with some minuteness, by enquiring, first, for what injuries a
distress may be taken; secondly, what things may be distreined; and, thirdly, the manner of taking, disposing of, and avoiding distreses.

1. AND, first, it is necessary to premise, that a distressi, districtio, is the taking of a personal chattel out of the possession of the wrongdoer into the custody of the party injured, to procure a satisfaction for the wrong committed. 1. The most usual injury, for which a distress may be taken is that of nonpayment of rent. It was observed in a former volumek that distresses were incident by the common law to every rent-service, and by particular reservation to rent-charges also; but not to rent-feck, till the statute 4 Geo. II. c. 28. extended the same remedy to all rents alide, and thereby in effect abolished all material distinction between them. So that now we may lay it down as an universal

i The thing itself taken by this process as well as the process itself, is in our law-books very frequently called a distress.

j Book II. ch. 3.

principle, that a distress may be taken for any kind of rent in arrear; the detaining whereof beyond the day of payment is an injury to him that is entitled to receive it. 2. For neglecting to do suit to the lord's courtl, or other certain personal service m, the lord may distrein, of common right. 3. For amercements in a court-leet a distress may be had of common right, but not for amercements in a court-baron, without a special prescription to warrant itn. 4. Another injury, for which distresse can be taken, is where a man finds beasts of a stranger wandering in his grounds damage-feasant; that is, doing him hurt or damage, by treading down his grafs, or the like; in which case the owner of the soil may distrein them, till satisfaction be made him for the injury he has thereby sustained. 5. Lastly, for several duties and penalties inflicted by special acts of parliament, (as for assessments made by commissioners of sewers, or for the relief of the poor) remedy by distress and sale is given; for the particulars of which we must have recourse to the statutes themselves: remarking only, that such distressesq are partly analogous to the ancient distress at common law, as being repleviable and the like; but more resembling the common law process of execution, by seising and felling the goods of the debtor under a writ of fieri facias, of which hereafter.

2. SECONDLY; as to the things which may be distreined, or taken in distress, we may lay it down as a general rule, that all chattels personal are
liable to be distreined, unless particularly protected or exempted. Instead therefore of mentioning what things are distreinable, it will be easier to recount those which are not so, with the reason of their particular exemptionsr. And, 1. As every thing which is distreined is presumed to be the property of the wrongdoer, it will follow that such things, wherein no man can have an absolute and valuable property (as dogs, cats,

l Bro. Abr. tit. difrefs. 15.
m Co. Litt. 46.
n Brownl. 36.
o Stat. 7 Ann. c. 10.
p Stat. 43 Eliz. c. 2.
q 4 Burr. 589.
r Co. Litt. 47.

rabbets, and all animals ferae naturae) cannot be distreined. Yet if deer (which are ferae naturae) are kept in a private inclosure for the purpose of sale or profit, this so far changes their nature by reducing them to a kind of stock or merchandize, that they may be distreined for rents. 2. Whatever is in the personal use or occupation of any man, is for the time privileged and protected from any distress; as an ax with which a man is cutting wood, or a horse while a man is riding him. But horses, drawing a cart, may (cart and all) be distreined for rent-arreare; and also if a horse, though a man be riding him, be taken damage-feasant, or trespassing in anothers grounds, the horse notwithstanding his rider may be distreined and led away to the poundt. 3. Valuabe things in the way of trade shall not be liable to distress. As a horse standing in a smith's shop to be shoed, or in a common inn; or cloth at a taylor's house; or corn sent to a mill, or a market. For all these are protected and privileged for the benefit of trade; and are supposed in common presumption not to belong to the tenant or a stranger, are distreinable by him for rent: for otherwise a door would be opened to infinite frauds upon the landlord; and the stranger has his remedy over by action on the case against the tenant, if by the tenant's default the chattels are distreined, so that he cannot render them when called upon. With regard to a stranger's beasts which are found on the tenant's land, the following distinctions are however taken; If they are put in by consent of the owner of the beasts, they are distreinable immediately afterwards for rent-arrere by the landlordv. So also if the stranger's cattle break the fences, and commit a trespass by coming on the land, they are distreinable immediately by the lessor for his tenant's rent, as a
punishment to the owner of the beasts for the wrong committed through his negligence. But if the lands were not sufficiently fenced so as to keep out cattle, the landlord cannot distress them, till they have been levant and couchant (levantes et cubantes) on the land; that is, have been long enough there to have laid down and rose up to feed; which in general is held to be one night at least: and then the law presumes, that the owner may have notice, whether his cattle have strayed, and it is his own negligence not to have taken them away. Yet, if the lessor or his tenant were bound to repair the fences and did not, and thereby the cattle escaped into their grounds without the negligence or default of the owner; in this case, though the cattle may have been levant and couchant, yet they are not distressable for rent, till actual notice is given to the owner that they are there, and he neglects to remove them: for the law will not suffer the landlord to take advantage of his own or his tenant's wrong. 4. There are also other things privileged by the ancient common law; as a man's tools and utensils of his trade, the ax of a carpenter, the books of a scholar, and the like: which are said to be privileged for the sake of the public, because the taking them away would disable the owner from serving the commonwealth in his station. So, beasts of the plough, averia carucae, and sheep, are privileged from distresses at common law; while goods or other sort of beasts, which Bracton calls catalla otiofa, may be distressed. But, as beasts of the plough may be taken in execution for debt, so they may be for distresses by statute, which partake of the nature of executions. And perhaps the true reason, why these and the tools of a man's trade were privileged at the common law, was because the distress was then merely intended to compel the payment of the rent, and not as a satisfaction for its nonpayment: and therefore, to deprive the party of the instruments and means of paying it, would counteract the very end of the distress. 5. Nothing shall be distressed for rent, which may not be rendered again in as good plight as when it was distressed: for which reason milk, fruit, and the like, cannot be distressed; a distress

w Lutw. 1580.
at common law being only in the nature of a pledge or security, to be restored in the same plight when the debt is paid. So, anciently, sheaves or shocks of corn could not be distreined, because some damage must needs accrue in their removal: but a cart loaded with corn might; as that could be safely restored. But now by statute 2 W. & M. c. 5. corn in sheaves or cocks, or loose in the straw, or hay in barns or ricks, or otherwise, may be distreined as well as other chattels. 6. Lastly, things fixed to the freehold may not be distreined; as caldrons, windows, doors, and chimney pieces: for they favour of the realty. For this reason also corn growing could not be distreined; till the statute 11 Geo. II. c. 19. empowered landlords to distrein corn, grass or other products of the earth, and to cut and gather them when ripe.

LET us next consider, thirdly, how distresses may be taken, disposed of, or avoided. And, first, I must premise, that the law of distresses is greatly altered within a few years last past. Formerly they were looked upon in no other light than as a mere pledge or security, for payment of rent or other duties, or satisfaction for damage done. And so the law still continues with regard to distresses of beasts taken damage-feasant, and for other causes, not altered by act of parliament; over which the distreinor has no other power than to retain them till satisfaction is made. But distresses for rent-arrere being found by the legislature to be the shortest and most effectual method of compelling the payment of such rent, many beneficial laws for this purpose have been made in the present century; which have much altered the common law, as laid down in our ancient writers.

IN pointing out therefore the methods of distreining, I shall in general suppose the distress to be made for rent; and remark, where necessary, the differences between such distress, and one taken for other causes.

IN the first place then, all distresses must be made by day, unless in the case of damage-feasant; an exception being there allowed, lest the beasts should escape before they are takena. And, when a person intends to make a distress, he must, by himself or his bailiff, enter on the demised premises; formerly during the continuance of the lease, but nowb he may distrein within six months after the determination of such lease whereon
rent is due. If the lessor does not find sufficient distress on the premises, formerly he could resort no where else; and therefore tenants, who were knavish, made a practice to convey away their goods and stock fraudulently from the house or lands demised, in order to cheat their landlords. But nowe the landlord may distrein any goods of his tenant, carried off the premises clandestinely, wherever he finds them within thirty days after, unless they have been bona fide sold for a valuable consideration: and all persons privy to, or assisting in, such fraudulent conveyance, forfeit double the value to the landlord. The landlord may also distrein the beasts of his tenant, feeding upon any commons or wastes, appendant or appurtenant to the demised premises. The landlord might not formerly break open a house, to make a distress, for that is a breach of the peace. But when he was in the house, it was held that he might break open an inner doord : and nowe he may, by the assistance of the peace officer of the parish, break open in the day time any place, locked up to prevent a distress; oath being first made, in case it be a dwelling-house, of a reasonable ground to suspect that goods are concealed therein.

WHERE a man is intitled to distrein for an entire duty, he ought to distrein for the whole at once; and not for part at one time, and part at anotherf . But if he distreins for the whole, and there is not sufficient on the premises, or he happens to mistake in the value of the thing distreined, and so takes an insuf

a Co. Litt. 142.
e Stat. 11 Geo. II. c. 19.
f 2 Lutw. 1532.

icient distress, he may take a second distress to complete his remedyg .

DISTRESSES must be proportioned to the thing distreined for. By the statute of Marlbridge, 52 Hen. III. c. 4. if any man takes a great or unreasonable distress, for rent-arrere, he shall be heavily amerced for the same. As ifh the landlord distreins two oxen for twelvepence rent; the taking of both is an unreasonable distress; but, if there were no other distress nearer the value to be found, he might reasonably have distreined one of them. But for homage, fealty, or suit, as also for parliamentary
wages, it is said that no distress can be excessive. For as these distresses cannot be sold, the owner, upon making satisfaction, may have his chattels again. The remedy for excessive distresses is by a special action on the statute of Marlbridge; for an action of trespass is not maintainable upon this account, it being no injury at the common law.

WHEN the distress is thus taken, the next consideration is the disposal of it. For which purpose the things distreined must in the first place be carried to some pound, and there impounded by the taker. But, in their way thither, they may be rescued by the owner, in case the distress was taken without cause, or contrary to law: as if no rent be due; if they were taken upon the highway, or the like; in these cases the tenant may lawfully make rescue. But if they be once impounded, even though taken without any cause, the owner may not break the pound and take them out; for they are then in the custody of the law.

A POUND (parcus, which signifies any inclosure) is either pound-overt, that is, open overhead; or pound-covert, that is, close. By the statute 1 & 2 P. & M. c. 12. no distress of cattle can be driven out of the hundred where it is taken, unless to a

pound-overt within the same shire; and within three miles of the place where it was taken. This is for the benefit of the tenants, that they may know where to find and replevy the distress. And by statute 11 Geo. II. c. 19. which was made for the benefit of landlords, any person distreining for rent may turn any part of the premises, upon which a distress is taken, into a pound pro hac vice, for securing of such distress. If a live distress, of animals, be impounded in a common pound-overt, the owner must take notice of it at his peril; but if in any special pount-overt, so constituted for this particular purpose, the distreinor must give notice to the owner: and, in both these cases, the owner, and not the distreinor, is bound to provide the beasts with food and necessaries. But if they be put in a pound-covert, as in a stable or the like, the landlord or distreinor must feed and sustain
them. A distress of household-goods, or other dead chattels, which are liable to be stolen or damaged by weather, ought to be impounded in a pound-covert, else the distressor must answer for the consequences.

WHEN impounded, the goods were formerly, as was before observed, only in the nature of satisfaction; and upon this account it hath been held, that the distressor is not at liberty to work or use a distreined beast. And thus the law still continues with regard to beasts taken damage-feasant, and distresses for suit or services; which must remain impounded, till the owner makes satisfaction, or contests the right of distreining, by replevying the chattels. To replevy (replegiare, that is, to take back the pledge) is, when a person distreined upon applies to the sheriff or his officers, and has the distress returned into his own possession; upon giving good security to try the right of taking it in a suit at law, and if that be determined against him, to return the cattle or goods once more into the hands of the distressor. This is called a replevin, or which more will be said hereafter. At present I shall only observe, that, as a distress is at common law only in nature

m Co. Litt. 47.
n Cro. Jac. 148.

of a security for the rent or damages done, a replevin answers the same end to the distressor as the distress itself; since the party replevying gives security to return the distress, if the right be determined against him.

THIS kind of distress, though it puts the owner to inconvenience, and is therefore a punishment to him, yet, if he continues obstinate and will make no satisfaction or payment, it is no remedy at all to the distressor. But for a debt due to the crown, unless paid within forty days, the distress was always saleable at the common law. And for an amercement imposed at a court-leet, the lord may also fell the distress: partly because, being the king's court of record, its process partakes of the royal prerogative; but principally because it is in the nature of an execution to levy a legal debt. And, so in the several statute-distresses, before-mentioned, which are also in the nature of executions, the power of sale is likewise usually given, to effectuate and complete the remedy. And, in like manner, by several acts of parliament, in all cases of distress for rent, if the tenant or owner do not, within five days after the distress is taken, and notice of the cause thereof given him, replevy the same with sufficient
security; the distreinor, with the sheriff or constable, shall cause the same
to be appraised by two frowning appraisers, and fell the same towards
satisfaction of the rent and charges; rendering the overplus, if any, to the
owner himself. And, by this means, a full and entire satisfaction may now
be had for rent in arreorre, by the mere act of the party himself, viz. by
distress, the remedy given at common law; and sale consequent thereon,
which is added by act of parliament.

BEFORE I quit this article, I must observe, that the many particulars
which attend the taking of a distress, used formerly to make it a hazardous
kind of proceeding: for, if any one ir-

o Bro. Abr. t. distress. 71.
p 8 Rep. 41.
q Bro. Ibid. 12 Mod. 330.
r 2 W. & M. c. 5. 8 Ann. c. 14. 4 Geo. II. c. 28. 11 Geo. II. c. 19.

regularity was committed, it vitiated the whole, and made the distreinors
trespassors ab initio. But now by the statute 11 Geo. II. c. 19. it is
provided, that, for any unlawful act done, the whole shall not be unlawful,
or the parties trespassors ab initio; but that the party grieved shall only
have an action for the real damage sustained; and not even that, if tender
of amends is made before any action is brought.

VI. THE seizing of heriots, when due on the death of a tenant, is also
another species of self-remedy; not much unlike that of taking cattle or
goods in distress. As for that division of heriots, which is called heriot-
service, and is only a species of rent, the lord may distrein for this, as well
as seize: but for heriot-custom (which sir Edward Coke sayst, lies only in
prender, and not in render) the lords may seize the identical thing itself,
but cannot distrein any other chattel for itu. The like speedy and effectual
remedy, of seizing, is given with regard to many things that are said to lie
in francise; as waifs, wrecks, estrays, deodands, and the like; all which the
person entitled thereto may seize, without the formal process of a suit or
action. Not that they are debarred of this remedy by action; but have also
the other, and more speedy one, for the better asserting their property; the
thing to be claimed being frequently of such a nature, as might be out of
the reach of the law before any action could be brought.
THESE are the several species of remedies, which may be had by the mere act of the party injured. I shall, next, briefly mention such as arise from the joint act of all the parties together. And these are only two, accord, and arbitration.

I. ACCORD is a satisfaction agreed upon between the party injuring and the party injured; which, when performed, is a bar of all actions upon this account. As if a man contract to build a house or deliver a horse, and fail in it; this is an injury, for which the sufferer may have his remedy by action; but if the party injured accepts a sum of money, or other thing, as a satisfaction, this is a redress of that injury, and entirely takes away the action. By several late statutes, particularly 11 Geo. II. c. 19. in case of irregularity in the method of distreining; and 24 Geo. II. c. 24. in case of mistakes committed by justices of the peace; even tender of sufficient amends to the party injured is a bar of all actions, whether he thinks proper to accept such amends or no.

II. ARBITRATION is where the parties, injuring and injured, submit all matters in dispute, concerning any personal chattels or personal wrong, to the judgment of two or more arbitrators; who are to decide the controversy: and if they do not agree, it is usual to add, that another person be called in as umpire, (imperator) to whose sole judgment it is then referred: or frequently there is only one arbitrator originally appointed. This decision, in any of these cases, is called an award. And thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties or the judgment of a court of justice. But the right of real property cannot thus pass by a mere award: which subtilty in point of form (for it is now reduced to nothing else) had its rife from feodal principles; for, if this had been permitted, the land might have been aliened collusively without the consent of the superior. Yet doubtless an arbitrator may now award a conveyance or a release of lands; and it will be a breach of the arbitration-bond to refuse compliance. For, though originally the submission to arbitration used to be by word, or by deed, yet both of these being revocable in their nature, it is now become the practice to enter into
mutual bonds, with condition to stand to the award or arbitration of the arbitrators or umpire therein

w 9 Rep. 79.
x Brownl. 55. 1 Freem. 410.
y 1 Roll. Abr. 242. Lord Raym. 115.

namedx. And experience having shewn the great use of these peaceable and domestic tribunals, especially in settling matters of account, and other mercantile transactions, which are difficult and almost impossible to be adjusted on a trial at law; the legislature has now established the use of them, as well in controversies where causes are depending, as in those where no action is brought, and which still depend upon the rules of the common law: enacting, by statute 9 & 10 W. III. c. 15. that all merchants and others, who desire to end any controversy, (for which there is no other remedy but by personal action or suit in equity) may agree, that their submission of the suit to arbitration or umpirage shall be made a rule of any of the king's courts of record: and, after such rule made, the parties disobeying the award shall be liable to be punished, as for a contempt of the court; unless such award shall be set aside, for corruption or other misbehaviour in the arbitrators or umpire, proved on oath to the court, within one term after the award is made. And, in consequence of this statute, it is now become a considerable part of the business of the superior courts, to set aside such awards when partially or illegally made; or to enforce their execution, when legal, by the same process of contempt, as is awarded for disobedience to such rules and orders as are issued by the courts themselves.

z Appned. No. III. 6.

CHAPTER THE SECOND.
OF REDRESS BY THE MERE OPERATION OF LAW.

THE remedies for private wrongs, which are effected by the mere operation of law, will fall within a very narrow compass: there being only two instances of this sort that at present occur to my recollection; the one that of retainer, where a creditor is made executor or administrator to his debtor; the other, in the case of what the law calls a remitter.
I. IF a person indebted to another makes his creditor or debtee his executor, or if such creditor obtains letters of administration to his debtor; in these cases the law gives him a remedy for his debt, by allowing him to retain so much as will pay himself, before any other creditors whose debts are of equal degree. This is a remedy by the mere act of law, and grounded upon this reason; that the executor cannot, without an apparent absurdity, commence a suit against himself as representative of the deceased, to recover that which is due to him in his own private capacity: but, having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose. Else, by being made executor, he would be put in a worse condition than

a 1 Roll. Abr. 922. Plowd. 543.

all the rest of the world besides. For, though a ratable payment of all the debts of the deceased, in equal degree, is clearly the most equitable method, yet as every scheme for a proportionable distribution of the assets among all the creditors hath been hitherto found to be impracticable, and productive of more mischiefs than it would remedy; so that the creditor who first commences his suit is intitled to a preference in payment; it follows, that as the executor can commence no suit, he must be paid the last of any, and of course must lose his debt, in case the estate of his testator should prove insolvency, unless he be allowed to retain it. The doctrine of retainer is therefore the necessary consequence of that other doctrine of the law, the priority of such creditor who first commences his action. But the executor shall not retain his own debt, in prejudice to those of a higher degree; for the law only puts him in the same situation, as if he had sued himself as executor, and recovered his debt; which he never could be supposed to have done, while debts of a higher nature subsisted. Neither shall one executor be allowed to retain his own debt, in prejudice to that of his co-executor in equal degree; but both shall be discharged in proportion. Nor shall an executor of his own wrong be in any case permitted to retain.

II. REMITTER is where he, who hath the true property or jus proprietatis in lands but is out of possession thereof and hath no right to enter without recovering possession in an action, hath afterwards the freehold cast upon him by some subsequent, and of course defective, title: in this case he is
remitted, or fent back, by operation of law, to his ancient and more certain
titled. The right of entry, which he hath gained by a bad title, shall be ipso
facto annexed to his own inherent good one; and his defeasible estate shall
be utterly defeated and annulled, by the instantaneous act of law, without
his participation or consent. As if A dispossesses B; that is, turns him out of
possession, and dies leaving a

c 5 Rep. 30.
d Litt. 659.

son C; hereby the estate descends to C the son of A, and B is barred from
entering thereon till he proves his right in an action: now, if afterwards C
the heir of the disfeifor 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. For he hath hereby gained a new right of possession, to which the
law immediately annexes his ancient right of propriety.

IF the subsequent estate, or right of possession, be gained by a man's own
act or consent, as by immediate purchase being of full age, he shall not be
remitted. For the taking such subsequent estate was his own folly, and
shall be looked upon as a waiver of his prior right. Therefore it is to be
observed, that to every remitter there are regularly these incidents; an
ancient right, and a new defeasible estate of freehold, uniting in one and
the same person; which defeasible estate must be cast upon the tenant, not
gained by his own act or folly. The reason given by Littleton, why this
remedy, which operates silently and by the mere act of law, was allowed, is
somewhat similar to that given in the preceding article; because otherwise
he who hath right would be deprived of all remedy. For as he himself is the
person in possession of the freehold, there is no other person against
whom he can bring an action, to establish his prior right. And for this
cause the law doth adjudge him in by remitter; that is, in such plight as if
he had lawfully recovered the same land by suit. For, as lord Bacon
observes, the benignity of the law is such, as when, to preserve the
principles and grounds of law, it depriveth a man of his remedy without
his own fault, 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. But there shall be no remitter to a right, for which the party has

f Finch. L. 194. Litt. 683.
g Co. Litt. 348. 350.
h 661.
i Elem. c. 9.

no remedy by actionk: as if the issue in tail be barred by the fine or warranty of his ancestor, and the freehold is afterwards cast upon him; he shall not be remitted to his estate taill: for the operation of the remitter is exactly the same, after the union of the two rights, as that of a real action would have been before it. As therefore the issue in could not by any action have recovered his ancient estate, he shall not recover it by remitter.

AND thus much for these extrajudicial remedies, as well for real as personal injuries, which are furnished by the law, where the parties are so peculiarly circumstanced, as not to be able to apply for redress in the usual and ordinary methods to the courts of public justice.

k Co. Litt. 349.
l Moor. 115. 1 And. 286.

CHAPTER THE THIRD.
OF COURTS IN GENERAL.

THE next, and principal, object of our enquiries is the redress of injuries by suit in courts: wherein the act of the parties and the act of law cooperate; the act of the parties being necessary to set the law in motion, and the process of the law being in general the only instrument, by which the parties are enabled to procure a certain and adequate redress.

AND here it will not be improper to observe, that although, in the several cases of redress by the act of the parties mentioned in a former chaptera, the law allows an extrajudicial remedy, yet that does not exclude the ordinary course of justice: but it is only an additional weapon put into the hands of certain persons in particular instances, where natural equity or the peculiar circumstances of their situation required a more expeditious remedy, than the formal process of any court of judicature can furnish.
Therefore, tough I may defend myself, or relations, from external violence, I yet am afterwards entitled to an action of assault and battery: though I may retake my goods if I have a fair and peaceable opportunity, this power of recaption does not debar me from my action of trover of detinue: I may either enter on the lands, on which I have a right of entry, or may demand possession by a real action: I may either abate a nuisance by my own authority, or call upon the law to do it for me: I may distrein for rent, or have an action of debt at my own option:

a ch. 1.

if I do not distrein my neighbours cattle damage-feasant, I may compel him by action of trespass to make me a fair satisfaction: if a heriot, or a deodand, be withheld from me by fraud or force, I may recover it though I never seized it. And with regard to accords and arbitrations, these, in their nature being merely an agreement or compromise, most indisputably suppose a previous right of obtaining redress some other way, which is given up by such agreement. But as to remedies by the mere operation of law, those are indeed given, because no remedy can be ministrd by suit or action, without running into the palpable absurdity of a man’s bringing an action against himself: the two cases wherein they happen being such, wherein the only possible legal remedy would be directed against the very person himself who seeks relief.

IN all other cases it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded. And, in treating of these remedies by suit in courts, I shall pursue the following method: first, I shall consider the nature and several species of courts of justice: and, secondly, I shall point out in which these courts, and in what manner, the proper remedy may be had for any private injury; or, in other words, what injuries are cognizable, and how redressed, in each respective species of courts.

FIRST then, of courts of justice. And herein we will consider, first, their nature and incidents in general; and, then, the several species of them, erected and acknowledged by the laws of England.

A COURT is defined to be a place wherein justice is judicially administered. And, as by our excellent constitution the sole executive
power of the laws is vested in the person of the king, it will follow that all
courts of justice, which are the me-
b Co. Litt. 58.
dium by which he administers the laws, are derived from the power of the
crown. For whether created by act of parliament, letters patent, or
prescription, (the only methods of erecting a new court of judicature) the
kings consent in the two former is expressly, and in the latter impliedly,
given. In all these courts the king is supposed in contemplation of law to
be always present; but as that is in fact impossible, he is there represented
by his judges, whose power is only an emanation of the royal prerogative.

FOR the more speedy, universal, and impartial administration of justice
between subject and subject, the law hath appointed a prodigious variety
of courts, some with a more limited, others with a more extensive
jurisdiction; some constituted to enquire only, others to hear and
determine; some to determine in the first instance, others upon appeal
and by way of review. All these in their turns will be taken notice of in their
respective places: and I shall therefore here only mention one distinction,
that runs throughout them all; viz. that some of them are courts of record,
others not of record. A court of record is that where the acts and judicial
proceedings are enrolled in parchment for a perpetual memorial and
testimony: which rolls are called the records of the court, and are of such
high and supereminent authority, that their truth is not to be called in
question. For it is a settled rule and maxim that nothing shall be averred
against a record, nor shall any plea, or even proof, be admitted to the
contrary. And if the existence of a record be denied, it shall be tried by
nothing but itself; that is, upon bare inspection whether there be any any
such record or no; else there would be no end of disputes. But if there
appear any mistake of the clerk in making up such record, the court will
direct him to amend it. All courts of record are the king’s courts, in right of
his crown and royal dignity, and therefore no other court hath authority
to fine or imprison; so that the very erection of

c See book 1. ch. 7.
d Co. Litt. 260.
e Ibid.
f Finch. L. 231.
a new jurisdiction with power of fine or imprisonment makes it instantly a
court of recordg. A court not of record is the court of a private man, whom
the law will not intrust with any discretionary power over the fortune or
liberty of his fellow-subjects. Such are the courts-baron incident to every
manor, and other inferior jurisdictions: where the proceedings are not
enrolled or recorded; but, as well their existence as the truth of the matters
therein contained shall, if disputed, be tried and determined by a jury.
These courts can hold no plea of matters cognizable by the common law,
unless under the value of 40 s; nor of any forcible injury whatsoever, not
having any process to arrest the person of the defendant.

IN every court there must be at least three constituent parts, the actor,
reus, and judex: the actor, or plaintiff, who complains of an injury done;
the reus, or defendant, who is called upon to make satisfaction for it; and
the judex or judicial power, which is to examine the truth of the fact, to
determine the law arising upon that fact, and, if any injury appears to have
been done, to ascertain and by its officers to apply the remedy. It is also
usual in the superior courts to have attorneys, and advocates or counsel, as
assistants.

AN attorney at law answers to the procurator, or proctor, of the civilians
and canonistsi. And he is one who is put in the place, stead, or turn of
another, to manage his matters of law. Formerly every suitor was obliged
to appear in person, to prosecute or defend his suit, (according to the old
Gothic constitutionk) unless by special licence under the king’s letters
patentl. This is still the law in criminal cases. And an idiot cannot to this
day appear by attorney, but in personm; for he hath not discretion to
enable him to appoint a proper substitute: and

g Salk. 200. 12 Mod. 388.
h 2 Inst. 311.
i Pope Boniface VIII, in 6 Decretal. l. 3. t. 16. 3. speaks of procuratoribus,
qui in aliquibus partibus atornati mancipanter.
j Stiernhook de jure Goth. l. t. c. 6.
k F. N. B. 25.
l Ibid. 27.
m

upon his being brought before the court in so defenceless a condition, the
judges are bound to take care of his interests, and they shall admit the best
plea in his behalf that any one present can suggestn. But, as in the Roman
lawcum olim in ufu, alterius nomine agi nom poffe, fed, quia hoc non
minimam incommoditatem habebat, coeperunt homines per procuratores
litigareo, so with us, upon the same principle of convenience, it is now
permitted in general, by divers ancient statutes, whereof the first is statute
West. 2. c. 10. that attorneys may be made to prosecute or defend any
action in the absence of the parties to the suit. These attorneys are now
formed into a regular corps; they are admitted to the execution of their
office by the superior courts of Westminster-hall; and are in all points
officers of the respective courts in which they are admitted: and, as they
have many privileges on account of their attendance there, so they are
peculiarly subject to the censure and animadversion of the judges. No man
can practise as an attorney in any of those courts, but such as is admitted
and sworn an attorney of that particular court: an attorney of the court of
king's bench cannot practice in the court of common pleas; nor vice versa.
To practice in the court of chancery it is also necessary to be admitted a
solicitor therein: and by the statute 22 Geo. II. c. 46. no person shall act as
an attorney at the court of quarter sessions, but such as has been regularly
admitted in some superior court of record. So early as the statute 4 Hen.
IV. c. 18. it was enacted, that attorneys should be examined by the judges,
and none admitted but such as were virtuous, learned, and sworn to do
their duty. And many subsequent statutesp have laid them under farther
regulations.

OF advocates, or (as we generally call them) counsel, there are two species
or degrees; barristers, and serjeants. The former are admitted after a
considerable period of study, or at least standing, in the inns of courtq;
and are in our old books styled

n Bro. Abr. t. ideot. I.
o Inst. 4. tit. 10.
p 3 Jac I. c. 7. 12 Geo. I. c. 29. 2 Geo. II. c. 23. 22 Geo. II. c. 46. 23 Geo. II.
c. 26.
q See vol. introd. 1.

apprentices, apprenticii ad legem, being looked upon as merely learners,
and not qualified to execute the full office of an advocate till they were
sixteen years standing; at which time, according to Fortescuer, they might
be called to the state and degree of serjeants, or servientes ad legem. How
ancient and honourable this state and degree is, the form, splendor, and
profits attending it, have been so fully displayed by many learned writerss,
that they need not be here enlarged on. I shall only observe, that serjeants at law are bound by a solemn oath to do their duty to their clients: and that by custom the judges of the courts of Westminster are always admitted into this venerable order, before they are advanced to the bench; the original of which was probably to qualify the puisne barons of the exchequer to become justices of assise, according to the exigence of the statute of 14 Edw. III. c. 16. From both these degrees some are usually selected to be his majesty's counsel learned in the law; the two principal of whom are called his attorney, and solicitor, general. The first king's counsel, under the degree of serjeant, was sir Francis Bacon, who was made so honoris caufa, without either patent or fee; so that the first of the modern order (who are now the sworn servants of the crown, with a standing salary) seems to have been sir Francis North, afterwards lord keeper of the great seal to king Charles II. These king's counsel answer in some measure to the advocates of the revenue, advocati fifci, among the Romans. For they must not be employed in any cause against the crown without special licence; in which restriction they agree with the advocates of the fifey: but in the imperial law the prohibition was carried still farther, and perhaps was more for the dignity of the sovereign; for, excepting some peculiar causes, the fiscal advocates were not permitted to be at all concerned in private suits between subject and

subject. A custom has of late years prevailed of granting letters patent of precedence to such barristers, as the crown thinks proper to honour with that mark of distinction: whereby they are intitled to such rank and preaudience as are assigned in their respective patents; sometimes next after the king's attorney general, but usually next after his majesty's counsel then being. These (as well as the queen's attorney and solicitor general) rank promiscuously with the king's counsel, and together with them sit within the bar of the respective courts: but receive no salaries, and are not
sworn; and therefore are at liberty to be retained in causes against the crown. And all other serjeants and barristers indiscriminately (except in the court of common pleas where only serjeants are admitted) may take upon them the protection and defence of any suitors, whether plaintiff or defendant; who are therefore called their clients, like the dependants upon the ancient Roman orators. Those indeed practised gratis, for honour merely, or at most for the sake of gaining influence: and so likewise it is established with us, that a counsel can maintain no action for his fees; which are given, not as locatio vel conductio, but as quiddam honorarium; not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation: as is also laid down with regard to advocates in the civil law, whose honorarium was directed by a decree of the senate not to exceed in any case ten thousand sesterces, or about 80 l. of English money.

And, in order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a cheek to the unseemly licentiousness of prostitute and illiberal men (a few of whom may sometime insinuate themselves even into the most honourable professions) it hath been holden that a counsel is not answerable for any matter by him spoken, relative to the cause in hand, and suggested in his client's instructions; although it should reflect upon the reputation of another, and even prove absolutely groundless: but if he mentions an untruth of his own invention,
or even upon instructions if it be impertinent to the case in hand, he is then liable to an action from the party injured. And counsel guilty of deceit or collusion are punishable by the statute Westm. 1. 3. Edw. I. c. 28. with imprisonment for a year and a day, and perpetual silence in the courts: a punishment still sometimes inflicted for gross misdemeanors in practice.

f Tac. ann. l. 11.
g Cro. Jac. 90.
h Raym. 376.

CHAPTER THE FOURTH.
OF THE PUBLIC COURTS OF COMMON LAW AND EQUITY.

WE are next to consider the several species and distinctions of courts of justice, which are acknowledged and used in this kingdom. And these are either such as are of public and general jurisdiction throughout the whole realm; or such as are only of a private and special jurisdiction in some particular parts of it. Of the former there are four sorts; the universally established courts of common law and equity; the ecclesiastical courts; the courts military; and courts maritime. And first of such public courts as are courts of common law of equity.

THE policy of our ancient constitution, as regulated and established by the great Alfred, was to bring justice home to every man's door, by constituting as many courts of judicature as there are manors and townships in the kingdom; wherein injuries were redressed in an easy and expeditious manner, by the suffrage of neighbours and friends. These little courts however communicated with others of a larger jurisdiction, and those with others of a still greater power; ascending gradually from the lowest to the supreme courts, which were respectively constituted to correct the errors of the inferior ones, and to determine such causes as by reason of their weight and difficulty demanded a more solemn discussion. The course of justice flowing in large streams from the king, as the fountain, to his superior courts of record; and being then subdivided into smaller channels, till the whole and every part of the kingdom were plentifully watered and refreshed. An institution that seems highly agreeable to the dictates of natural reason, as well as of more
enlightened policy; being equally similar to that which prevailed in Mexico and Peru before they were discovered by the Spaniards; and that which was established in the Jewish republic by Moses. In Mexico each town and province had its proper judges, who heard and decided causes, except when the point in litigation was too intricate for their determination; and then it was remitted to the supreme court of the empire, established in the capital, and consisting of twelve judges. Peru, according to Garcilafso de Vega (an historian descended from the ancient Incas of that country) was divided into small districts containing ten families each, all registred, and under one magistrate; who had authority to decide little differences and punish petty crimes. Five of these composed a higher class or fifty families; and two of these last composed another called a hundred. Ten hundreds constituted the largest division, consisting of a thousand families, and each division had its separate judge or magistrate, with a proper degree of subordination. In like manner we read of Moses; that, finding the sole administration of justice too heavy for him, he chose able men out of all Israel, such as feared God, men of truth, hating covetousness; and made them heads over the people, rulers of thousands, rulers of hundreds, rulers of fifties, and rulers of tens: and they judged the people at all seasons; the hard causess they brought unto Moses, but every small matter they judged themselves. These inferior courts, at least the name and form of them, still continue in our legal constitution: but as the superior courts of record have in practice obtained a concurrent original jurisdiction with these; and as there is besides a power of removing plaints or actions thither from all the inferior jurisdictions; upon these accounts (among others) it has happened

a Mod. Un. Hist. xxxviii. 469.
b Ibid. xxxix. 14.
c Exod. c. 18.

that these petty tribunals have fallen into decay, and almost into oblivion: whether for the better or the worse, may be matter of some speculation; when we consider on the one hand the encrease of expense and delay, and on the other the more upright and impartial decision, that follow from this change of jurisdiction.

THE order I shall observe in discoursing on these several courts, constituted for the redress of civil injuries, (for with those of a jurisdiction merely criminal I shall not at present concern myself) will be by beginning
with the lowest, and those whose jurisdiction, though public and generally dispersed throughout the kingdom, is yet, (with regard to each particular court) confined to very narrow limits; and so ascending gradually to those of the most extensive and transcendent power.

I. THE lowest, and at the same time the most expeditious, court of justice known to the law of England is the court of piepoudre, curia pedis pulverzati: so called from the dusty feet of the suitors; or according to sir Edward Coked, because justice is there done as speedily as dust can fall from the foot. Upon the same principle that justice among the Jews was administered in the gate of the city, that the proceedings might be the more speedy, as well as public. But the etymology given us by a learned modern writer is much more ingenious and satisfactory; it being derived, according to him, from pied puldreaux a pedlar, in old french, and therefore signifying the court of such petty chapmen as resort to fairs or markets. It is a court of record, incident to every fair and market, of which the steward of him, who owns or has the toll of the market, is the judge. It was instituted to administer justice for all injuries done in that very fair or market, and not in any preceding one. So that the injury must be done complained of, heard, and determined, within the compass of one and the same day. The court hath
d 4 Inst. 272.
e Ruth. c. 4.
f Barrington's observat. on the ftat. 337.
cognizance of all matters that can possibly arise within the precinct of that fair or market; and the plaintiff must make oath that the cause of an action arose there. From this court a writ of error lies, in the nature of an appeal, to the courts at Westminster. The reason of its institution seems to have been, to do justice expeditiously among the variety of persons, that resort from distant places to a fair or market: since it is probable that no other inferior court might be able to serve its process, or execute its judgements, on both or perhaps either of the parties; and therefore, unless this court had been erected, the complaint must necessarily have resorted even in the first instance to some superior judicature.

II. THE court-baron is a court incident to every manor in the kingdom, and was holden by the steward within the said manor. This court-baron is of two natures: the one is customary court, of which we formerly spokek,
appertaining entirely to the copyholders, in which their estates are
transferred by surrender and admittance, and other matters transacted
relative to their tenures only. The other, of which we now speak, is a court
of common law, and it is the court of the barons, by which name the
freeholders were sometimes anciently called; for that it is held before the
freeholders who owe suit and service to the manor, the steward being
rather the registrar than the judge. These courts, though in their nature
distinct, are frequently confounded together. The court we are now
considering, viz. the freeholders' court, was composed of the lords tenants,
who were the pares of each other, and were bound by their feodal tenure to
assist their lord in the dispensation of domestic justice. This was formerly
held every three weeks; and its most important business is to determine,
by writ of right, all controversies relating to the right of lands within the
manor. It may also hold plea of any personal actions, of debt, trespass on
the case, or the like, where the debt or damages do not amount to forty
shil-

g Stat. 17 Edw. IV. c. 2.
h Cro. Eliz. 773.
i Co. Litt. 58.
j Book II. ch. 6. and ch. 22.

lingsl . Which is the same sum, or three marks, that bounded the
jurisdiction of the ancient Gothic courts in their lowest instance, or
fierding-courts, so called because four were instituted within every
superior district or hundredm .quia tollit atque eximit caufam e curia
baronumo . And the proceedings in all other actions may be removed into
the superior courts by the king's writs of ponet , or accedas ad curiam,
according to the nature of the suitq . After judgment given, a writ also of
false judgmentr lies to the courts at Westminster to rehear and review the
cause, and not a writ of error; for this is not a court of record: and
therefore in all these writs of removal, the first direction given is to cause
the plaintiff to be recorded, recordari facias loquelam.

III. A HUNDRED court is only a larger court-baron, being held for all the
inhabitants of a particular hundred instead of a manor. The free suitors
are here also the judges and the steward the registrar, as in the case of a
court baron. It is likewise no court of record; resembling the former in all
points, except that in point of territory it is of a greater jurisdictions . This
is said by sir Edward Coke to have been derived out of the county court for
the case of the people, that they might have justice done to them at their own doors, without any charge or loss of time: but its institution was probably co-eval with that of hundreds themselves, which were formerly observed to have been introduced though not invented by Alfred, being derived from the polity of the ancient Germans. The centeni, we may remember were the principal inhabitants of district composed of different villages, originally in number an hundred, but afterwards only

1 Finch. 248.

q F. N. B. 4. 70. Finch. L. 444. 445.
m Stiernhook de jure Goth. l. 1. c. 2. r F. N. B. 18.
n F. N. B. 3. 4. See append. No. 2. s Finch. l. 248. 4. Inst. 267.
o 3 Rep. Pref.

p See append. No. 1. 3.

t 2 Inst. 71.

y Vol. I. introd. 4.

called by that name; and who probably gave the same denomination to the district out of which they were chosen. Caesar speaks positively of the judicial power exercised in their hundred-courts and courts-baron. Principes regionum, atque pagorum,? (which we may fairly construe, the lords of hundred and manors) inter fuos jus dicunt, controversiasque minuuntw. And Tacitus, who had examined their constitution till more attentively, informs us not only of the authority of the lords, but of that of the centeni, the hundredors, or jury; who were taken out of the common freeholders, and had themselves a share in the
determination. Eliguntur in conciliis et principes, qui jura per pagos vicofque reddunt: centeni fingulis, ex plebe comites, confiñium fimul et auctoritas, adfunctx. This hundred-court was denominated haereda in the Gothic constitutiony. But this court, as causes are equally liable to removal from hence, as from the common court-baron, and by the same writs, and may also be reviewed by writ of false judgment, is therefore fallen into equal disuse with regard to the trial of actions.

IV. THE county court is a court incident to the jurisdiction of the sheriff. It is not a court of record, but may hold pleas of debt or damages under the value of forty shillingsz. Over some of which causes these inferior courts have, by the express words of the statute of Gloucestera, a jurisdiction totally exclusive of the king's superior courts. For in order to be entitled to sue an action of trespass for goods before the king's justiciars, the plaintiff is directed to make affidavit that the cause of action does really and bona side amount to 40 s: which affidavit is now unaccountably dissectx, except in the court of exchequer. The statute also 43 Eliz. c. 6. which gives the judges in all personal actions, where the jury assess less damages than 40 s, a power

u Centri ex fingulis pagis fut, idque ipsum inter fous vocantur; et, quod primo numerus suit, jam nomen et honor est. Tac. de mor. Germ. c. 6.
w de bell. Gall. l. 6. c. 22.
x de morib. German. c. 13.
y Stiernhock, l. 1. c. 2.
z 4 Inst. 266.
a 6 Edw. I. c. 8.
b 2 Inst. 391.

to certify the same and abridge the plaintiff of his full costs, was also meant to prevent vexation by litigious plaintiffs; who, for purposes of mere oppression, might be inclined to institute suits in the superior courts for injuries of a trifling value. The county court may also hold plea of many real actions, and of all personal actions to any amount, by virtue of a special writ called a justices; which is a writ empowering the sheriff for the sake of dispatch to do the same justice in his county court, as might otherwise be had at Westminsterc. The freeholders of the county are the real judges in this court, and the sheriff is the ministerial officer. The great conflux of freeholders, which are supposed always to attend at the county court, (which Spelman callsj forum plebeiae justitiae et theatrum
comitiva potestatis) is the reason why all acts of parliament at the end of every session were wont to be there published by the sheriff; why all outlawries of absconding offenders are there proclaimed; and why all popular elections which the freeholders are to make, as formerly of sheriffs and conservators of the peace, and still of coroners, verderors, and knights of the shire, must ever be made in pleno comtatu, or, in full county court. By the statute 2 Edw. VI. c. 25. no county court shall be adjourned longer than for one month, consisting of twenty eight days. And this was also the ancient usage, as appears from the laws of king Edward the elder: praepositus (that is, the sheriff) ad quartam circiter septimanam frequentatem populii concionem celebrato: cuique jus dicito; litefque singulas dirimito. In those times the county court was a court of great dignity and splendor, the bishop and the ealdorman (or earl) with the principal men of the shire sitting therein to administer justice both in lay and ecclesiastical cases. But its dignity was much impaired, when the bishop was prohibited and the earl neglected to attend it. And, in modern times, as proceedings are removable from hence into the king's, as proceedings are removable from hence into the king's superior courts, by writ of pone or recordare, in the same manner as from hundred-

c Finch. 318. F. N. B. 152.
d Gloff. v. cemitatas.
e c. 11.
f LL. Eadgari. c. 5.
g F. N. B. 70. Finch. 445.

courts, and courts-baron; and as the same writ of false judgment may be had, in nature of a writ of error; this has occasioned the same disuse of bringing actions therein.

THESE are the several species of common law courts, which though dispersed universally throughout the realm are nevertheless of a partial jurisdiction and confined to particular districts: yet communicating with, and as it were members of, the superior courts of a more extended and general nature; which are calculated for the administration of redress not in any one lordship, hundred, or county only, but throughout the whole kingdom at large. Of which sort is

V. The court of common pleas, or, as it is frequently termed in law, the court of common bench.
BY the ancient Saxon constitution there was only one superior court of justice in the kingdom: and that had cognizance both of civil and spiritual causes; viz. the wittena-gemote, or general council, which assembled annually or oftener, wherever the king kept his Easter, Christmas, or Whitsontide, as well to do private justice as to consult upon public business. At the conquest the ecclesiastical jurisdiction was diverted into another channel; and the conqueror, fearing danger from these annual parliaments, contrived also to separate their ministerial power, as judges, from their deliberative, as counsellors to the crown. He therefore established a constant court in his own shall, thence called by Bracton and other ancient authors aula regia or aula regis. This court was composed of the king's great officers of the state resident in his palace, and usually attendant on his person: such as the lord high constable and lord mareschal, who chiefly presided in matters of honour and of arms; determining according to the law military and the law of nations. Besides these there were the lord high steward, and lord great chamberlain; the steward of the household; the lord chancellor, whose peculiar business it was

h L. 3. tr. I. c.

to keep the king's seal and examine all such writs, grants, and letters, as were to pass under that authority; and the lord high treasurer, who was the principal adviser in all matters relating to the revenue. These high officers were assisted by certain persons learned in the laws, who were called the king's justiciars or justices; and by the greater barons of parliament, all of whom had a seat in the aula regia, and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. All these in their several departments transacted all secular business both criminal and civil, and likewise the matters of the revenue: and over all presided one special magistrate, called the chief justiciar of capitalis justiciarius totius Angliae; who was also the principal minister of state, the second man in the kingdom, and by virtue of his office guardian of the realm in the king's absence. And this officer it was who principally determined all the vast variety of causes that arose in this extensive jurisdiction; and from the plenitude of his power grew at length both obnoxious to the people and dangerous to the government which employed him.
THIS great universal court being bound to follow the king’s household in all his progresses and expeditions, the trial of common causes therein was found very burdensome to the subject. Wherefore king John, who dreaded also the power of the justiciar, very readily consented to that article which now forms the eleventh chapter of magna carta, and enacted that communia placita non fequantur curiam regis, fed teneantur in aliquo loco certo. This certain place was established in Westminster-hall, the place where the aula regis originally sate when the king resided in that city; and there it hath ever since continued. And the court being thus rendered fixed and stationary, the judges became so too, and a chief with other justices of the common pleas was thereupon appointed; with jurisdiction to hear and determine all pleas of land, and injuries merely civil between subject and subject. Which critical establishment of this principal court of


common law, at that particular juncture and that particular place, gave rise to the inns of court in its neighbourhood; and thereby collecting together the whole body of the common lawyers, enabled the law itself to withstand the attacks of the canonists and civilians, who laboured to extirpate and destroy iti. This precedent was soon after copied by king Philip the fair in France, who about the year 1302 fixed the parliament of Paris to abide constantly in that metropolis; which before used to follow the person of the king, wherever he went, and in which he himself used frequently to decide the causes that were there depending: but all were then referred to the sole connizance of the parliament and its learned judgesk. And thus also in 1495 the emperor Maximilian I. fixed the imperial chamber (which before always travelled with the court and household) to be constantly held at Worms, from whence it was afterwards translated to Spirel.

THE aula regia being thus stripped of so considerable a branch of its jurisdiction, and the power of the chief justiciar being also considerably curbed by many articles in the great charter, the authority of both began to decline apace under the long and troublesome reign of king Henry III. And, in farther pursuance of this example, the other several office of the chief justiciar were under Edward the first (who new-modelled the whole frame of our judicial polity) subdivided and broken into distinct courts of judicature. A court of chivalry was erected, over which the constable and mareschal presided; as did the steward of the household over another,
constituted to regulate the king’s domestic servants. The high steward, with the barons of parliament, formed an august tribunal for the trail of delinquent peers; and the barons reserved to themselves in parliament the right of reviewing the sentences of other courts in the last resort. The distribution of common justice between man and man was thrown into so provident an order, that the great judicial officers were

made to form a checque upon each other: the court of chancery issuing all original writs under the great seal to the other courts; the common pleas being allowed to determine all causes between private subjects; the exchequer managing the king’s revenue; and the court of king’s bench retaining all the jurisdiction which was not cantoned out to other courts, and particularly the superintendence of all the rest by way of appeal; and the sole cognizance of pleas of the crown or criminal causes. For pleas of suits are regularly divided into two sorts; pleas of the crown, which comprehend all crimes and misdemesnors, wherein the king (on behalf of the public) is the plaintiff; and common pleas, which include all civil actions depending between subject and subject. The former of these were the proper object of the jurisdiction of the court of king’s bench; the latter of the court of common pleas. Which is a court of record, and is styled by sir Edward Cokem the lock and key of the common law; for herein only can real actions, that is, actions which concern the right of freehold or the realty, be originally brought: and all other, or personal, pleas between man and man are likewise here determined; though in some of them the king’s bench has also a concurrent authority.

THE judges of this court are at present four in number, one chief and three puisne justices, created by the king’s letters patent, 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.

m 4 Inst. 99.
n King James I, during part of his reign, appointed five judges in every
court, for the benefit of a casting voice in case of a difference in opinion,
and that the circuits might at all times be fully supplied with judge of the
superior courts. And, in subsequent reigns, upon the permanent
indisposition of a judge, a fifth hath been sometimes appointed. Raym.
475.

VI. THE court of king's bench (so called because the king used formerly to
sit there in persono, the title 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. Yet, though
the king himself used to sit in this court, and still is supposed so to do; he
did not, neither by law is the empowered to, determine any cause or
motion, but by the mouth of his judges, to whom he hath committed his
whole judicial authority.

THIS court (which as we have said) is the remnant of the aula regia, is not,
nor can be, from the very nature and constitution of it, fixed to any certain
place, but may follow the king's court wher'er it goes; for which reason all
process issuing out of this court in the king's name is returnable ubicumque
suerimus in Anglia. It hath indeed, for some centuries past, usually sate at
Westminster, being an ancient palace of the crown; but might remove with
the king to York or Exeter, if he thought proper to command it. And we
find that, after Edward I had conquered Scotland, it actually sate att
Roxburghe. And this moveable quality, as well as its dignity and power,
are fully expressed by Bracton, when he says that the justices of this court
are capitales, generales, perpetui, et majores; a latere regis residentes; qui
omnium aliorum corrigere tenetur injurias et erroress. And it is
moreover especially provided in the articuli super cartast that the king's
chancellor, and the justices of his bench shall

0 4 Inst. 73.
p See book I. ch. 7. The king used to decide causes in person in the aula
regina. In curia domini regis ipse in propria persona juradecernit. (Dial. de
Sead b. I. I. 4.) After its dissolution, king Edward I frequently sate in the
court of king's bench. (See the records cited 4 Burr. 851.) And, later times,
James I is said to have sate there in person, but was informed by his
judges that he could not deliver an opinion.
q 4 Inst. 71.
follow him, so that he may have at all times near unto him some that be learned in the laws.

THE jurisdiction of this court is very high and transcendent. 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 superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the liberty of the subject, by speedy and summary interposition. It takes cognizance both of criminal and civil causes; the former in what is called the crown-side or crown-office; the latter in the plea-side of the court. The jurisdiction of the crown-side it is not our present business to consider: that will be more properly discussed in the ensuing volume. But on the plea-side, or civil branch, it hath an original jurisdiction and cognizance of all trespasses, and other injuries, alleged to be committed vi et armis: which, being a breach of the peace, favour of a criminal nature although the action is brought for a civil remedy; and for which the defendant ought in strictness to pay a fine to the king, as well as damages to the injured party. This court might likewise, upon the division of the aula regia, have originally held plea of any other civil action whatsoever, (excepting actions real, which are new very seldom in use) provided the defendant was an officer of the court; or in the custody of the marshall, or prison-keeper, of this court, for a breach of the peace or any other offence. In process of time, by a fiction, this court began to hold plea of all personal actions whatsoever, and as continued to do so for ages: it being surmised that the defendant is arrested for a supposed trespass, which he never has in reality committed; and being thus in the custody of the marshall of this court, the plaintiff is at liberty to proceed against him for any other personal injury: which surmise, of being in the marshall's custody.

u Finch. L. 198.
w 4 Inst. 71.
x Ibid. 72.
the defendant is not at liberty to disputey. And these fictions of law, though at first they may startle the student, he will find upon farther consideration to be highly beneficial and useful: especially as this maxim is ever invariably observed, that no fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law z. So true is it, that in fictione juris femper subsistit aequitasa. In the present case, it gives the suitor his choice of more than one tribunal, before which he may institute his action; and prevents the circuity and delay of justice, by allowing that suit to be originally, and in the first instance, commenced in this court, which after a determination in another, might ultimately be brought before it on a writ of error.

FOR 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: and to which a writ of error lies also from the court of king's bench in Ireland. Yet even this so high and honourable court is not the derneir resort of the subject; for if he be not satisfied with any determination here, he may remove it 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.

VII. THE court of exchequer is inferior in rank not only to the court of king's bench, but to the common pleas also: but I have chosen to consider it in this order, on account of its double capacity, as a court of law and a court of equity also. It is a very ancient ocurt of record, set up by William the conquerorb.
exchequer, scaccharium, from the chequed cloth, resembling a chessboard, which covers the table there; and on which, when certain of the king's accounts are made up, the sums are marked and scored with counters. It consists of two divisions: the receipt of the exchequer, which manges the royal revenue, and with which these commentaries have no concern; and the court or judicial part of it, which is again subdivided into a court of equity, and a court of common law.

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 ones. These Mr Selden conjectures to have anciently been made out of such as were barons of the kingdom, or parliamentary barons; and thence to have derived their name: which conjecture receives great strength from Bracation's explanation of magna charta, c. 14. which directs that the earls and barons be amerced by thier peers; that is, says he, by the barons of the exchequer. The primary and original business of this court is to call the king's debtors to account by bill filed by the attorney general; and to recover any lands, tenements, or hereditaments, any goods, chattels, or other profits or benefits, belonging to the crown. So that by their original constitution the jurisdiction of the courts of common pleas, king's bench, and exchequer, was entirely separate and distinct; the common pleas being intended to decide all controversies between subject and subject; the king's bench to correct all crimes and misdemeanors that amount to a breach of the peace, the king being then plaintiff, as such offences are in open derogation of the jura regalia of his crown; and the exchequer to adjust and recover his revenue, wherein the king also is plaintiff, as the withholding and non-

 e 4 Inst. 103-116.
 f Tit. hon. 2. 5. 16.
 g l. 3. tr. 2. c. 1. 3.

payment thereof is an injury to his jura fifcalia. But, as by fiction almost all sorts of civil actions are now allowed to be brought in the king's bench, in like manner by another fiction all kinds of personal suits may be prosecuted in the court of exchequer. For as all the officers and ministers of this court have, like those of other superior courts, the privilege of suing and being sued only in their own court; so also the king's debtors, and
farmers, and all accomptants of the exchequer, are privileged to sue and implead all manner of persons in the same court of equity, that they themselves are called into. They have likewise privilege to sue and implead one another, or any stranger, in the same kind of common law actions (where the personalty only is concerned) as are prosecuted in the court of common pleas.

THIS gives original to the common law part of their jurisdiction, which was established merely for the benefit of the king's accomptants, and is exercised by the barons only the exchequer, and not the treasurer or chancellor. The writ upon which all proceedings here are gounded is called a quo minus: in which the plaintiff suggests that he is the king's farmer or debtor, and that the defendant hath done him the injury or damage complained of; quo minus sufficiens existit, by which he is the less abie, to pay the king his debt or rent. And these suits are expressly directed, by what is called the statute of Rutlandh , to be confined to such matters only as specially concern the king or his ministers of the exchequer. And by the articuli super cartasi it is enacted, that no common pleas be thenceforth holden in the exchequer, contrary to the form of the great charter. But now by the suggestion of privilege, any person may be admitted to sue in the exchequer as well as the king's accomptant. The surmise, of being debtor to the king, is thererfore become matter of form and mere words of course, and the court is open to all the nation equally. The same holds with regard to the equity side of the court: for there any person may file a bill against

h 10 Edw. I. c. 11.
f 28 Edw. I. c. 4.

another upon a bare suggestion that he is the kings accomptant; but wherther he is so, or not, is never controverted. In this court, on the equity side, the clergy have long used to exhibit their bills for the non-payment of tithes; in-which case the surmise of being the king's debtor is no fiction, they being bound to pay him their first fruits, and annual tenths. But the chancery has of late years obtained a large share in this business.

AN appeal from the equity side of this court lies immedaitely to the house of peers; but from the common law side, in pursuance of the statute 31 Edw. III. c. 12. a.writ of error must be first brought into the court of exchequer chamber. And from their determination there lies, in the dernier resort, a writ of error to the house of lords.
VIII. THE high court of chancery is the only remaining, and in matters of
civil property by much the most important of any, of the king's superior
and original courts of justice. It has its name of chancery, cancellaria, from
the judge who presides here, the lord chancellor or cancellarius; who, sir
Edward Coke tells us, is so termed a cancellando, from cancelling the
king's letters patents when granted contrary to law, which is the highest
point of his jurisdiction. But the office and name of chancellor (however
derived) was certainly known to the courts of the Roman emperors; where
originally it seems to have signified a chief scribe or secretary, who was
afterwards invested with several judicial powers, and a general
superintendency over the rest of the officers of the prince. From the
Roman empire it passed to the Roman church, ever emulous of imperial
state; and hence every bishop has to this day his chancellor, the principal
judge of his consistory. And when the modern kingdoms of Europe were
established upon the ruins of the empire, almost every state preserved its
chancellor, with different jurisdictions and dignities, according to their
different constitutions. But in all of them he seems to have had the
supervision of all charter, letters, and

k 4 Inst. 88.

such other public instruments of the crown, as were authenticated in the
most solemn manner; and therefore, when seals came in use, he had
always the custody of the king's great seal. So that the office of chancellor,
or lord keeper, (whose authority by statute 5 Eliz. c. 18. is declared to be
exactly the same) is with us at this day created by the mere delivery of the
king's great seal into his custody: whereby he becomes, without writ or
patent, an officer of the greatest weight and power of any now subsisting in
the kingdom; and superior in point of precedency to every temporal
lord. He is privy councilor by his office, and, according to lord
chancellor Ellenfmeren, prolocutor of the house of lords by prescription.
To him belongs the appointment of all justices of the peace throughout the
kingdom. Being formerly usually an ecclesiastic, (for none else were them
capable of an office so conversant in writings) and presiding over the royal
chapelo, he became 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 20 l. per annum in the king's
books. He is the general guardian of all infants, idiots, and lunatics; and
has the general superintendence 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, as in the exchequer, there are two distinct tribunals; the one ordinary, being a court of common law; the other extraordinary, being a court of equity.

THE ordinary legal court is much more ancient than the court of equity. Its jurisdiction is to hold plean upon a scire facias to repeal and cancel the king’s letters patent, when made against law, or upon untrue suggestions; and to hold plea 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. On proof of which, as the king can never be supposed intentionally to do any wrong, the law questions not but he will immediately redress the injury; and refers that conscientious task to the chancellor, the keeper of his conscience. It also appertains to this court to hold plea of all personal actions, where any officer or minister of the court is a party. It might likewise hold plea (by scire facias) of partitions of lands in coparcenary, and of dowers, where any ward of the crown was concerned in interest, so long as the military tenures subsisted: as it now may also do of the tithes of forest land, where granted by the king and claimed by a stranger against the grantee of the crown; and of executions on statutes, or recognizances in nature thereof by the statute 23 Hen. VIII. c. 6. But if any cause comes 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 propria manu 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: though so little is usually done on the common law side of the court, that I have met with no traces of any writ of error being actually brought, since the fourteenth year of queen Elizabeth, A. B. 1572.
IN this ordinary, or legal, court is also kept the officina justitiae: out of which all original writs that pass under the great seal, all commissions of charitable uses, sewers, bankruptcy,

p 4 Rep. 64.
q 4 Inst. 80.
r Co. Litt. 171. F. N. B. 62.
s Bro. Abr. tit. dower. 66. Moor. 565.
t Bro. Abr. t. difmes. 10.
w 2 Roll. Abr. 469.
w Cro. Jac. 12.
y The opinion of lord keeper North in 1682 (1 Vern. 131. 1 Equ. Caf. abr. 129.) that no such writ of error lay, and that an injunction might be issued against it, seems not to have been well considered.

idiocy, lunacy, and the like, do issue; and for which it is always open to the subject, who may there at any time demand and have, cx debito justitiae, any writ that his occasions may call for. These writs (relating to the business of the subject) and the returns to them were, according to the simplicity of ancient times, originally kept in a hamper, in hanaperio; and the other (relating to such matters wherein the crown is immediately or mediate concerned) were preserved in a little sack or bag, in parva baga; and thence hath arisen the distinction of the hanaper office, and petty bag office, which both belong to the common law court in chancery.

BUT the extraordinary court, or court of equity, is now become the court of the greatest judicial consequence. This distinction between law and equity, as administered in different courts, is not a present known, nor seems to have ever been known, in any other country at any time: and yet the difference of one from the other, when administered by the same tribunal, was perfectly familiar to the Romansa; the jus praetorium, or difference of the praetor, being distinct from the leges or standing lawsb; but the power of both centered in one and the same magistrate, who was equally intrusted to pronounce the rule of law, and to apply it to particular cases by the principles of equity. With us too, the aula regia, which was the supreme court of judicature, undoubtedly administered equal justice according to the rules of both or either, as the case might chance to require: and, when that was broken to pieces, the idea of a court of equity, as distinguished from a court of law, did not subsist in
The council of conscience, instituted by John III, king of Portugal, to review the sentences of all inferior courts, and moderate them by equity. (Mod. Un. Hist. xxii. 237.) seems rather to have been a court of appeal. Thus too the parliament of Paris, the court of session in Scotland, and every other jurisdiction in Europe of which we have any tolerable account, found all their decisions as well upon principles of equity as those of positive law (Lord Kayms. h flor. lawtracts, I. 325. 330. princ of equity 44.)

Thus Cicero; jam illis promissas non esse esse standum, quis non videt, quae coeptusquis metu et deceptus aolo premijerit quatquem plerumque jure praetorto liberantur, nonnulla legibus. Office. l. 1.

the original plan of partition. For though equity is mentioned by Bracton as a thing contrasted to strict law, yet neither in that writer, nor in Glanvil or Fleta, nor yet in Britton (composed under the auspices and in the name of Edward I, and treating particularly of courts and their several jurisdictions) is there a syllable to be found relating to the equitable jurisdiction of the court of chancery. It seems therefore probable, that when the courts of law, proceeding merely upon the ground of the king's original writs and confining themselves strictly to that bottom, gave a harsh or imperfect judgment, the application for redress used to be to the king in person assisted by his privy council, (from whence also arose the jurisdiction of the court of requested, which was virtually abolished by the statute 16 Car. I. c. 10.) and they were wont to refer the matter either to the chancellor and a select committee, or by degrees to the chancellor only, who mitigated the severity or supplied the defects of the judgments pronounced in the courts of law, upon weighing the circumstances of the case. This was the custom not only among our Saxon ancestors, before the institution of the aula regiae, but also after its dissolution, in the reign of king Edward I, if not that of Henry II.

IN these early times the chief juridical employment of the chancellor must have been in devising new writs, directed to the courts of common law, to give remedy in cases where none was before administered. And to quicken the diligence of the clerks in the

cl. 2. c. 7. fol. 23.

d The matters cognizable in this court, immediately before its dissolution, were almost all suits, that by colour of equity, or supplication made to the prince, might be brought before him: but originally and properly all poor
men's suits, which were made to his majesty by supplication; 'and upon
which they were intitled to have right without payment of any money
for the same. (Smith's commonwealth. b. 3. c. 7.)
e Nemo ad regem appllet pro aliqua lite, nifi jus domi confequi non poffit.
Si jus nimis severeum fit, alleviatio deinde queratur apud regem. LL. Edg.
c. 2.
f Lambard. Archeion. 59.
g Joannes Sarifburienfis (who died A. D. 1182, 26 Hen. II.) speaking of the
chancellor's office in the verses prefixed to his polycraticon, has these
lines; Hie est, qui leges regni cancellat iniquas, Et mandata pii principis
atqua facit.

chancery, who were too much attached to ancient precedents, it is
provided by statute Westm. 2. 13. Edw. I. c. 24. that whenever from
thenceforth in one case a writ shall be found in the chancery, and in a like
case falling under the same right and 'requiring like remedy no precedent
of a writ can be produced, the clerks in chancery shall agree in forming a
new one: and, if they cannot agree, it shall be adjourned to the next
parliament, where a writ shall be framed by consent of the learned in the
law, lest it happen for the future that the court of our lord the king be
deficient in doing justice to the suitors. And this accounts for the very
great variety of writs of trespass on the case, to be met with in the register,
whereby the suitor had ready relief according to the exigency of his
business, and adapted to the specialty, reason, and equity of his very case.
Which provision (with a little accuracy in the clerks of the chancery, and a
little liberality in the judges, by extending rather than narrowing the
remedial effects of the writ) might have effectually answered all the
purposes of a court of equity; except that of obtaining a discovery by the
oath of the defendant.

BUT when, about the end of the reign of king Edward III, uses of land
were introduced, and, though totally discountenanced by the courts of
common law, were considered as fiduciary deposits and binding in
conscience by the clergy, the separate jurisdiction of the chancery as a
court of equity began to be established; and John Waltham, who was
bishop of Salisbury and chancellor to king Richard II, by a strained
interpretation of the above-mentioned statute of Westm. 2. devised the
writ of subpoena, returnable in the court of chancery only, to make the
feoffe to uses accountable to his cestury que use: which process was
afterwards
A great variety of new precedents of writs, in cases before provided for, are given by this very statute of Westm. 2. Lamb. Archeion. 61.

This was the opinion of Fairfax, a very learned judge in the time of Edward the fourth. Le subpoena (says he) ne ferrcit myty foventement use come if eft ore fi nous attendomus tiels actions fur les cases, et mainteinomus le jurisdiction de ceo court, et d'axter courts. (Yearb. 21. Edw. IV. 23.)

See book II. ch. 20.

Spelm Gloff. 106. 1. Lev. 242.

extended to other matters wholly determinable at the common law, upon false and fictitious suggestions; for which therefore the chancellor himself is by statute 17 Ric. II. c. 6. directed to give damages to the parties unjustly aggrieved. But as the clergy, so early as the reign of king Stephen, had attempted to turn their ecclesiastical courts into courts of equity, by entertaining suits pro laefione sidei, as a spiritual offence against conscience, in case of nonpayment of debts or any breach of civil contractn ; till checked by the constitutions of Clarendono, which declared that placita de debitis, quae side interpofita debentur, vel abfque interpositione sidei, fint in justicia regis: therefore probably the ecclesiastical chancellors, who then held the seal, were remiss in abridging their own new-acquired jurisdiction; especially as the spiritual courts continued to graft at the same authority as before, in suits pro laefione sidei, so late as the fifteenth centuryp, till finally prohibited by the unanimous concurrence of all the judges. However, it appears from the parliament rollsq, that in the reigns of Henry IV and V the commons were repeatedly urgent to have the writ of subpoena entirely suppressed, as being a novelty devised by the subtilty of chancellor Waltham, against the form of the common law; whereby no plea could be determined, unless by examination and oath of the parties, according to the form of the law civil, and the law of holy church, in subversion of the common law. But though Henry IV, being then hardly warm in his throne, gave a palliating answer to their petitions, and actually passed the statute 4 Hen. IV. c. 23. whereby judgments at law are declared irrevocable unless by attaint or writ of error, yet his son put a negative at once upon their whole application: and in Edward IV's time, the process by bill and subpoena was become the daily practice of the courtr.
BUT this did not extend very far: for in the ancient treatise, intitled "diversite des courtess," supposed to be written very early in the sixteenth century, we have a catalogue of the matters of conscience then cognizable by subpoena in chancery, which fall within a very narrow compass. No regular judicial system at that time prevailed in the court; but the suitor, when he thought himself aggrieved, found a desultory and uncertain remedy, according to the private opinion of the chancellor, who was generally an ecclesiastic, or sometimes (though rarely) a statesman: no lawyer having sat in the court of chancery from the times of the chief justices Thorpe and Knyvet, successively chancellors to king Edward III in 1372 and 1373, to the promotion of sir Thomas More by king Henry III in 1530. After which the great seal was indiscriminately committed to the custody of lawyers, or courtiers, or churchmen, according as the convenience of the times and the disposition of the prince required, till serjeant Puckering was made lord keeper in 1592: from which time to the present the court of chancery has always been filled by a lawyer, excepting the interval from 1621 to 1625, when the seal was intrusted to Dr Williams, then dean of Westminister, but afterwards bishop of Lincoln; who had been chaplain to lord Ellesmere, when chancellor.

IN the time of lord Ellesmere (A. D. 1616.) arose that notable dispute between the courts of law and equity, set on foot by sir Edward Coke, then chief justice of the court of king's bench; whether a court of equity could give relief after or against a judgment at the common law. This contest was so warmly carried on, that indictments were preferred against the suitors, the solicitors, the counsel, and even a master in chancery, for having incurred a praemunire, by questioning in a court of equity a judgment in the court of king's bench, obtained by

t Spelm. Gloff. III. Dugd. chron Ser. 50.
gross fraud and imposition. This matter, being brought before the king, was by him referred to his learned counsel for their advice and opinion; who reported so strongly in favour of the courts of equity, that his mefty gave judgment on their behalf: but, not contented with the irrefragable reasons and precedents produced by his counsel, (for the chief justice was clearly in the wrong) he chose rather to decide the question by referring it to the plenitude of his royal prerogative. Sir Edward Coke submitted to the decision, and thereby made atonement for his error. but this struggle, together with the business of commendams (in which he acted a very noble part) and his controlling the commissioners of sewers, were the open and avowed causes, first of his suspension, and soon after of his removal, from his office.

LORD Bacon, who succeeded lord Ellesmere, reduced the practice of the court into a more regular system; but did not sit long enough to effect any considerable revolution in the science itself: and few of his decrees which have reached us are of any great consequence to posterity. His successors, in the reign of

Bacon's works. IV. 611, 612. 632.
For that it appertaineth to our princely office only to judge over all judges, and to discern and determine such differences, as at any time may and shall arise between our several courts touching their jurisdictions, and the same to settle and determine, as we in our princely wisdom shall find to stand most with our honour, & c. (1 Chan. Rep. append. 26.)
See the entry in the council book, 26 July, 1616. (biogr. Brit. 1390.)
In a cause of he bishop of Winchester, touching a commendam, king James, conceiving that the matter affected his prerogative, sent letters to the jueges not to proceed in ti, till himself had been first consulted. The twelve judges joined in a memorial to his majesty, declaring that their compliance would be contrary to their oaths and the law: but upon being brought before the king in council, they all retracted and promised obedience in every such
case for the future, except sir Edward Coke, who said, that when the case happened, he would do his duty. (Biogr. Brit. 1388.)
c See that article in chap. 6.
d See lord Ellesmere’s speech to sir Henry Montague, the new chief justice, 15 Nov. 1616. (Moor’s reports. 828.) Though sir Edward might probably have retained his seat, if during his suspension he would have complimented lord Villiers (the new favorite) with the disposal of the most lucrative office in his court. (biogr. Brit. 1391.)

Charles I, little to improve upon his plan: and even after the restoratin the seal was committed to the earl of Clarendon, who had withdrawn from practice as a lawyer near twenty yeras s and afterwards to the earl of Shaftesbury, who had never practised at all. Sir Heneage Finch, who succeeded in 1673 and became afterwards earl of Nottingham, was a person of the greatest abilities and most uncorrupted integrity; a thorough master and zealous defender of the laws and constitution of his country; and endued with a pervading genius, that enabled him to discover and to pursue the true spirit of justice, notwithstanding the embarassments raised by the narrow and technical notions which then prevailed in the courts of law, and the imperfect ideas of redress which had possessed the courts of equity. The reason and necessities of mankind, arising from the great change in property by the extension of trade and the abolition of military tenures, co-operated in establishing his plan, and enabled him in the course of nine years to build a system of jurisprudence and jurisdiction upon wide and rational foundtions; which have also been extended and improved by many great men, who have since presided in chancery. And from that time to this, the power and business of the court have increased to an amazing degree.

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, and writs of error from a court of law: 1. That the former may be brought upon any interlocutory matter, the latter upon noting but only a definitive judgment. 2. That on writs of error the house of lords pronounces the judgment, on appeals it gives direction to the court below to rectify its own decree.

IX. THE next court that I shall mention is one that hath no original jurisdiction, but is only a court of appeal, to correct the errors of other
jurisdictions. This is the court of exchequer chamber; which was first erected by statute 31 Edw. III. c. 12. to determine causes upon writs of error from the common law side of the court of exchequer. And to that end it consists of the lord treasurer, the lord chancellor, and the justices of the king's bench and common pleas. In imitation of which, a second court of exchequer chamber was erected by statute 27 Eliz. c. 8. consisting of the justices of the common pleas, and the barons of the echequer; before whom writs of error may be brought to reverse judgments in certain suits originally begun in the court of king's bench. Into the court also of exchequer chamber, (which then consists of all the judges of the three superior courts and now and then the lord chancellor also) are sometimes adjourned from the other courts such causes as the judges upon argument find to be of great weight and difficulty, before any judgment is given upon them in the court belowe.

FROM all the branches of this court of exchequer chamber, a writ of error lies to

X. THE house of peers, which is the supreme court of judicature in the kingdom, having at present no original jurisdiction over causes, but only upon appeals and writs of error; to rectify any injustice or mistake of the law, committed by the courts below. To this authority they succeeded of course, upon the dissolution of the aula regia. For, as the barons of parliament were constituent members of that court, and the rest of its jurisdiction was dealt out to other tribunals, over which the great officers who accompanied those barons were respectively delegated to preside; it followed, that the right of receiving appeals, and superintending all other jurisdictions, still remained in that noble assembly, from which every other great court was derived. They are therefore in all causes the last resort, from whose judgment no farther appeal is permitted; but every subordinate tribunal must conform to their determinations. The law reposing an entire confidence in the honour and conscience of the noble persons who compose this important assembly, that they

e 4 Inst. 119. 4 Bulfr. 146.

will make themselves masters of those questions upon which they undertake to decide; since upon their decision all property must finally depend.
HITHERTO may also be referred the tribunal established by statute 14 Edw. III. c. 5. consisting (though now out of use) of one prelate, two earls, and two barons, who are to be chosen at every new parliament, to hear complaints of grievances and delays of justice in the king's courts, and to give directions for remedying these inconveniences in the courts below. This committee seems to have been established, lest there should be a defect of justice for want of a supreme court of appeal, during the intermission or recess of parliament; for the statute farther directs, that if the difficulty be so great, that it may not well be determined without assent of parliament, it shall be brought by the said prelate, earls, and barons unto the next parliament, who shall finally determine the same.

XI. BEFORE I conclude this chapter, I must also mention an eleventh species of courts, of general jurisdiction and use, which are derived out of, and act as collateral auxiliaries to, the foregoing; I mean the courts of assise and nisi prius.

THESE are composed of two or more commissioners, who are twice in every year sent by the king's special commission all round the kingdom, (except only London and Middlesex, where courts of nisi prius are holden in and after every term, before the chief or other judge of the several superior courts) 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. These judges of assise came into use in the room of the ancient justices in eyre, justitiarii in itinere; who were appointed by the great council of the realm, A. D. 1176, 22 Hen. II, with a delegated power from the king's great court or aula regia, being looked upon as members thereof: and they made their circuit

\[f\] Seld. Tan. l. 2. 5. Spelm. Cod. 329.

round the kingdom once in seven years for the purpose of trying causes g. They were afterwards directed by magna carta, c. 12. to be sent into every county once a year to take or try certain actions then called recognition or assises; the most difficult of which they are directed to adjourn into the court of common pleas to be there determined. The present justices of assise and nisi prius are derived from the statute Westm. 2. 13. Edw. I. c. 30. explained by several other acts, particularly the statute 14 Edw. III. 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 serjeants sworn. They
usually make their circuits in the respective vacations after Hilary and Trinity terms; assises being allowed to be taken in the holy time of lent by consent of the bishops at the king's request, as expressed in statute Westm. 1. 3. Edw. I. c. 51. And it was also usual, during the times of popery, for the prelates to grant annual licences to the justices of assise to administer oaths in holy times: for oaths being of a sacred nature, the logic of those deluded ages concluded that they must be of ecclesiastical cognizance. /i The prudent jealousy of our ancestors ordained that no man of law should be judge of assise in his own country: and a similar prohibition is found in the civil law; /l which has carried this principle so far, that it is equivalent to the crime of sacrilege for a man to be governor of the province in which he was born, or has any civil connexion. /m

THE judges upon their circuits sit by virtue of five several authorities. 1. The commission of the peace. 2. A commission of oyer and terminer. 3. A commission of general goal-delivery. The consideration of all which belongs properly to the subsequent book of these commentaries. But the fourth commission is,

/g Co. Litt. 293.
/h It would have been strange to have denied this consent, if, as Whitelocke imagines (on parl. ii. 260.) the hint of our justices of assise was taken from Samuel's going an annual circuit to judge Israel. 2 Sam vii. 16.
/i Instances hereof may be met with in the appendix to Spelman's original of the terms, and in Parker's ecclesiastical Hist. 209.
/k Stat. 4. Edw. III. c. 2. 8 Ric. II. c. 2. 33 Hen. VIII. c. 24.
/l Ff. 1. 22. 3.
/m c. 9. 29. 4.

4. A commission of assise, 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, of which hereafter. The other authority is, 5. That of nisi prius, which as a consequence of the commission of assise, /n being annexed to the office of those justices by the statute of Westm. 2. 13 Edw. I. c. 30. And it empowers them to try all questions of fact issuing out of the courts at Westminster, that are then ripe for trial by jury. The original of the name is this: all causes commenced in the courts of Westminster-hall are by the course of the courts appointed to be there tried, on a day fixed in some Easter or Michaelmas term, by a jury returned from the county, wherein the cause of
action arises; but with this proviso, nisi prius justitiarii ad assisas capiendás venerint; unless before the day prefixed the judges of assise come into the county in question. This they are sure to do in the vacations preceding each Easter and Michaelmas terms, and there dispose of the cause; which saves much expence and trouble, both to the parties, the jury, and the witnesses.

THESE are the several courts of common law and equity, which are of public and general jurisdiction throughout the kingdom. And, upon the whole, we cannot but admire the wise economy and admirable provision of our ancestors, in settling the distribution of justice in a method so well calculated for cheapness, expedition, and ease. By the constitution which they established, all trivial debts, and injuries of small consequence, were to be recovered or redressed in every man's own county, hundred, or perhaps parish. Pleas of freehold, and more important disputes of property, were adjourned to the king's court of common pleas, which was fixed in one place for the benefit of the whole kingdom. Crimes and misdemeanors were to be examined in a court by themselves; and matters of the revenue in another distinct jurisdiction. Now indeed, for the ease of the subject and greater dispatch of causes, methods have been found to open all

/c Salk. 454.

the three superior courts for the redress of private wrongs; which have remedied many inconveniences, and yet preserved the forms and boundaries handed down to us from high antiquity. If facts are disputed, they are sent down to be tried in the country by the neighbours; but the law, arising upon those facts, is determined by the judges above: and, if they are mistaken in point of law, there remain in both cases two successive courts of appeal, to rectify such their mistakes. If the rigor of general rules does in any case bear hard upon individuals, courts of equity are open to supply the defects, but not sap the fundamentals, of the law. Lastly, there presides over all one great court of appeal, which is the last resort in matters both of law and equity; and which will therefore take care to preserve an uniformity and equilibrium among all the inferior jurisdictions: a court composed of prelates selected for their piety, and of nobles advanced to that honour for their personal merit, or deriving both honour and merit from an illustrious train of ancestors; who are formed by their education, interested by their property, and bound upon their
conscience and honour, to be skilled in the laws of their country. This is a faithful sketch of the English juridical constitution, as designed by the masterly hands of our forefathers. Of which the great original lines are still strong and visible; and, if any of its minuter strokes are by the length of time at all obscured or decayed, they may still be with ease restored to their pristine vigor: and that not so much by fanciful alterations and wild experiments (so frequent in this fertile age) as by closely adhering to the wisdom of the ancient plan, concerted by Alfred and perfected by Edward I; and by attending to the spirit, without neglecting the forms, of their excellent and venerable institutions.

CHAPTER THE FIFTH.
OF COURTS ECCLESIASTICAL, MILITARY, AND MARITIME.

BESIDES the several courts, which were treated of in the preceding chapter, and in which all injuries are redressed, that fall under the cognizance of the common law of England, or that spirit of equity which ought to be its constant attendant, there still remain some other courts of a jurisdiction equally public and general: which take cognizance of other species of injuries, of an ecclesiastical, military, and maritime nature; and therefore are properly distinguished by the title of ecclesiastical courts, courts military, and courts maritime.

I. BEFORE I descend to consider particular ecclesiastical courts, I must first of all in general premise, that in the time of our Saxon ancestors there was no sort of distinction between the lay and the ecclesiastical jurisdiction: the county court was as much a spiritual as a temporal tribunal: the rights of the church were ascertained and asserted at the same time and by the same judges as the rights of the laity. For this purpose the bishop of the diocese, and the alderman, or in his absence the sheriff of the county, used to fit together in the county court, and had there the cognizance of all causes as well ecclesiastical as civil: a superior deference being paid to the bishop's opinion in spiritual matters, and to that of the law judges in temporal a. This union of power was very advantageous to them both: the pre-

/a Celeberrimo huic conventui episcopus et aldermannus interfundo; quorum alter jura divina, alter bamana populumedoceto. LL. Eadgar. c. 5.
sence of the bishop added weight and reverence to the sheriff's proceedings; and the authority of the sheriff was equally useful to the bishop, by enforcing obedience to his decrees in such refractory offenders, as would otherwise have despised the thunder of mere ecclesiastical censures.

BUT so moderate and rational a plan was wholly inconsistent with those views of ambition, that were then forming by the court of Rome. It soon became an established maxim in the papal system of policy, that all ecclesiastical persons and all ecclesiastical causes should be solely and entirely subject to ecclesiastical jurisdiction only: which jurisdiction was supposed to be lodged in the first place and immediately in the pope, by divine indefeasible right and investiture from Christ himself; and derived from the pope to all inferior tribunals. Hence the canon law lays it down as a rule, that facerdotes a rigibus honorandifunt, non judicandi b; and places an emphatical reliance on a fabulous tale which it tells of the emperor Constantine; that when some petitions were brought to him, imploring the aid of his authority against certain of his bishops, accused of oppression and injustice, he caused (says the holy canon) the petitions to be burnt in their presence, dismissing them with this valediction; ite, et inter vos caufas vestras difcutite, quia dignum non eft ut non judicemus Deos c.

IT was not however till after the Norman conquest, that this doctrine was received in England; when William I, (whose title was warmly espoused by the monasteries which he liberally endowed, and by the foreign clergy, whom he brought over in shoals from France and Italy and planted in the best preferments of the English church,) was at length prevailed upon to establish this fatal encroachment, and separate the ecclesiastical court from the civil: whether actuated by principles of bigotry, or by those of a more refined policy, in order to discountenance the laws of king Edward abounding with the spirit of Saxon liberty, is not

b Decret. cauf. 11. qu. 1. c. 41.
c Ibid.

altogether certain. But the latter, if not the cause, was undoubted the consequence, of this separation: for the Saxon laws were soon overborne by the Norman justiciaries, when the county court fell into disregard by
the bishop's withdrawing his presence, in obedience to the charter of the conqueror d; which prohibited any spiritual cause from being tried in the secular courts, and commanded the suitors to appear before the bishop only, whose decisions were directed to conform to the canon law e.

KING Henry the first, at his accession, among other restorations of the laws of king Edward the confessor, revived this of the union of the civil and ecclesiastical courts f. Which was, according to sir Edward Coke g, after the great heat of the conquest was past, only a restitution of the ancient law of England. This however was ill relished by the popish clergy, who, under the guidance of that arrogant prelate archbishop Anselm, very early disapproved of a measure that put them on a level with the profane laity, and subjected spiritual men and causes to the inspection of the secular magistrates; and therefore in their synod at Westminster, 3 Hen. I. they ordained that no bishop should attend the discussion of temporal causes h; which soon dissolved this newly effected union. And when, upon the death of king Henry the

e Nullus episcopus vel archidiaconus de legibus episcopobibus amplius in hundret placita teneant, nee caufam quae ad reglmen animarum pertinet ad judicium secularium hominum adducant: fed quicunque fecundum episcopales leges de quacunque caufa vel culpa interpellatus suerit, ad locum quem ad hoc episcopus elegerit et nominaverit, veniat; ilique de caufa fua refpondeat; et non fecundum bundret, sed secundam canones et episcopales leges, rectum Deo et episcopo suo faciat.
f Velo et praecipiio, ut omnes de comitatu cant ad comitatus et hundreda, sicut fecerint tempur regis Edwardi. (Cort. Hen. l. in Spelm. cod. vet. Legum: 305.) And what is here obscurely hinted at, is fully explained by his code of laws extant in the red book of the exchequer, though in general but of doubtful authority. cap. 8. Generalia comitatuum pla. cita certis locis et vicibus teneantur. Interfint autem episopi, comites, &c; et agantur primo debita verae christianitatis jura, fecundo regis placita, poftremo caufae fingulorum dignis satisfactionibus expleantur.
g 2 Inst. 70.
h Ne episcopi saecularium placitorum officium suffsipient. Spelm. Cod. 301.
First, the usurper Stephen was brought in an supported by the clergy, we find one article of the oath which they imposed upon him was, that ecclesiastical persons and ecclesiastical causes should be subject only to the bishop's jurisdiction. And as it was about this time that the contest and emulation began between the laws of England and those of Rome, the temporal courts adhering to the former, and the spiritual adopting the latter as their rule of proceeding, this widened the breach between them, and made a coalition afterwards impracticable; which probably would else have been effected at the general reformation of the church.

IN briefly recounting the various species of ecclesiastical courts, or, as they are often styled, courts christian, (curiae christianitatis) I shall begin with the lowest, and so ascend gradually to the supreme court of appeal.

1. THE archdeacon's court is the most inferior court in the whole ecclesiastical polity. It is held in the archdeacon's absence before a judge appointed by himself, and called his official; and its jurisdiction is sometimes in concurrence with, sometimes in exclusion of, the bishop's court of the diocese. From hence however by statute 24 Hen. VIII. c. 12. there lies an appeal to that of the bishop.

2. THE consistory court of every diocesan bishop is held in their several cathedrals for the trial of all ecclesiastical causes arising within their respective dioceses. The bishop's chancellor, or his commissary, is the judge, and from his sentence there lies an appeal, by virtue of the same statute, to the archbishop of each province respectively.

3. THE court of arches is a court of appeal, belonging to the archbishop of each province; whereof the judge is called the dean of the arches; because he anciently held his court in the church of St. Mary le bow (sancta Maria de arcubus) though all the principal spiritual courts are now holden at doctors' commons. His proper jurisdiction is only over the thirteen peculiar parishes belonging to the archbishop in London; but the office of dean of the arches having been for
a long time united with that of the archbishop's principal official, he now, in right of the last mentioned office, receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province. And from him there lies an appeal to the king in chancery (that is, to a court of delegates appointed under the king's great seal) by statute 25 Hen. VIII. c. 19. as supreme head of the English church, in the place of the bishop of Rome, who formerly exercised this jurisdiction; which circumstance alone will furnish the reason why the popish clergy were so anxious to separate the spiritual court from the temporal.

4. THE court of peculiars is a branch of and annexed to the court of arches. It has a jurisdiction over all those 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 an appeal lay formerly to the pope, but now by the statute 25 Hen. VIII. c. 19. to the king in chancery.

5. THE prerogative court is established for the trial of all testamentary causes, where the deceased hath left bona notabilia within two different dioceses. In which case the probate of wills belongs, as we have formerly seen m, to the archbishop of the province, by way of special prerogative. And all causes relating to the wills, administrations, or legacies of such persons are, originally, cognizable herein, before a judge appointed by the arch-bishop, called the judge of the prerogative court; from whom an appeal lies by statute 25 Hen. VIII. c. 19. to the king in chancery, instead of the pope as formerly.

I PASS by such ecclesiastical courts, as have only what is called a voluntary and not a contentious jurisdiction; which are merely concerned in doing or selling what no one opposes, and which keep an open office for that purpose, (as granting dispensations, licences, faculties, and other remnants of the papal extortions) but do not concern themselves with administering redress to any injury: and shall proceed to
6. THE great court of appeal in all ecclesiastical causes, viz. the court of delegates, judices delegati, appointed by the king's commission under his great seal, and issuing out of chancery, to represent his royal person, and hear all appeals to him made by virtue of the before-mentioned statute of Henry VIII. This commission is usually filled with lords spiritual and temporal, judges of the courts at Westminster, and doctors for the civil law. Appeals to Rome were always looked upon by the English nation, even in the times of popery, with an evil eye; as being contrary to the liberty of the subject, the honour of the crown, and the independence of the whole realm: and were first introduced in very turbulent times in the sixteenth year of king Stephen (A. D. 1151.) at the same period (sir Henry Spelman observes) that the civil and canon laws were first imported into England n. But, in a few years after, to obviate this growing practice, the constitutions made at Clarendon, 11 Hen. II. on account of the disturbances raised by arch-bishop Becket and other zealots of the holy see, expressly declare o, that appeals in causes ecclesiastical ought to lie, from the arch-deacon to the diocesan; from the diocesan too the archbishop of the province; and from the arch-bishop to the king; and are not to proceed any farther without special licence from the crown. But the unhappy advantage that was given in the reigns of king John, and his son Henry the third, to the encroaching power of the pope, who

n Cod. vet. leg. 315.
o chap. 8.

was ever vigilant to improve all opportunities of extending his jurisdiction hither, at length rivetted the custom of appealing to Rome in causes ecclesiastical so strongly, that it never could be thoroughly broken off, till the grand rupture happened in the reign of Henry the eighth; when all the jurisdiction usurped by the pope in matters ecclesiastical was restored to the crown, to which it originally belonged: so that the statute 25 Hen. VIII. was but declaratory of the ancient law of the realm p. But in case the king himself be party in any of these suits, the appeal does not then lie to him in chancery, which would be absurd; but by the statute 24 Hen. VIII. c. 12. to all the bishops of the realm, assembled in the upper house of convocation.

7. A COMMISSION of review is a commission sometimes granted, in extraordinary cases, to revise the sentence of the court of delegates; when it is apprehended they have been led into a material error. This commission the king may grant, although the statutes 24 & 25 Hen. VIII.
before cited declare the sentence of the delegates definitive; because the pope as supreme head by the canon law used to grant such commission of review; and such authority, as the pope heretofore exerted, is now annexed to the crown q by statutes 26 Hen. VIII. c. 1. and 1 Eliz. c. 1. But it is not matter of right, which the subject may demand ex debito justitiae; but merely a matter a matter of favour, and which therefore is often denied.

THESE are now the principal courts of ecclesiastical jurisdiction; none of which are allowed to be courts of record: no more than was another much more formidable jurisdiction, but now deservedly annihilated viz. the court of the king's high commission in causes ecclesiastical. This court was erected and united to the regal power r by virtue of the statute 1 Eliz. c. 1. instead of a larger jurisdiction which had before been exercised under the popes authority. It was intended to vindicate the dignity and peace of the church, by reforming, ordering, and correcting the ecclesiastical state and persons, and all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities. Under the shelter of which very general words, means were found in that and the two succeeding reigns, to vest in the high commissioners extraordinary and almost despotic powers, of fining and imprisoning; which they exerted much beyond the degree of the offence itself, and frequently over offences by no means of spiritual cognizance. For these reasons this court was justly abolished by statute 16 Car. I. c. 11. And the weak and illegal attempt that was made to revive it, during the reign of king James the second, served only to hasten that infatuated prince's ruin.

II. NEXT, as to the courts military. The only court of this kind known to, and established by, the permanent laws of the land, is the court of chivalry, 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 marshal onlys. This court by statute 13 Ric. II. c. 2. 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

p 4 Inst. 341.
q Ibid.
r 4 Inst. 324.
immediately to the king in person. This court was in great reputation in the times of pure chivalry, and afterwards during our connexions with the continent, by the territories which our princes held in France; but is now grown almost entirely out of use, on account of the feebleness of its jurisdiction, and want of power to enforce its judgments; as it can neither fine nor imprison, not being a court of record.

III. THE maritime courts, or such as have power and jurisdiction to determine all maritime injuries, arising upon the seas,

s 1 Lev. 230. Show Parl. Caf. 60.
t 4 Inst. 125.
u 7 Mod. 127.

or in parts out of the reach of the common law, are only the court of admiralty, and its courts of appeal. The court of admiralty is held before the lord high admiral of England, or his deputy, who is called the judge of the court. According to sir Henry Spelman w, and Lambard x, it was first of all erected by king Edward the third. Its proceedings are according to the method of the civil law, like those of the ecclesiastical courts; upon which account it is usually held at the same place with the superior ecclesiastical courts, any more than the spiritual courts. From the sentences of the admiralty judge an appeal always lay, in ordinary course, to the king in chancery, as may be collected from statute 25 Hen. VIII. c. 19. which directs the appeal from the arch-bishop's courts to be determined by persons named in the king's commission, like as in case of appeal from the admiral-court. But this is also expressly declared by statute 8 Eliz. c. 5. which enacts, that upon appeal made to the chancery, the sentence definitive of the delegates appointed by commission shall be final.

APPEALS from the vice-admiralty courts in America, and our other plantations and settlements, 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. And this by virtue of divers treaties with foreign nations; by which particular courts are established in
all the maritime countries of Europe for the decision of this question, 
whether lawful prize or not: for this being a question between subjects of 
different states, it belongs entirely to the law of nations, and not to the 
municipal laws of either country, to determine it. The original court, to 
which this question is

w Gloff 13.
x Arciden. 41.

permitted in England, is the court of admiralty; and the court of appeal is 
in effect the king's privy council, the members of which are, in 
consequence of treaties, commissioned under the great seal of this 
purpose. In 1748, for the more speedy determination of appeals, the judges 
of the courts of Westminster-hall, though not privy counsellors, were 
added to the commission then in being. But doubts being conceived 
concerning the validity of that commission, on account of such addition, 
the same was confirmed by statute 22 Geo. II. c. 3. with a proviso, that no 
sentence given under it should be valid, unless a majority of the 
commissioners present were actually privy counsellors. But this did not, I 
apprehend, extend to any future commissions: and such an addition 
became indeed wholly unnecessary in the course of the war which 
commenced in 1756; since, during the whole of that war, the commission 
of appeals was regularly attended and all its decisions conducted by a 
judge, whose masterly acquaintance with the law of nations was known 
and revered by every state in Europe y.

y See the sentiments of the president Montesquieu, and M. Vattel (a 
subject of the king of Prussia) on the answer transmitted by the English 
court to his Prussian majesty's Exposition desmotifs &c. A. D. 1753. 
(Montesquieu's letters. 5 Mar. 1753. Vattel's droit de gent. L. 2. c. 7. 84.)

CHAPTER THE SIXTH.
OF COURTS OF A SPECIAL JURISDICTION.

IN the two preceding chapters we have considered the several courts, 
whose jurisdiction is public and general; and which are so contrived that 
some or other of them may administer redress to every possible injury 
than can arise in the kingdom at large. There yet remain certain others,
whose jurisdiction is private and special, confined to particular spots, or instituted only to redress particular injuries. These are

I. THE forest courts, instituted for the government of the king's forests in different parts of the kingdom, and for the punishment of all injuries done to the king's deer or venison, to the vert or greensward, and to the cover in which such deer are lodged. These are the courts of attachments, of regard, of sweinmote, and of justice-feat. 1. The court of attachments, wood-mote, or forty days court, is to be held before the verderors of the forest once in every forty days a; and is instituted to enquire into all offenders against vert and venison b: who may be attached by their bodies, if taken with the mainour (or mainoeuvre, a manu) that is, in the very act of killing venison or stealing wood, or preparing so to do, or by fresh and immediate pursuit after the act is done c; else they must be attached by their goods. And in this forty days court the foresters or keepers are to bring in

a Cart. de forest. 9 Hen. III. c. 8.
b 4 Inst. 289.
c Carth. 79.
	heir attachments, or presentments de viridi et venatione; and the verderors are to receive the same, and to enroll them, and to certify them under their seals to the court of justice-seat, or sweinmote d: for this court can only enquire of, but not convict offenders. 2. The court of regard, or survey of dogs, is to be holden every third year for the lawing or expeditation of mastiffs, which is done by cutting off the claws of the forefeet, to prevent them from running after deer e. No other dogs but mastiffs are to be thus lawed or expeditated, for none other were permitted to be kept within the precincts of the forest; it being supposed that the keeping of these, and these only, was necessary for the defence of a man's house f. 3. The court of swinmote is to be holden before the verderors, as judges, by the steward of the sweinmote thrice in every year g, the sweins or freeholders within the forest composing the jury. The principal jurisdiction of this court is, first, to enquire into the oppressions and grievances committed by the officers of the forest; de super- operatione forestariorum, et aliorum miniutrorum forestae; et de eorum oppressionibus populo regis illatis: and, secondly, to receive and try presentments certified from the court of attachments against offences in vert and venison h. And this court may not only enquire, but convict also, which conviction shall be certified to the court of justice-feat, which is held
before the chief justice in eyre, or chief itinerant judge, capitalis
justitiarius in itinere, or his deputy; to hear and determine all trespasses
within the forest, and all claims of franchises, liberties, and privileges, and
all pleas and causes whatsoever therein arising k. It may also proceed to
try presentments in the inferior courts of the forests, and to give judgment
upon convictions of the sweinmote. And the chief justice may therefore
after presentment made or indictment found,

d Cart. de forest. c. 16.
e Ibid. c. 6.
f 3 Inst. 308.
g Cart de forest. c. 8.
h Stat. 34 Edw. I. c. 1.
i 4 Inst. 289.
k 4 Inst. 291.

but not before l, issue his warrant to the officers of the forest to apprehend
the offenders. It may be held every third year; and forty days notice ought
to be given of its fitting. This court may fine and imprison for offences
within the forest m, it being a court of record: and therefore a writ of error
lies from hence to the court of king's bench, to rectify and redress any mal-
administrations of justice n; or the chief justice in eyre may adjourn any
matter of law into the court of king's bench o. These justices in eyre were
instituted by king Henry II, A. D. 1184 p; and their courts were formerly
very regularly held: but the last court of justice feat of any note was that
holden in the reign of Charles I, before the earl of Holland; the rigorous
proceedings at which are reported by sir William Jones. After the
restoration another was held, pro forma only, before the earl of Oxford q;
but since the era of the revolution in 1688, the forest laws have fallen into
total disuse, to the great advantage of the subject.

II. A SECOND species of private courts, is that of commissioners of
sewers. This is a temporary tribunal, erected by virtue of a commission
under the great seal; which formerly used to be granted pro re nata at the
pleasure of the crown r, but now at the discretion and nomination of the
lord chancellor, lord treasurer, and chief justices, pursuant to the statute
23 Hen. VIII. c. 5. Their jurisdiction is to overlook the repairs of sea banks
and sea walls; and the cleansing of rivers, public streams, ditches and
other conduits, whereby any waters are carried off: and is confined to such
county, or particular district as the commission shall expressly name. The
commissioners are a court of record, and may fine and imprison for contempts; and in the execution of their duty may proceed by jury, or upon their own view, and may take order for the removal of any annoyances, or the safe-

l Stat. 1 Edw. III. c. 8. 7 Ric. II. c. 4.
m 4 Inst. 313.
n Ibid. 297.
o Ibid. 295.
p Hoveder.
q North's life of lord Guilford. 45.
r F. N. B. 115.
s 1 Sid. 145.

guard and conservation of the sewers within their commission, either according to the laws and customs of Romney-marsh, or otherwise at their own discretion. They may also assess such rates, or scots, upon the owners of lands within their district, as they shall judge necessary: and, if any person refuses to pay them, the commissioners may levy the same by distress of his goods and chattels; or they may, by statute 23 Hen. VIII. c. 5. fell his freehold lands (and by the 7 Ann. c. 10. his copyhold also) in order to pay such scots or assessments. But their conduct is under the control of the court of king's bench, which will prevent or punish any illegal or tyrannical proceedings. And yet in the reign of king James I, (8 Nov. 1616.) the privy council took upon them to order, that no action or complaint should be prosecuted against the commissioners, unless before that board; and committed several to prison who had brought such actions at common law, till they should release the same: and one of the reasons for discharging sir Edward Coke from his office of lord chief justice was for countenancing those proceedings. The pretence for which arbitrary measures was no other then the tyrant's plea, of the necessity of unlimited powers in works of evident utility to the public, the supreme reason above all reasons, which is the salvation of the king's lands and people. But now it is clearly held, that this (as well as all other inferior jurisdictions) is subject to the discretionary coercion of his majesty's court of king's bench.

III. The court of policies of assurance, when subsisting, is erected in pursuance of the statute 43 Eliz. c. 12. which recites the immemorial usage
of policies of assurance, by means whereof it cometh to pass, upon the loss or perishing of any ship, there

t Tomney-marsh in the county of Kent, a tract containing 24000 acres, is governed by certain ancient and equitable laws of sewers, composed by Henry de Bathe, a venerable judge in the reign of king Henry the third; from which laws all commissioners of sewers in England may receive light and direction. (4 Inst. 276.)
v Moor. 825, 826. See pag. 54.
w Milt. parad. Lost. iv. 393.
x 1 Ventr. 66. Salk. 146.

followeth not the undoing of any man, but the loss lighteth rather easily upon many than heavily upon few, and ratherupon them that adventure not, than upon those that do adventure; whereby all merchants, especially those of the younger sort, are allured to venture more willingly and more freely: and that heretofore such assurers had used to stand so justly and precisely upon their credits, as few or no controversies had arisen thereupon; and if any had grown, the same had from time to time been ended and ordered by certain grave and discreet merchants appointed by the lord mayor of the city of London; as men by reason of their experience sittest to understand and speedily decide those causes: but that of late years divers persons had withdrawn themselves from that course of arbitration, and had driven the assured to bring separate actions at law against each assurer: it therefore enables the lord chancellor yearly to grant a standing commission to the judge of the admiralty, the recorder of London, two doctors of the civil law, two common lawyers, and eight merchants; any three of which, one being a civilian or a barrister, are thereby and by the statute 13 & 14 Car. II. c. 23. empowered to determine in a summary way all causes concerning policies of assurance in London, with an appeal (by way of bill) to the court of chancery. But the jurisdiction being somewhat defective, as extending only to London, and to no other assurances but those on merchandize, and to suits brought by the assured only and not by the insurers, no such commission has of late years issued: but insurance causes are now usually determined by the verdict of a jury of merchants, and the opinion of the judges in case of any legal doubts; whereby the decision is more speedy, satisfactory, and final: though it is to be wished, that some of the parliamentary powers invested in these commissioners, especially for the examination of witnesses, either
beyond the seas or speedily going out of the kingdom a, could at present be
adopted by the courts of Westminster-hall, without requiring the consent
of parties.

y Styl. 166.
z 1 Show. 396.
a Stat. 13 & 14 Car. II. c. 22. 3 & 4.

IV. THE court of the marshalsea, and the palace court at Westminster,
though two distinct courts, are frequently confounded together. The
former was originally holden before the steward and marshal of the king's
house, and was instituted to administer justice between the king's
domestic servants, that they might not be drawn into other courts, and
thereby the king lose their service b. It was formerly held in, though not a
part of, the aula regis c; and, when that was subdivided, remained a
distinct jurisdiction: holding plea of all trespasses committed within the
verge of the court, where only one of the parties is in the king's domestic
service (in which case the inquest shall be taken by a jury of the country)
and of all debts, contracts and covenants, where both of the contracting
parties belong to the royal household; and then the inquest shall be
composed of men of the household only d. By the statute of 13 Ric. II. ft. 1.
c. 3. (in affirmance of the common law e) the verge of the court in this
respect extends for twelve miles round the king's place of residence f. And,
as this tribunal was never subject to the jurisdiction of the chief justiciary,
no writ of error lay from it (though a court of record) to the king's bench,
but only to parliament g, till the statute of 5 Edw. III. c. 2. and 10 Edw. III.
ft. 2. c. 3. which allowed such writ of error before the king in his place. But
this court being ambulatory, and obliged to follow the king in all his
progresses, so that by the removal of the household, actions were
frequently discontinued h, and doubts having arisen as to the extent of its
jurisdiction I, king Charles I in the fifth year of his reign by his letters
patent erected a new court of record, called the curia palatu or palace
court, to be held before the steward of the household

b 1 Bulftr. 211.
c Flet. l. 2. c. 2.
/d Artic. fup. Cart. 28 Edw. I. c. 3. Stat. 5 Edw. I. c. 2. 10 Edw. III. ft. 2. c. 2.
/e 2 Inst. 548.
By the ancient Saxon constitution, the pax regia, or privilege or the king’s palace, extended from his palace gate to the distance of three miles, three furlongs, three acres, nine feet, nine palms, and nine barley corns; as appears from a fragment of the textur Roffenfis cited in Dr. Hickes’s by fertat. Epistol. 114.

1 Bulftr. 211. 10 Rep. 79.
F. N. B. 241. 2 Inst. 548.
1 Bulftr. 209.

and knight marshal, and the steward of the court, or his deputy; with jurisdiction to hold plea of all manner of personal actions whatsoever, which shall arise between any parties within twelve miles of his majesty’s palace at Whitehall k. The court is now held once a week, together with the ancient court of marshalsea, in the borough of Southwark: and writ of error lies from thence to the court of king’s bench. But, if the cause is of any considerable consequence, it is usually removed on its first commencement, together with the custody of the defendant, either into the king’s bench or common pleas by a writ of habeas corpus cum causa: and the inferior business of the court hath of late years been much reduced, by the new courts of conscience erected in the environs of London; in consideration of which the four counsel belonging to these courts had salaries granted them for their lives by the statute 23 Geo. II. c. 27.

V. A FIFTH species of private courts of a limited, though extensive, jurisdiction are those of the principality of Wales; which upon its thorough reduction, and the settling of its polity in the reign of Henry the eighth l, were erected all over the country; principally by the statute 34 & 35 Hen. VIII. c. 26. though much had before been done, and the way prepared by the statute of Wales, 12 Edw. I. and other statutes. By the statute of Henry the eighth before-mentioned, courts-baron, hundred, and county courts are there established as in England. A sessions 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 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 judgments 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 courts at Westminster do not run into the principality of Wales m; though process of execution does n: as do also all
prerogative writs, as writs of certiorari, mandamus, and the like. And
even in causes between subject and subject, to prevent injustice through
family factions and prejudices, it is held lawful (in causes of freehold at
least, if not in all others) to bring an action in the English courts, and try
the same in the next English county adjoining to that part of Wales where
the cause arises.

VI. THE court of the duchy chamber of Lancaster is another special
jurisdiction, held before the chancellor of the duchy or his deputy,
concerning all matters of equity relating to lands holden of the king in
right of the duchy of Lancaster; which is a thing very distinct from the
county palatine, and comprizes much territory which lies at a vast distance
from it; as particularly a very large district within the city of Westminster.
The proceedings in this court are the same as on the equity side in the
courts of exchequer and chancery; so that it seems not to be a court of
record: and indeed it has been holden that those courts have a concurrent
jurisdiction with the duchy court, and may take cognizance of the same
causes.

VII. ANOTHER species of private courts, which are of a limited local
jurisdiction, and have at the same time an exclusive cognizance of pleas, in
matters both of law and equity, are those which appertain to the counties
palatine of Chester, Lancaster, and Durham, and the royal franchise of Ely.
In all these, as in the principality of Wales, the king's ordinary writs,
issuing under the great seal out of chancery, do not run; that is, they are of
no force. For, as originally all jura regalia were granted to the lords of
these counties palatine, they had of course the sole administration of
justice, by their own judges appointed by themselves and not by the crown.
It would therefore be incongruous for the king to send his writ to direct the
judge of another's court.

o Cro. Jac. 484.
p Vaugh. 413. Hardr. 66.
q Hob. 77. 2 Lev. 24.
in what manner to administer justice between the suitors. But, when the privileges of these counties palatine and franchises were abridged by statute 27 Hen. VIII. c. 24. it was also enacted, that all writs and process should be made in the king's name, but should be teste'd or witnessed in the name of the owner of the franchise. Wherefore all writs, whereon actions are founded, and which have current authority here, must be under the seal of the respective franchises; the two former of which are now annexed to the crown, and the two latter under the government of their several bishops. And the judges of assise, who sit therein, sit by virtue of a special commission from the owners of the several franchises, and under the seal thereof; and not by the usual commission under the great seal of England. Hither also may be referred the courts of the cinque ports, or five most important havens, as they formerly were esteemed, in the kingdom; viz. Dover, Sandwich, Romney, Hastings, and Hythe; to which Winchelsey and Rye have been since added: which have also similar franchises in many respects w with the counties palatine, and particularly an exclusive jurisdiction (before the mayor and jurats of the ports) in which exclusive jurisdiction the king's ordinary writ does not run. A writ of error lies from the mayor and jurats of each port to the lord warden of the cinque ports, in his court of Shepway; and from the court of Shepway to the king's bench x. And so too a writ of error lies from all the other jurisdictions to the same supreme court of jurisdiction y, s an ensign of superiority reserved to the crown at the original creation of the franchises. And all prerogative writs (as those of habeas corpus, prohibition, certiorari, and mandamus) may issue for the same reason to all these exempt jurisdictions z; because the privilege, that the king's writ runs not must be intended between party and party, for there can be no such privilege against the king a.

w 1 Sid. 166.
x Jenk. 71. Dyverfyte des courts. t. bank le rey. 1 Sid. 356.
z 1 Sid. 92.
a Cro. Jac. 543.
III. THE stannary courts in Devonshire and Cornwall for the
administration of justice among the tinners therein, are also courts of
record, but of the same private and exclusive nature. They are held before
the lord warden and his substitutes, in virtue of a privilege granted to the
workers in the tinmines there, to sue and be sued only in their own courts,
that they may not be drawn from their business which is highly profitable
to the public, by attending their lawsuits in other courts b. The privileges
of the tinners are confirmed by a charter, 33 Edw. I. and fully expounded
by a private statute, 50 Edw. III. which c has since been explained by a
public act, 16 Car. I. c. 15. What relates to our present purpose is only this:
that all tinners and labourers in and about the stannaries shall, during the
time of their working therein bona fide, be privileged from suits in other
courts, and be only impleaded in the stannary courts in all matters,
excepting pleas of land, life, and member. No writ of error lies from hence
to any court in Westminster-hall; as was agreed by all the judges d in 4
Jac. I. But an appeal lies from the steward of the court to the under-
warden; and from him to the lord-warden; and thence to the privy council
of the prince of Wales, as duke of Cornwall e, when he hath had livery or
investiture of the same f. And from thence the appeal lies to the king
himself, in the last resort g.

IX. THE several courts within the city of London h, and other cities,
boroughs, and corporations throughout the kingdom, held by prescription,
charter, or act of parliament, are also of the same private and limited
species. It would exceed the design

b 4 Inst. 232.
c See this at length in 4 Inst. 232.
d 4 Inst. 231.
e Ibid. 230.
f 3 Bulftr. 183.
g Doderidge Hist. of Cornw. 94.
h The chief of those in London are the Beriffs courts, holden before their
steward or judge; from which a writ of error lies to the court of hustings,
before the mayor, recorder, and sheriffs; and from thence to justices
appointed by the king's commission, who used to sit in the church of St.
Martin le grand. (F. N. B. 32.) And from the judgment of those justices a
writ of error lic. Immediately to the house of lords.
and compass of our present enquiries, if I were to enter into a particular
detail of these, and to examine the nature and extent of their several
jurisdictions. It may in general be sufficient to say; that they arose
originally from the favour of the crown to those particular districts,
wherein we find them erected, upon the same principle that hundred-
courts, and the like, were established; for the conveyance of the
inhabitants, that they might prosecute their suits, and receive justice at
home: that, for the most part, the courts at Westminster-hall have a
concurrent jurisdiction with these, or else a super-intendency over them I:
and that the proceedings, in these special courts ought to be according to
the course of the common law, unless otherwise ordered by parliament;
for though the king may erect new courts, yet he cannot alter the
established course of law.

BUT there is one species of courts, constituted by act of parliament, in the
city of London and other trading and populous districts, which in its
proceedings so varies from the course of the common law, that it may
deserve a more particular consideration. I mean the courts of requests, or
court of conscience, for the recovery of small debts. The first of these was
established in London, so early as the reign of Henry the eighth, by an act
of their common council; which however was certainly insufficient for that
purpose and illegal, till confirmed by statute 3 Jac. I. c. 15. which has since
been explained and amended by statute 14 Geo. II. c. 10. The constitution
is this: 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. The time and expense of obtaining this summary redress are
very inconsiderable, which make it a great benefit to trade; and thereupon
divers trading towns and other districts have, within these few years last
past, obtained acts of parliament, for establishing in them courts of
conscience upon nearly

I Salk. 144. 263.

the same plan. The first of which was that for Southwark by statute 22
Geo. II. c. 47. which has since been followed by very many others k.

THE anxious desire, that has been shewn to obtain these several acts,
proves clearly that the nation in general is truly sensible of the great
inconvenience, arising from the disuse of the ancient county and hundred-
courts; wherein causes of this small value were always formerly decided, with very little trouble and expense to the parties. But it is to be feared, that the general remedy which of late hath been principally applied to this inconvenience, (the erecting these new jurisdictions) may itself be attended in time with very ill consequences: as the method of proceeding therein is entirely in derogation of the common law; as their large discretionary powers create a petty tyranny in a set of standing commissioners; and as the disuse of the trial by jury may tend to estrange the minds of the people from that valuable prerogative of Englishmen, which has already been more than sufficiently excluded in many instances. How much rather is it to be wished, that the proceedings in the county and hundred-courts could again be revived, without burdening the freeholders with too frequent and tedious attendances, but at the same time removing the delays that have insensibly crept into their proceedings, and the power that either party have of transferring at pleasure their suits to the courts at Westminster! And we may with satisfaction observe, that this experiment has been actually tried, and has succeeded in the populous county of Middlesex; which might serve as an example for others. For by statute 23 Geo. II. c. 33. it is enacted, 1. That a special county court shall be held, at least once a month in every hundred of the county of Middlesex, by the county clerk. 2. That twelve freeholders of that hundred, qualified to serve on juries, and struck by the sheriff, shall be summoned to appear at such court by rotation; so as none shall be summoned oftener than once a year. 3. That in all causes, not exceeding the value of forty shillings, the county clerk and twelve suitors shall proceed in a summary way, examining the parties and witnesses on oath, without the formal process anciently used; and shall make such order therein as they shall judge agreeable to conscience. 4. That no plaints shall be removed out of this court, by any process whatsoever; but the determination herein shall be final. 5. That if any action be brought in any of the superior courts against a person resident in Middlesex, for a debt or
contract, upon the trial whereof the jury shall find less than 40 s. damages, the plaintiff shall recover no costs, but shall pay the defendant double costs; unless upon some special circumstances, to be certified by the judge who tried it. 6. Lastly, a table of very moderate fees is prescribed and set down in the act. Which are not to be exceeded upon any account whatsoever. This is a plan entirely agreeable to the constitution and genius of the nation: calculated to prevent a multitude of vexatious actions in the superior courts, and at the same time to give honest creditors an opportunity of recovering small sums; which now they are frequently deterred from by the expense of a suit at law: a plan which, in short, wants only to be generally known, in order to its universal reception.

X. THERE is yet another species of private courts, which I must not pass over in silence: viz. the chancellor's courts in the two universities of England. Which two learned bodies enjoy the sole jurisdiction, in exclusion of the king's courts, over all civil actions and suits whatsoever, where a scholar or privileged person is one of the parties; excepting in such cases where the right of freehold is concerned. And these 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, for reasons sufficiently explained in a former volume I.

THESE privileges were granted, that the students might not be distracted from their studies by legal process from distant courts, and other forensic avocations. And privileges of this kind are of very high antiquity, being generally enjoyed by all foreign universities as well as our own, in consequence (I apprehend) of a constitution of the emperor Frederick, A. D. 1158 m. But as to England in particular, the oldest charter that I have seen, containing this grant to the university of Oxford was 28 Hen. III. A. D. 1244. And the same privileges were confirmed and enlarged by almost every succeeding prince, down to king Henry the eighth; in the fourteenth year of whose reign the largest and most extensive charter of all was granted. One similar to which was afterwards granted to Cambridge in the third year of queen Elizabeth. But yet, notwithstanding these charters, the privileges granted therein, of proceeding in a course different from the law of the land, were of so high a nature, that they were held to be invalid; for though the king might erect new courts, yet he could not alter the course of law by his letters patent. Therefore in the reign of queen Elizabeth an act
of parliament was obtained n, confirming all the charters of the two universities, and those of 14 Hen. VIII. and 3 Eliz. by name. Which bluffed act, as sir Edward Coke intitles it o, established this high privilege without any doubt or opposition p: or, as sir Matthew Hale q very fully expresses the sense of the common law and the operation of the act of parliament, although king Henry the eighth, 14 A. R. sui, granted to the university a liberal charter, to proceed according to the use of the university; viz. by a course much conformed to the civil law; yet that charter had not been sufficient to have warranted such proceedings without the help of an act of parliament. And therefore in 13 Eliz. an act passed, whereby that charter was in effect enacted; and it is thereby that at this day they have a kind of civil law procedure, even in matters that are of themselves of common law cognizance, where either of the parties is privileged.

THIS privilege, so far as it relates to civil causes, is exercised at Oxford in the chancellor’s court; the judge of which is the vice-chancellor, his deputy, or assessor. From his sentence 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 final, at least by the statute of the university r, according to the rule of the civil law s. But, if there be any discordance or variation in any of the three sentences, an appeal lies in the last resort to judges delegates appointed by the crown under the great seal in chancery.

I HAVE now gone through the several species of private, or special courts, of the greatest note in the kingdom, instituted for the local redress of private wrongs; and must, in the close of all, make one general observation from sir Edward Coke t: that these particular jurisdictions, derogating from the general jurisdiction of the courts of common law, are ever taken strictly, and cannot be extended farther that the express letter of their privileges will most explicity warrant.
CHAPTER THE SEVENTH.
OF THE COGNIZANCE OF PRIVATE WRONGS.

WE are now to proceed to the cognizance of private wrongs; that is, to consider in which of the vast variety of courts, mentioned in the three preceding chapters, every possible injury that can be offered to a man's person or property is certain of meeting with redress.

THE authority of the several courts of private and special jurisdiction, or of what wrongs such courts have cognizance, was necessarily remarked as those respective tribunals were enumerated; and therefore need not be here again repeated: which will confine our present enquiry to the cognizance of civil injuries in the several courts of public or general jurisdiction. And the order, in which I shall pursue this enquiry, will be by shewing; 1. What actions may be brought, or what injuries remedied, in the ecclesiastical courts. 2. What in the military. 3. What in the maritime. And 4. What in the courts of common law.

AND, with regard to the three first of these particulars, I must beg leave not so much to consider what hath at any time been claimed or pretended to belong to their jurisdiction, by the officers and judges of those respective courts; but what the common law allows and permits to be so. For these eccentrical tribunals (which are principally guided by the rules of the imperial and canon laws) as they subsist and are admitted in England, not by any right of their own a, but upon bare sufferance and toleration from the municipal laws, must have recourse to the laws of that country wherein they are thus adopted, to be informed how far their jurisdiction extends, or what causes are permitted, and what forbidden, to be discussed or drawn in question before them. It matters not therefore what the pandects of Justinian, or the decretals of Gregory have ordained. They are here of no more intrinsic authority than the laws of Solon and Lycurgus: curious perhaps for their antiquity, respectable for their equity, and frequently of admirable use in illustrating a point of history. Nor is it
at all material in what light other nations may consider this matter of
jurisdiction. Every nation must and will abide by its own municipal laws;
which various accidents conspire to render different in almost every
country in Europe. We permit some king of suits to be of ecclesiastical
cognizance, which other nations have referred entirely to the temporal
courts; as concerning wills and successions to intestates' chattels: and
perhaps we may, in our turn, prohibit them from interfering in some
controversies, which on the continent may be looked upon as merely
spiritual. In short, the common law of England is the one uniform rule to
determine the jurisdiction of courts: and, if any tribunals whatsoever
attempt to exceed the limits so prescribed them, the king's courts of
common law may and do prohibit them; and in some cases punish their
judges b.

HAVING premised this general caution, I proceed now to consider.

I. THE wrongs or injuries cognizable by the ecclesiastical courts. I mean
such as are offered to private persons or individuals; which are cognizable
by the ecclesiastical court, not for reformation of the offender himself or
party injuring (pro salute animae, as immoralities in general are, when
unconnected with

a See Vol. I. introd. 1.
b Hal. Hist. C. L. c. 2.

private injuries) but such as are there to be prosecuted for the sake of the
party injured, to make him a satisfaction and redress for the damage
which he has sustained. And these I shall reduce under three general
heads; of causes pecuniary, causes matrimonial, and causes testamentary.

1. PECUNIARY causes, cognizable in the ecclesiastical courts, are such as
arise either from the withholding ecclesiastical dues, or the doing or
neglecting some act relating to the church, whereby some damage accrues
to the plaintiff; towards obtaining a satisfaction for which he is permitted
to institute a suit in the spiritual court.

THE principal of these is the subtraction or withholding of tithes from the
parson or vicar, whether the former be a clergyman or a lay appropriator c.
But herein a distinction must be taken: for the ecclesiastical courts have no
jurisdiction to try the right of tithes unless between spiritual persons d;
but in ordinary cases, between spiritual men and lay men, are only to compel the payment of them, when the right is not disputed e. By the statute or rather writ f of circumspecte agatis g, it is declared that the court christian shall not be prohibited from holding plea, si rector petat verfus parochianos oblations et decimas debitas et consuetas: so that if any dispute arises whether such tithes be due and accustomed, this cannot be determined in the ecclesiastical court, but before the king's courts of the common law; as such question affects the temporal inheritance, and the determination must bind the real property. But where the right does not come into question, but only the fact, whether or no the tithes allowed to be due be really subtracted or withdrawn, this is a transient personal injury, for which the remedy may properly be had in the spiritual court; viz. the recovery of the tithes, or their equivalent. By testaments 2 & 3 Edw. VI. c. 13. it is enacted, that

c Stat. 32 Hen. VIII. c. 7.
e 2 Inst. 364. 489, 490.
f See Barrington's observ. 120.
g 13 Edw. I. ft. 4.

if any person shall carry off his praedial tithes (viz. of corn, hay, or the like) before the tenth part is duly set forth, or agreement is made with the proprietor, or shall willingly withdraw his tithes of the same, or shall stop or hinder the proprietor of the tithes or his deputy from viewing or carrying them away; such offender shall pay double the value of the tithes, with costs, to be recovered before the ecclesiastical judge, according to the king's ecclesiastical laws. by a former clause of the same statute, the treble value of the tithes, so subtracted or withheld, may be sued for in the temporal courts, which is equivalent to the double value to be sued for in the ecclesiastical. For one may sue for and recover in the ecclesiastical courts the tithes themselves, or a recompense for them, by the ancient law; to which the suit for the double value is superadded by the statute. But as no suit law in the temporal courts for the subtraction of tithes themselves, therefore the statute gave a treble forfeiture, if sued for there; in order to make the course of justice uniform, by giving the same reparation in one court as in the other h. However it now seldom happens that tithes are sued for at all in the spiritual court; for if the defendant pleads any custom, modus, composition, or other matter whereby the right of tithing is called in question, this takes it out of the jurisdiction of the ecclesiastical judges:
for the law will not suffer the existence of such a right to be decided by the
sentence of any single, much less an ecclesiastical, judge; without the
verdict of a jury. But a more summary method than either of recovering
small tithes under the value of 40 s. is given by statute 7 & 8 W. III. c. 6. by
complaint to two justices of the peace: and, by another statute of the same
year j, the same remedy is extended to all tithes withheld by quakers under
the value of ten pounds.

ANOTHER pecuniary injury, cognizable in the spiritual courts, is the non-
payment of other ecclesiastical dues to the clergy; as penafions,
mortuaries, compositions, offerings, and whatsoever falls under the
denomination of surplice-fees, for marriages or

h 2 Inst. 250. c. 34.

other ministerial offices of the church: all which injuries are redressed by a
decree for their actual payment. Besides which all offerings, oblations, and
obventions, not exceeding the value of 40 s. may be recovered in a
summary way, before two justices of the peace i. But care must be taken
that these are real and not imaginary dues; for, if they be contrary to the
common law, a prohibition will issue out of the temporal courts to stop all
suits concerning them. As where a fee was demanded by the minister of
the parish for the baptism of a child, which was administered in another
place k; this, however authorized by the canon, is contrary to common
right: for of common right no fee is due to the minister even for
performing such branches of his duty, and it can only be supported by a
special custom l; but no custom can support the demand of a fee without
performing them at all.

FOR fees also, settled and acknowledged to be due to the officers of the
ecclesiastical courts, a suit will lie therein: but not if the right of the fees is
at all disputable; for then it must be decided at the common law m. It is
also said, that if a curate be licenced, and his salary appointed by the
bishop, and he be not paid, the curate hath a remedy in the ecclesiastical
court n: but, if he be not licenced, or hath no such salary appointed, or
hath made a special agreement with the rector, he must sue for a
satisfaction at common law o; either by proving such special agreement, or
else by leaving it to a jury to give damages upon a quantum meruit, that is,
in consideration of what he reasonably deserved in proportion to the
service performed.
UNDER this head of pecuniary injuries may also be reduced the several
matters of spoliation, dilapidations, and neglect of repairing the church
and things thereunto belonging; for which a satisfaction may be sued for in
the ecclesiastical court.

I Stat. 7 & 8 W. III. c. 6.
k Salk. 332.
l Ibid. 334. Lord Raym. 450. 1558. Fitzg. 55.
m 1 Ventr. 165.
n 1 Burn. eccl. law. 438.
o 1 Freem. 70.

SPOLIATIONS in an injury done by one clerk or incumbent to another, in
taking the fruits of his benefice without any right thereunto, but under a
pretended title. It is remedied by a decree to account for the profits so
taken. This injury, when the jus patronatus or right of advowson doth not
come in debate, is cognizable in the spiritual court: as if a patron first
presents A to a benefice, who is instituted and inducted thereto; and then,
upon pretence of a vacancy, the same patron presents B to the same living,
and he also obtains institution and induction. Now if A disputes the fact
of the vacancy, then that clerk who is kept out of the profits of the living,
whichever it be, may sue the other in the spiritual court for spoliation, or
taking the profits of his benefice. And it shall there be tried, whether the
living were, or were not, vacant; upon which the validity of the second
clerk's pretensions must dependp. But if the right of patronage comes at
all into dispute, as if one patron presented A, and another patron
presented B, there the ecclesiastical court hath no cognizance, provided
the tithes sued for amount to a fourth part of the value of the living, but
may be prohibited at the instance of the patron by the king's writ of
indicavit q. So also if a clerk, without any colour of title, ejects another
from his parsonage, this injury must be redresed in the temporal courts:
for it depends upon no question determinable by the spiritual law, (as
plurality of benefices or no plurality, vacancy or no vacancy) but is merely
a civil injury.

For dilapidations, which are a kind of ecclesiastical waste, either
voluntary, by pulling down; or permissive, by suffering the chancel,
parsonage-house, and other buildings thereunto belonging, to decay; an
action also lies, either in the spiritual court by the canon law, or in the
courts of common law r: and it may be brought by the successor against the predecessor, if living, or, if dead, then against his executors. By statute 13 Eliz. c. 10.

p F. N. 36.
rCart. 224. 3 Lev. 268.

if any spiritual person makes over or alienates his goods with intent to defeat his successors of their remedy for dilapidations, the successor shall have such remedy against the alinee, in the ecclesiastical court, as if he were the executor of is predecessor. And by statute 14 Eliz. c. 11. all money recovered for dilapidations shall within two years be employed upon the buildings, in respect whereof it was recovered, on penalty of forfeiting double the value to the crown.

AS to the neglect of reparations of the church, church-yard, and the like, the spiritual court has undoubted cognizance thereof s; and a suit may be brought therein for non-payment of a rate made by the church-wardens for that purpose, and these are the principal pecuniary injuries, which are cognizable, or for which suits may be instituted, in the ecclesiastical courts.

2. MATRIMONIAL causes, or injuries respecting the rights of marriage, are another, and a much more undisturbed, branch of the ecclesiastical jurisdiction. Though, if we consider marriage in the light of mere civil contracts, they do not seem to be properly of spiritual cognizance t. But the Romanists having very early converted this contract into a holy sacramental ordinance, the church of course took it under her protection, upon the division of the two jurisdictions. And, in the hands of such able politicians, it soon became an engine of great importance to the papal scheme of an universal monarchy over Christendom. The numberless canonical impediments that were invented, and occasionally dispensed with, by the holy see, not only enriched the coffers of the church, but gave it a vast ascendant over princes of all denominations; whose marriage were sanctified or reprobated, their issue legitimated or bastardized, and the succession to their thrones established or rendered precarious, according to the humour or interest of the reigning pontiff: besides a thousand nice and difficult scruples, with which the clergy of those
ages puzzled the understandings and loaded the consciences of the inferior orders of the laity; and which could only be unraveled by these their spiritual guides. Yet, abstracted from this universal influence, which affords so good a reason for their conduct, one might otherwise be led to wonder, that the same authority, which enjoined the strictest celibacy to the priesthood, should think them the proper judges in causes between man and wife. These causes indeed, partly from the nature of the injuries complained of, and partly from the clerical method of treating them, soon became too gross for the modesty of a lay tribunal. And causes matrimonial are now so peculiarly ecclesiastical, that the temporal courts will never interfere in controversies of this kind, unless in some particular cases. As if the spiritual court do proceed to call a marriage in question after the death of either of the parties; this the courts of common law will prohibit, because it tends to bastardize and disinherit the issue; who cannot so well defend the marriage, as the parties themselves, when both of them living, might have done.

OF matrimonial causes, one of the first and principal is, 1. Causa jactitationis matrimonii; when one of the parties boasts or gives out that he or she is married to the other, whereby a common reputation of their matrimony may ensue. On this ground the party injured may libel the other in the spiritual court; and, unless the defendant undertakes and makes out a proof of the actual marriage, he or she is enjoined perpetual silence upon that head; which is the only remedy the ecclesiastical courts can give for this injury. 2. Another species of matrimonial causes was when a party contracted to another brought a suit in the ecclesiastical court to compel a celebration of the marriage in pursuance of such contract; but his branch of causes is now cut off entirely by the act for preventing clandestine marriages, 26 Geo II. c. 33. which enacts, that for the future no suit shall

Some of the impurest books, that are extant in any language, are those written by the popish clergy on the subjects matrimony and divorces.
be had in any ecclesiastical court, to compel a celebration of marriage in facie ecclesiae, for or because of any contract of matrimony whatsoever. 3. The suit for restitution of conjugal rights is also another species of matrimonial causes: which is brought whenever either the husband or wife is guilty of the injury of subtraction, or lives separate from the other without any sufficient reason; in which case the ecclesiastical jurisdiction will compel them to come together again, if either party be weak enough to desire it, contrary to the inclination of the other. 4. Divorces also, of which and their several distinctions we treated at large in a former volume w, are causes thoroughly matrimonial, and cognizable by the ecclesiastical judge. If it becomes improper, through some supervenient cause arising ex post facto, that the parties should live together any longer; as through intolerable cruelty, adultery, a perpetual disease, and the like; this unfitness or inability for the marriage state may be looked upon as an injury to the suffering party; and for this the ecclesiastical law administers the remedy of separation, or a divorce a mensa et thoro. But if the cause existed previous to the marriage, and was such a one as rendered the marriage unlawful ab initio, as consanguinity, corporal imbecility, or the like; in this case the law looks upon the marriage to have been always null and void, being contracted in fraudem legis, and decrees not only a separation from bed and board, but a vinculo matrimonii itself. 5. The last species of matrimonial causes is a consequence drawn from one of the species of divorce, that a mensa et thoro; which is the suit for alimony, a term which signifies maintenance: which suit the wife, in case of separation, may have against her husband, if he neglects or refuses to make her an allowance suitable to their station in life. This is an injury to the wife, and the court christian will redress it by assigning her a competent maintenance, and compelling the husband by ecclesiastical censures to pay it. But no alimony will be assigned in case of a divorce for adultery on her part; for as that amounts to a forfeiture of her dower after his death, it is also a sufficient reason why she should not be partaker of his estate when living.

3. TESTAMENTARY causes are the only remaining species, belonging to the ecclesiastical jurisdiction; which, as they are certainly of a mere temporal nature x, may seem at first view a little oddly ranked among matters of a spiritual cognizance. And indeed (as was in some degree
observed in a former volume y) they were originally cognizable in the king’s courts of common law, viz. the county courts z; and afterwards transferred to the jurisdiction of the church by the favour of the crown, as a natural consequence of granting to the bishops the administration of intestates effects.

THIS spiritual jurisdiction of testamentary causes is a peculiar constitution of this island; for in almost all other (even in popish) countries all matters testamentary are of the jurisdiction of the civil magistrate. And that this privilege is enjoyed by the clergy in England, not as a matter of ecclesiastical right, but by the special favour and indulgence of the municipal law, and as it should seem by some public act of the great council, is freely acknowledged by Lindewode, the ablest canonist of the fifteenth century. Testamentary causes, he observes, belong to the ecclesiastical courts de consuetudine Angliae, et super confenfu regio et fuorum procerum in talibus ab antiquo confeso a. The same was, about a century before, very openly professed in a canon of archbishop Stratford, viz. that administration of intestates goods wasab olim granted to the ordinary, confenfu regio et magnatum regni Angliae b. The constitutions of cardinal Othobon also testify, that this provision olim a praelatis cum approbatione regis et baronum dicitur emanaff e. And arch-bishop Parker d, in queen Elizabeth’s time, affirms in express words, that originally in mat-

x Warburt. alliance. 173.
y Book II. ch. 32.
z Hickes Differ. Epistola. pag. 8. 58.
b Ibid. l. 3. t. 38. fol. 263.
c cap. 23.
d See 9 Rep. 38.

ters testamentary non ullam habebant episcopi authoritatem, praeter eam quam a rege acceptam referebant. Jus testamentorum probarum non habebant: administrationis potestatem cuique delegare non poterant.

At what period of time the ecclesiastical jurisdiction of testaments and intestacies began in England, is not ascertained by any ancient writer; and Lindewode e very fairly confesses, cujusregis temporibus hoc ordinatum fit, non reperio. We find it indeed frequently asserted in our common law
books, that it is but of late years that the church hath had the probate of
wills f. But this must only be understood to mean, that it had not always
had this prerogative: for certainly it is of very high antiquity. Lindewode,
we have seen, declares that it was ab antiquo;? Stratford, in the reign of
king Edward III, mentions it as abolim ordinatum;? and cardinal Othobon,
in the 52 Hen. III. speaks of it as an ancient tradition. Bracton holds it for
clear law in the same reign of Henry III, that matters testamentary
belonged to the spiritual court g. And, yet earlier, the disposition of
intestates' goods per visum ecclefiae? was one of the articles confirmed to
the prelates by king John's magna carta h. Matthew Paris also informs us,
that king Richard I ordained in Normandy, quod distributio rerum quae in
testamento relinquuntur autoritate ecclefiac fiet. And even this ordinance,
of king Richard, was only an introduction of the same law into his ducal
dominions, which before prevailed in this kingdom: for in the reign of his
father Henry II Glanvil is express, that si quis aliquid dixerit contra
testamentum, placitum illud in curia christianitatis audiridebet et
terminari i. And the Scots book called regiam majestatem agrees verbatim
with Glanvil in this point k.

It appears that the foreign clergy were pretty early ambitious of this
branch of power: but their attempts to assume it on the

e fel. 263.
g l. 5. de exceptionibis. c. 10.
h cap. 27. edit. Oxon.
i l. 7. c. 8.
k l. 2. c. 38.

continent were effectually curbed by the edict of the emperor Justin l,
which restrained the insinuation or probate of testaments (as formerly) to
the office of the magister cenfus: for which the emperor subjoins this
reason; abfur dum etenim clericis eft, immo etiam opprobriosus, si peritos
se velint offendere discpectionum esse forenfiin. But afterwards by the
canon law m it was allowed, that the bishop might compel by ecclesiastical
censures the performance of the bequest to pious uses. And therefore, that
being considered as a cause quae secundum canones et episcopales leges
ad regimen animarum perinuit, it fell within the jurisdiction of the
spiritual courts by the express words of the charter of king William I,
which separated those courts from the temporal. And afterwards, when
king Henry I by his coronation-charter directed, that the goods of an intestate should be divided for the good of his soul n, this made all intestacies immediately spiritual causes, as much as a legacy to pious uses had been before. This therefore, we may probably conjecture, was the era referred to by Stratford and Othobon, when the king by the advice of the prelates, and with the consent of his barons, invested the church with this privilege. And accordingly in king Stephen's charter it is provided, that the goods of an intestate ecclesiastic shall be distributed pro salute animae ejus, ecclesiae consilio; which latter words are equivalent to per visum ecclesiae in the great charter of king John before-mentioned. And the Danes and Swedes (who received the rudiments of christianity and ecclesiastical discipline from England about the beginning of the twelfth century) have thence also adopted the spiritual cognizance of intestacies, testaments, and legacies.

THIS jurisdiction, we have seen, is principally exercised with us in the consistory courts of every diocesan bishop, and in the

l Cod. 1. 3. 41.
n St quis baronum feu hominum meorum __ pecuniam fuam non dederit vel dare disposuerit, nor fua, five liberi, aut parentes et legitimi bonines ejus, eam proanima c.u. d'vidant. Feus eis melius vifan fucrii. (Text Roffens. c. 34. p. 51.)
p Stiernhook, de jure Syeon l. 3. c. 3.

prerogative court of the metropolitan, originally; and in the arches court and court of delegates by way of appeal. It is divisible into three branches; the probate of wills, the granting of administrations, and the suing for legacies. The two former of which, when no opposition is made, are granted merely ex officio et debito justitiae, and are then the object of what is called the voluntary, and not the contentious jurisdiction. But when a caveat is entered against proving the will, or granting administration, and a suit thereupon follows to determine either the validity of the testament, or who hath a right to the administration; this claim and obstruction by the adverse party are an injury to the party entitled, and as such are remedied by the sentence of the spiritual court, either by establishing the will or granting the administration. Subtraction, the withholding or
detaining, of legacies is also still more apparently injurious, by depriving
the legatees of that right, with which the laws of the land, and the will of
the deceased have invested them: and therefore, as a consequent part of
testamentary jurisdiction, the spiritual court administers redress herein,
by compelling the executor to pay them. But in this last case the courts of
equity exercise a concurrent jurisdiction with the ecclesiastical courts, as
incident to some other species of relief prayed by the complainant; as to
compel the executor to account for the testator's effects, or assent to the
legacy, or the like. For, as it is beneath the dignity of the king's courts to be
merely ancillary to other inferior jurisdiction, the cause, when once
brought there, receives there also its full determination.

THESE are the principal injuries, for which the party grieved either must,
or may, seek his remedy in the spiritual courts. but before I entirely
dismiss this head, it may not be improper to add a short word concerning
the method of proceeding in these tribunals, with regard to the redress of
injuries.

IT must (in the first place) be acknowledged, to the honour of the spiritual
courts, that though they continue to this day to decide many questions
which are properly of temporal cognizance, yet justice is in general so ably
and impartially administered in those tribunals, (especially of the superior
kind) and the boundaries of their power are now so well known and
established, that no material inconvenience at present arises from this
jurisdiction still continuing in the ancient channel. And, should an
alteration be attempted, great confusion would probably arise, in
overturning long established forms, and new-modelling a course of
proceedings that has now prevailed for seven centuries.

THE establishment of the civil law process in all the ecclesiastical courts
was indeed a masterpiece of papal discernment, as it made a coalition
impracticable between them and the national tribunals, without manifest
inconvenience and hazard. And this consideration had undoubtedly its
weight in causing this measure to be adopted, though many other causes
concurred. The time when the pandects of Justinian were discovered
afresh and rescued from the dust of antiquity, the eagerness with which
they were studied by the popish ecclesiastical, and the consequent
dissensions between the clergy and the laity of England, have formerly q
been spoken to at large. I shall only now remark upon those collections,
that their being written in the Latin tongue, and referring so much to the
will of the prince and his delegated officers of justice, sufficiently recommended them to the court of Rome, exclusive of their intrinsic merit. To keep the laity in the darkest ignorance, and to monopolize the little science, which then existed, entirely among the monkish clergy, were deep-rooted principles of papal policy. And, as the bishops of Rome affected in all points to mimic the imperial grandeur, as the spiritual prerogatives were moulded on the pattern of the temporal, so the canon law process was formed on the model of the civil law: the prelates embracing with the utmost ardor a method of judicial proceedings, which was carried on in a language unknown to the bulk of the people, which banished the intervention of a jury (that bulwark of Gothic liberty) and which placed an arbitrary power of decision in the breast of a single man.

THE proceedings in the ecclesiastical courts are therefore regulated according to the practice of the civil and canon laws; or rather according to a mixture of both, corrected and new-modelled by their own particular usages, and the interposition of the courts of common law. For, if the proceedings in the spiritual court be never so regularly consonant to the rules of the Roman law, yet if they be manifestly repugnant to the fundamental maxims of the municipal laws, to which upon principles of sound policy the ecclesiastical process ought in every state to conform; (as if they require two witnesses to prove a fact, where one will suffice at common law) in such cases a prohibition will be awarded against them. But, under these restrictions, their ordinary course of proceeding is; first, by citation, to call the party injuring before them. Then by libel, libellus, a little book, or by articles drawn out in a formal allegation, to set forth the complainant's ground of complaint. To this succeeds the defendant's answer upon oath; when, if he denies or extenuates the charge, they proceed to proofs by witnesses examined, and their depositions taken down in writing, by an officer of the court. If the defendant has any circumstances to offer in his defence, he must also propound them in what is called his defensive allegation, to which he is entitled in his turn to the plaintiff's answer upon oath, and may from thence proceed to proofs as well as his antagonist. The canonical doctrine of purgation, whereby the parties were obliged to answer upon oath to any matter, however criminal, that might be objected against them, (though long ago overruled in the
court of chancery, the genius of the English law having broken through the
bondage imposed on it by its clerical chancellors, and asserted the
doctrines of judicial as well as civil liberty) continued till the middle of the
last century to be upheld by the spiritual courts; when the legislature was
obliged to interpose, to teach them a lesson of similar moderation. By the

r Warb. alliance. 179.
s 2 Roll. Abr. 300. 302.

statute of 13 Car. II. c. 12. it is enacted, that it shall not be lawful for any
bishop, or ecclesiastical judge, to tender or administer to any person
whatsoever, the oath usually called the oath ex officio, or any other oath
whereby he may be compelled to confess, accuse, or purge himself of any
criminal matter or thing, whereby he may be liable to any censure or
punishment. When all the pleadings and proofs are concluded, they are
referred to the consideration, not of a jury, but of a single judge; who takes
information by hearing advocates on both sides, and thereupon forms his
interlocutory decree or definitive sentence at his own discretion: from
which there generally lies an appeal, in the several stages mentioned in a
former chapter t; though, if the same be not appealed from in fifteen days,
it is final, by the statute 25 Hen. VIII. c. 19.

BUT the point in which these jurisdictions are the most defective, is that of
enforcing their sentences when pronounced; for which they have no other
process, but that of excommunication: which is described u to be twofold;
the less, and the greater excommunication. The less is an ecclesiastical
censure, excluding the party from the participation of the sacraments: the
greater proceeds farther, and excludes him not only from these but also
from the company of all christians. But, if the judge of any spiritual court
excommunicates a man for a cause of which he hath not the legal
cognizance, the party may have an action against him at common law, and
he is also liable to be indicted at the suit of the king w.

HEAVY as the penalty of excommunication is, considered in a serious
light, there are, notwithstanding, many obstinate or profligate men, who
would despise the brutum fulmen of mere ecclesiastical censures,
especially when pronounced by a petty surrogate in the country, for railing
or contumelious words, for non-payment of fees, or costs, or for other
trivial cause. The common law therefore compassionately steps in to
their aid, and kindly lends a supporting hand to an otherwise tottering authority. Imitating herein the policy of our British ancestors, among whom, according to Caesar x, whoever were interdicted by the Druids from their sacrifices, in numero impiorum archbishop celeratorum habentur: ab iis omnes decedunt, adytum eorum fermonemque defugiunt, ne quid ex contagione incommodi accipient: neque iis petentibus jus redditur, neque honos ullu communicatur. And so with us by the common law an excommunicated person is disabled to do any act, that is required to be done by one that is probus et legalis homo. He cannot serve upon juries, cannot be a witness in any court, and, which is the worst of all, cannot bring an action, either real or personal, to recover lands or money due to him y. Nor is this the whole: for if, within forty days after the sentence has been published in the church, the offender does not submit and abide by the sentence of the spiritual court, the bishop may certify such contempt to the king in chancery. Upon which there issues out a writ to the sheriff of the county, called, from the bishop's certificate, a significavit; or from its effect a writ de excommunicato capiendo: and the sheriff shall thereupon take the offender, and imprison him in the county gaol, till he is reconciled to the church, and such reconciliation certified by the bishop; upon which another writ, de excommunicato deliberando, issues out of chancery to deliver and release him z. This process seems founded on the charter of separation (so often referred to) of William the conqueror. Sialiquis per superbiam elatus ad justitiam episcopalem venire noluerit, cocetur femal, fecundo, et tertio: quod fi nec fic ad emendationem venerit, excommunicetur; et, fi opus suerit, ad hoc vindicandum fortitudo et justitia regis fve vicecomitis adhibeatur. And in case of subtraction of tithes, a more summary and expeditious assistance is given by the statutes of 27 Hen. VIII. c. 20. and 32 Hen. VIII. c. 7. which enact, that upon complaint of any contempt or misbehaviour to the ecclesiastical judge by the defendant in any suit for tithes, any privy counsellor or any two justices of the peace (or

x de bello Gall. l. 6.
y Litt. 201.
z F. N. B. 62.
in case of disobedience to a definitive sentence, any two justices of the peace) may commit the party to prison without bail or mainprize, till he enters into a recognizance with sufficient sureties to give due obedience to the process and sentence of the court. These timely aids, which the common and statute law have lent to the ecclesiastical jurisdiction, may serve to refute that groundless notion which some are too apt to entertain, that the courts of Westminster-hall are at open variance with those at doctors' commons. It is true that they are sometimes obliged to use a parental authority, in correcting the excesses of these of these inferior courts, and keeping them within their legal bounds; but, on the other hand, they afford them a parental assistance, in repressing the insolence of contumacious delinquents, and rescuing their jurisdiction from the contempt, which for want of sufficient compulsive powers would otherwise be sure to attend it.

II. I AM next to consider the injuries cognizable in the court military, or court of chivalry. The jurisdiction of which is declared by statute 13 Ric. II. c. 2. to be this; that it hath 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 samematters appertaining. So that wherever the common law can give redress, this court hath no jurisdiction: which has thrown it entirely out of use as to the matter of contracts, all such being usually cognizable in the courts of Westminster-hall, if not directly, at least by fiction of law: as if a contract be made at Gibraltar, the plaintiff may suppose it made at Northampton; for the locality, or place of making it, is of no consequence with regard to the validity of the contract.

THE words, other usages and customs,? support the claim of this court, 1. To give relief to such of the nobility and gentry as thing themselves aggrieved in matters of honour; and 2. To keep up the distinction of degrees and quality. Whence it follows, that the civil jurisdiction of this court of chivalry is principally in two points; the redressing injuries of honour, and correcting encroachments in matters of coat-armour, precedency, and other distinctions of families.

AS a court of honour, it is to give satisfaction to all such as are aggrieved in that point; a point of a nature so nice and delicate, that its wrongs and injuries escape the notice of the common law, and yet are fit to be
redressed somewhere. Such, for instance, as calling a man coward, or
giving him the lye; for which, as they are productive of no immediate
damage to his person or property, no action will lie in the courts at
Westminster: and yet they are such injuries as will prompt every man of
spirit to demand some honourable amends, which by the ancient law of
the land was appointed to be given in the court of chivalry a. But modern
resolutions have determined, that how much soever such a jurisdiction
may be expedient, yet no action for words will at present lie therein b. And
it hath always been most clearly holden c, that as this court cannot meddle
with any thing determinable by the common law, it therefore can give no
pecuniary satisfaction or damages; inasmuch as the quantity and
determination thereof is ever of common law cognizance. And therefore
this court of chivalry can at most order reparation in point of honour; as,
to compel the defendant mendacium fibi ipsi 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 d. Neither can this court, as to the point of
reparation in honour, hold plea of any such word, or thing, wherein they
party is relievable by the courts of the common law. As if a man gives
another a blow, or calls him thief or murderer; for in both these cases the
common law has pointed out his proper remedy by action.

b Salk. 533. 7 Mod. 125. 2 Hawk. P. C. 11.
d 1 Roll. Abr. 128.

AS to the other point of its civil jurisdiction, the redressing of
incroachments and usurpations in matters of heraldy and coat-armour; it
is the business of this court, according to sir Matthew Hale, to adjust the
right of armorial ensigns, bearings, crests, supporters, pennons, &c; and
also rights of place or precedence, where the king's patent or act of
parliament (which cannot be overruled by this court) have not already
determined it.

THE proceedings in this court are by petition, in a summary way; and the
trial not by a jury of twelve men, but by witnesses, or by combat e. But as it
cannot imprison, not being a court of record, and as by the resolution of
the superior courts it is now confined to so narrow and restrained a
jurisdiction, it has fallen into contempt and disuse. The marshalling of
cootarmour, which was formerly the pride and study of all the best families
in the kingdom, is now greatly disregarded; and has fallen into the hands
of certain officers and attendants upon this court, called heralds, who
consider it only as a matter of lucre and not of justice: whereby such falsity
and confusion has crept into their records, (which ought to be the standing
evidence of families, descents, and coat-armour) that, though formerly
some credit has been paid to their testimony, now even their common seal
will not be received as evidence in any court of justice in the kingdom f.
But their original visitation-books, compiled when progresses were
solemnly and regularly made into every part of the kingdom, to enquire
into the state of families, and to register such marriages and descents as
were verified to them upon oath, are allowed to be good evidence of
pedigrees g. And it is much to be wished, that this practice of visitations at
certain periods were revived; for the failure of inquisitions post mortem,
by the abolition of military tenures, combined with the negligence of the
heralds in omitting their usual progresses, has rendered the proof of a
modern descent, for the recovery of an es-

e Co. Litt. 261.
f 2 Roll. Abr. 686. 2 Jon. 224.
g Comb. 63.

tate or succession to a title of honour, more difficult than that of an
ancient. This will be indeed remedied for the future, with respect to claims
of peerage, by a late standing order h of the house of lords: directing the
heralds to take exact accounts and their respective descendants; and that
an exact pedigree of each peer and his family shall, on the day of his first
admission, be delivered to the house by garter, the principal king at arms.
But the general inconvenience, affecting more private successions, still
continues without a remedy.

III. INJURIES cognizable by the courts maritime, or admiralty courts, are
the next object of our enquiries. These courts have jurisdiction and power
to try and determine all maritime causes, or such injuries, which, though
they are in their nature of common law cognizance, yet being committed
on the high seas, out of the reach of our ordinary courts of justice, are
therefore to be remedied in a peculiar court of their own. All admiralty
causes must be therefore causes arising wholly upon the sea, and not
within the precincts of any county j. For the statute 13 Ric. II. c. 5. directs
that the admiral and his deputy shall not meddle with any thing, but only
things done upon the sea; and the statute 15 Ric. II. 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 i. 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 k. If part of any contract, or other cause of action, doth arise upon the sea, and part upon the land, the common law excludes the admiralty court from its jurisdiction; for, part belonging properly to one cognizance and part to another, the common or general law takes place of the particular l. Therefore though pure maritime a acqui-

h 11 May. 1767.
I Co. Litt. 260. Hob. 79.
l See book I. ch. 8.
k t Rep. 106.
l Co. Litt. 261.

sitions, which are earned 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 m; yet, in general if there be a contract made in England and to be executed upon the seas, as a charterparty or covenant that a ship shall sail to Jamaica, or shall be in such a latitude by such a day; or a contract made upon the sea to be performed in England, as a bond made on shipboard to pay money in London or the like; these kind of mixed contracts belong not to the admiralty jurisdiction, but to the courts of common law n. And indeed it hath been farther holden, that the admiralty court cannot hold plea of any contract under seal o.

AND also, as the courts of common law have obtained a concurrent jurisdiction with the court of chivalry with regard to foreign contracts, by supposing them made in England; so it is no uncommon thing for a plaintiff to feign that a contract, really made at sea, was made at the royal exchange, or other inland place, in order to draw the cognizance of the suit from the courts of admiralty to those of Westminster-hall p. This the civilians exclaim against loudly, as inequitable and absurd; and sir Thomas Ridley q hath very gravely proved it to be impossible, for the ship in which such cause of action arises to be really at the royal exchange in Cornhill. But our lawyers justify this fiction, by alleging as before, that the locality of such contracts is not at all essential to the merits of them: and that learned
civilian himself seems to have forgotten how much such fictions are 
adopted and encouraged in the Roman law: that a son killed in battle is 
supposed to live for ever for the benefit of his parent r; and that, by the 
fiction of postliminium and the lex cornelia, captives, when freed from 
bondage, were held to have never been prisoners s, and such as died in 
captivity were supposed to have died in their own country t.

m 1 Ventr. 146. 
o Hob. 212. 
q View of the civil law, b. 3. p. 1. 3. 
r Inst. 1. tit. 25. 
s Ff. 49. 13. 12. 6. 
t Ff. 49. 15. 18. 

WHERE the admiral's court hath not original jurisdiction of the cause, 
though there should arise in it a question that is proper for the cognizance 
of that court, yet that doth not alter nor take away the exclusive 
jurisdiction of the common law v. And so, vice versa, if it hath jurisdiction 
of the original, it hath also jurisdiction of all consequential questions, 
though properly determinable at common law u. Wherefore, among other 
reasons, a suit for beaconage of a beacon standing on a rock in the sea may 
be brought in the court of admiralty, the admiral having an original 
jurisdiction over beacons w. In case of prizes also in time of war, between 
our own nation and another, or between two other nations, which are 
taken at sea, and brought into our ports, the courts of admiralty have an 
undisturbed and exclusive jurisdiction to determine the same according to 
the law of nations x.

THE proceedings of the courts of admiralty bear much resemblance to 
those of the civil law, but are not entirely founded thereon; and they 
likewise adopt and make use of other laws, as occasion requires; such as 
the Rhodian law, and the laws of Oleron y. For the law of England, as has 
frequently been observed, doth not acknowledged or pay any deference to 
the civil law considered as such; but merely permits its use in such cases 
where it judged its determinations equitable, and therefore blends it, in 
the present instance, with other marine laws: the whole being corrected, 
altered, and amended by acts of parliament and common usage; so that 
out of this composition a body of jurisprudence is extracted, which owes
its authority only to its reception here by consent of the crown and people.
The first process in these courts is frequently by arrest of the defendant's
person; and they also take recognizances or stipulation of certain
sidejussors in the nature of bail, and in case of default may

r Comb. 462.
w 1 Siid. 158.
x 2 Show. 232. Comb. 474.
a Ibid. 11. 1 Roll. Abr. 531. Raym. 78. Lord Raym. 1286.

imprison both them and their principal. They may also fine and
imprison for a contempt in the face of the court. And all this is supported
by immemorial usage, grounded on the necessity of supporting a
jurisdiction so extensive; though opposite to the usual doctrines of the
common law: these being no courts of record, because in general their
process in much conformed to that of the civil law.

IV. I AM next to consider such injuries as are cognizable by the courts of
the common law. And herein I shall for the present only remark, that all
possible injuries whatsoever, that did not fall within the cognizance of
either the ecclesiastical, military, or maritime tribunals, are for that very
reason within the cognizance of the common law courts of justice. For it is
a settled and invariable principle in the laws of England, that every right
when with-held must have a remedy, and every injury its proper redress.
The definition and explication of these numerous injuries, and their
respective legal remedies, will employ our attention for many subsequent
chapters. But, before we conclude the present, I shall just mention two
species of injuries, which will properly fall now within our immediate
consideration; and which are, either when justice is delayed by an inferior
court that has proper cognizance of the cause; or, when such inferior court
takes upon itself to examine a cause and decide the merits without any
legal authority.

1. THE first of these injuries, refusal or neglect of justice, is remedied
either by writ of procedendo, or of mandamus. A writ of procedendo ad
judicium, issues out of the court of chancery, where judges of any court do
delay the parties; for that they will not give judgment, either on the one
side or on the other, when they ought so to do. In this case a writ of procedendo shall be awarded, commanding them in the king's name to proceed to judgment; but without specifying any particular judgment, for

c 1 Ventr. 1.
d 1 Keb. 552.
e Bro. Abr. t. error. 177.

that (if erroneous) may be set aside in the course of appeal, or by writ of error or false judgment: and, upon farther neglect or refusal, the judges of the inferior court may be punished for their contempt, by writ of attachment returnable in the king's bench or common pleas t.

A WRIT of mandamus is, in general, a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature, within the king's dominions; requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice. It is a high prerogative writ, of a most extensively remedial nature: and may be issued in some cases where the injured party has also another more tedious method of redress, as in the case of admission or restitution to an office; but it issues in all cases where the party hath a right to have anything done, and hath no other specific means of compelling its performance. A mandamus therefore lies to compel the admission or restoration of the party applying, to any office or franchise of a public nature whether spiritual or temporal; to academical degrees; to the use of a meeting-house; &c: it lies for the production, inspection, or delivery, of public books and papers; for the surrender of the regalia of a corporation; to oblige bodies corporate to affix their common seal; to compel the holding of a court; and for an infinite number of other purposes, which it is impossible to recite minutely. But at present we are more particularly to remark, that it issues to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the court of king's bench, to superintend all other inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers, with which the crown or legislature have invested them: and this, not only by restraining their excesses, but also by quickening their neg-
ligence, and obviating their denial of justice. A mandamus may therefore be had to the courts of the city of London, to enter up judgment; to the spiritual courts to grant an administration, to swear a church-warden, and the like. This writ is grounded on a suggestion, by the oath of the party injured, of his own right, and the denial of justice below: whereupon, in order more fully to satisfy the court that there is a probable ground for such interposition, a rule is made (except in some general cases, where the probable ground is manifest) directing the party complained of to shew cause why a writ of mandamus should not issue: and, if he shews no sufficient cause, the writ itself is issued, at first in the alternative, either to do thus, or signify some reason too the contrary; to which a return, or answer, must be made at a certain day. And, if the inferior judge, or other person to whom the writ is directed, returns or signifies an insufficient reason, then the issues in the second place a peremptory mandamus, to do the thing absolutely; to which no other return will be admitted, but a certificate of perfect obedience and due execution of the writ. If the inferior judge or other person makes no return, or fails in his respect and obedience, he is punishable for his contempt by attachment. But, if he, at the first, returns a sufficient cause, although it should be false in fact, the court of king's bench will not try the truth of the fact upon affidavits; but will for the present believe him, and proceed no farther on the mandamus. But then the party injured may have an action against him for his false return, and (if found to be false by the jury) shall recover damages equivalent to the injury sustained; together with a peremptroy mandamus to the defendant to do his duty. Thus much for the injury of neglect or refusal of justice.

2. THE other injury, which is that of encroachment of jurisdiction, or calling one coram non judice, to answer in a court that has no legal cognizance of the cause, is also grievance, for which the common law has provided a remedy by the writ of prohibition.

A 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 I, or exchequer k; directed to the judge and parties of 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. This writ may issue either to inferior courts of common law; as, to the courts of the counties palatine or principality of Wales, if they hold plea of land or other matters not lying within their respective franchises l; to the county courts or courts-baron, where they attempt to hold plea of any matter of the value of forty shillings m: or it may be directed to the courts christian, the university courts, the court of chivalry, or the court of admiralty, where they concern themselves with any matter not within their jurisdiction; as if the first should attempt to try the validity of a custom pleaded, or the latter a contract made or to be executed within this kingdom. Or if, in handling of matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of England; as where they require two witnesses to prove the payment of a legacy, a release of tithes n, or the like; in such cases also a prohibition will be awarded. For, as the fact of signing a release, or of actual payment, is not properly a spiritual question, but only allowed to be decided in those courts, because incident or accessory to some original question clearly within their jurisdiction; it ought therefore, where the two laws differ, to be decided not according to the spiritual, but the temporal law; else the same question might be determined different ways, according to the court in which the suit is depending: an impropriety, which no wise government can or ought to endure,

h 1 P. Wms. 476.
I Hob. 15.
k Palmer. 523.
l Lord Rayn. 1408.
m Finch. L. 451.
n Cro. Eliz. 666. Hob. 188.

and which is therefore a ground of prohibition. And, if either the judge or the party shall proceed after such prohibition, an attachment may be had against them, to punish them for the contempt, at the discretion of the court that awarded it o; and an action will lie against them, to repair the party injured in damages.
SO long as the idea continued among the clergy, that the ecclesiastical state was wholly independent of the civil, great struggles were constantly maintained between the temporal courts and the spiritual, concerning the writ of prohibition and the proper objects of it; even from the time of the constitutions of Clarendon made in opposition to the claims of archbishop Becket in 10 Hen. II, to the exhibition of certain articles of complaint to the king by archbishop Bancroft in 3 Jac. I. on behalf of the ecclesiastical courts: from which, and from the answers to them signed by all the judges of Westminster-hall, much may be collected concerning the reasons of granting and methods of proceeding upon prohibitions. A short summary of the latter is as follows. The party aggrieved in the court below applies to the superior court, setting forth in a suggestion upon record the nature and cause of his complaint, in being drawn ad aliud examen, by a jurisdiction or manner of process disallowed by the laws of the kingdom: upon which, if the matter alleged appears to the court to be sufficient, the writ of prohibition immediately issues; commanding the judge not to hold, and the party not to prosecute, the plea. But sometimes the point may be too nice and doubtful to be decided merely upon a motion: and then, for the more solemn determination of the question, the party applying for the prohibition is directed by the court to declare in prohibition; that is, to prosecute an action, by filing a declaration, against the other, upon a supposition, or fiction, that he has proceeded in the suit below, notwithstanding the writ of prohibition. And if, upon demurrer and argument, the court shall finally be of opinion, that the matter suggested is a good and sufficient ground of prohibition in point of law, then judg-

O F. N. B. 40.
p 2 Inst. 601-618.

ment with nominal damages shall be given for the party complaining, and the defendant, and also the inferior court, shall be prohibited from proceeding any farther. On the other hand, if the superior court shall think it no competent ground for restraining the inferior jurisdiction, then judgment shall be given against him who applied for the prohibition in the court above, and a writ of consultation shall be awarded; so called, because, upon deliberation and consultation had, the judges find the prohibition to be ill founded, and therefore by this writ they return the cause to its original jurisdiction, to be there determined, in the inferior court. And, even in ordinary cases, the writ of prohibition is not absolutely final and conclusive. For, though the ground be a proper one in point of
law, for granting the prohibition, yet, if the fact that gave rise to it be
afterwards falsified, the cause shall be remanded to the prior jurisdiction.
If, for instance, a custom be pleaded in the spiritual court; a prohibition
ought to go, because that court has no authority to try it: but, if the fact of
such a custom be brought to a competent trial, and be there found false, a
writ of consultation will be granted. For this purpose the party prohibited
may appear to the prohibition, and take a declaration, (which must always
pursue the suggestion) and so plead to issue upon it; denying the
contempt, and traversing the custom upon which the prohibition was
grounded: and, if that issue be found for the defendant, he shall then have
a writ of consultation. The writ of consultation may also be, and is
frequently, granted by the court without any action brought; when, after a
prohibition issued, upon more mature consideration the court are of
opinion that the matter suggested is not a good and sufficient ground to
stop the proceedings below. Thus careful has the law been, in compelling
them from transgressing their due bounds; and in allowing them the
undisturbed cognizance of such causes as by right, founded on the usage of
the kingdom or act of parliament, do properly belong to their jurisdiction.

CHAPTER THE EIGHTH.
OF WRONGS, AND THEIR REMEDIES, RESPECTING
THE RIGHTS OF PERSONS.

THE former chapters of this part of our commentaries having been
employed in describing the several methods of redressing private wrongs,
either by the mere act of the parties, or the mere operation of law; and in
treating of the nature and several species of courts; together with the
cognizance of wrongs or injuries by private or special tribunals, and the
public ecclesiastical, military, and maritime jurisdictions of this kingdom:
I come now to consider at large, and in a more particular manner, the
respective remedies in the public and general courts of common law for
injuries or private wrongs of any denomination whatsoever, no exclusively
appropriated to any of the former tribunals. And herein I shall, first, define
the several injuries cognizable by the courts of common law, with the
respective remedies applicable to each particular injury: and shall,
secondly, describe the method of pursuing and obtaining these remedies
in the several courts.
FIRST then, as to the several injuries cognizable by the courts of common
law, with the respective remedies applicable to each particular injury. And,
in treating of these, I shall at present confine myself to such wrongs as may
be committed in the mutual intercourse between subject and subject;
which the king as the fountain of justice is officially bound too redress in the
ordinary forms of law: reserving such injuries or encroachments as may
occur between the crown and the subject, to be distinctly considered
hereafter; as the remedy in such cases is generally of a peculiar and
eccentrical nature.

NOW, as all wrong may be considered as merely a privation of right, the
one natural remedy for every species of wrong is the being put in
possession of that right, whereof the party injured is deprived. This may
either be effected by a specific delivery or restoration of the subject-matter
in dispute to the legal owner; as when lands or personal chattels are
unjustly withheld or invaded: or, where that is not a possible, or at least
not an adequate remedy, by making the sufferer a pecuniary satisfaction in
damages; as in case of assault, breach of contract, &c: to which damages
the party injured has acquired an incomplete or inchoate right, the instant
he receives the injury a; though such right be not fully ascertained till they
are assessed by the intervention of the law. The instruments whereby this
remedy is obtained (which are sometimes considered in the light of the
remedy itself) are a diversity of suits and actions, which are defined by the
mirrour b to bethe lawful demand of one's right: or as Bracton and Fleta
express it, in the words of Justinian c, jus prosequendi in judicio quod
alicui debetur.

THE Romans introduced, pretty early, set forms for actions and suits in
their law, after the example of the Greeks, and made it a rule that each
injury should be redressed by its proper remedy only. Actiones, say the
pandects, compositae sunt, quibus inter homines disceptantur, quas
actions ne populus prout vellet institueret, certas solemnnesque esse
vollerunt? The forms of these actions were originally preserved in the
books of the pontifical college, as choice and inestimable secrets, till one
Cneius Flavius, the secretary of Appius Claudius, stole a copy and
published them to the people e. The concealment was ridiculous:

a See book II. ch. 29.
b c. 2. 1.
but the establishment of some standard was undoubtedly necessary, to fix the true state of question of right; lest in a long and arbitrary process it might be shisted continually, and be at length no longer discernible. Or, as Cicero expresses it, funt iuris, funt formulae, de omnibus rebus constiitutae, ne quis aut ingenere injuriae, aut in ratione actionis, errare poffit. Expressae enim sunt ex uniuscujusque damno, dolore, incommodo, calamitate, injuria, publicae a praetore formulae, ad quas privata lis accommodatur. And in the same manner our Bracton, speaking of the original writs upon which all our actions are founded, declares them to be fixed and immutable, unless by authority of parliament. And all the modern legislators of Europe have found it expedient from the same reasons to fall into the same or a similar method. With us in England the several suits, or remedial instruments of justice, are from the subject of them 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: and they are the same which the civil law calls actions in personam, quae adversus eum intenduntur, qui ex contractu vel delicto obligatus est aliquid dare vel concedere. Of the former nature are all actions upon debt or promises; of the latter all actions for trespasses, nuisances, assaults, defamatory words, and the like.

REAL actions, (or, as they are called in the mirror I, feodal actions) which concern real property only, are such whereby the plaintiff, here called the demandant, claims title to have any lands or tenements, rents, commons, or other hereditaments, in
fee-simple, fee-tail, or for term of life. By these actions formerly all disputes concerning real estates were decided; but they are now pretty generally laid aside in practice, upon account of the great nicety required in their management, and the inconvenient length of their process: a much more expeditious method of trying titles being since introduced, by other actions personal and mixed.

MIXED actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained. As for instance, an action of waste: which is brought by him who hath the inheritance, in remainder or reversion, against the tenant for life, who hath committed waste therein, to recover not only the land wasted, which would make it merely a real action; but also treble damages, in pursuance of the statute of Glocester k, which is a personal recompense; and so both, being joined together, denominate it a mixed action.

UNDER these three heads may every species of remedy by suit or action in the courts of common law be comprized. But in order effectually to apply the remedy, it is first necessary to ascertain the complaint. I proceed therefore now to enumerate the several kinds, and to enquire into the respective natures, of all private wrongs, or civil injuries, which may be offered to the rights of either a man's person or his property; recounting at the same time the respective remedies, which are furnished by the law for every infraction of right. But I must first beg leave to premise, that all civil injuries are of two kinds, the one without force or violence, as slander or breach of contract; the other coupled with force and violence, as batteries, or false imprisonmentl. Which latter species favour something of the criminal kind, being always attended with some violation of the peace; for which in strictness of law a fine ought to be paid to the king,

k 6 Edw I. C. 5.
l Finch. L. 184.

as well as private satisfaction to the party injured m. And this distinction of private wrongs, into injuries with and without force, we shall find to run through all the variety of which we are now to treat. In considering of which, I shall follow the same method, that was pursued with regard to the
distribution of rights: for as these are nothing else but an infringement or breach of those rights, which we have before laid down and explained, it will follow that this negative system, of wrongs, must correspond and tally with the former positive system, of rights. As therefore we divided all rights into those of persons, and those of things, so we must make the same general distribution of injuries into such as affect the rights of persons, and such as affect the rights of property.

THE rights of persons, we may remember, were distributed into absolute and relative: absolute, which were such as appertained and belonged to private men, considered merely as individuals, or single persons; and relative, which were incident to them as members of society, and connected to each other by various ties and relations. And the absolute rights of each individual were defined to be the right of personal security, the right of personal liberty, and the right of private property: so that the wrongs or injuries affecting them must consequently be of a correspondent nature.

I. AS to injuries which affect the personal security of individuals, they are either injuries against their lives, their limbs, their bodies, their health, or their reputations.

1. WITH regard to the first subdivision, or injuries affecting the life of man, they do not fall under our present contemplation; being one of the most atrocious species of crimes, the subject of the next book of our commentaries.


n See book I. Ch. 1.

2. The two next species of injuries, affecting the limbs or bodies of individuals, I shall consider in one and the same view. And these may be committed, 1. By threats and menaces of bodily hurt, through fear of which a man’s business is interrupted. A menace alone, without a consequent inconvenience, makes not the injury; but, to complete the wrong, there must be both of them together. The remedy for this is in pecuniary damages, to be recovered by action of trespass vi et armis, this being an inchoate, though not an absolute, violence. 2. By assault; which is an attempt or offer to beat another, without touching him: as if one lifts up his cane, or his fist, in a threatening manner at another; or strikes at him,
but misses him; this is an assault, insultus, which Finch describes tobean unlawful setting upon one's person. This also is an inchoate violence,amounting considerably higher than bare threats; and therefore, thoughno actual suffering is proved, yet the party injured may have redress byaction of trespass vi et armis; wherein he shall recover damages as acompensation for the injury. 3. By battery; which is the unlawful beatingof another. The least touching of another's person wilfully, or in anger, is abattery; for the law cannot draw the line between different degrees ofviolence, and therefore totally prohibits the first and lowest stage of it:every man's person being sacred, and no other having a right to meddlewith it, in any the slightest manner. And therefore upon a similar principlethe Cornelian law de injuriis prohibited pulsation as well as verberation;distinguishing verberation, which was accompanied with pain, frompulsation which was attended with none. But battery is, in some cases,justifiable or lawful; as where one who hath authority, a parent or master,gives moderate correction to his child, his scholar, or his apprentice. Soalso on the principle of self-defence: for if one strikes me first, or evenonly assaults me, I may strike in my own defence; and, if sued for it, mayplead son assault demesne, or that it was the plaintiff's own ori-

o Finch. L. 202.
p Regiftr. 104. 27 Aff. 11. 7 Edw IV. 24.
q Finch. L. 202.
r Ff. 47. 10. 5.

ginal assault that occasioned it. So likewise in defence of my goods orpossession, if a man endeavours to deprive me of them, I may justifylaying hands upon him to prevent him; and in case he persists withviolence, I may proceed to beat him away. Thus too in the exercise of anoffice, as that of church-warden or beadle, a man may lay hands uponanother to turn him out of church, and prevent his disturbing thecongregation. And, if sued for this or the like battery, he may set forth thewhole case, and plead that he laid hands upon him gently, molliter manusimposuit, for this purpose. On account of these causes of justification,battery is defined to be the unlawful beating of another; for which thereis no remedy, as for assault, by action of trespass vi et armis: wherein the jurywill give adequate damages. 4. By mayhem or wounding; which is aninjury still more atrocious, and consists in violently depriving another ofthe use of a member proper for his defence in fight. This is a battery,attended with this aggravating circumstance, that thereby the party
injured is for ever disabled from making so good a defence against future external injuries, as he otherwise might have done. Among these defensive members are reckoned not only arms and legs, but a finger, an eye, and a fore-tooth t, and also some others u. 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. The same remedial action of trespass vi et armis lies also to recover damages for this injury; an injury, which (when wilful) no motive can justify, but necessary self-preservation. If the ear be cut off, treble damages is given by statute 37 Hen. VIII. c. 6. though this is not mayhem at common law. And here I must observe, that for these three last injuries, assault, battery, and mayhem, an indictment may be brought as well as an action; and frequently both are accordingly prosecuted: the one at the suit of the crown for the crime against the public; the other at the suit of the party injured, to make him a reparation in damages.

r Finch. L. 203.
s 1 Sid. 301.
t Finch. L. 204.
u 1 Hawk. P. C. 111.

4. INJURIES, affecting a man's health, are where by any unwholesome practices of another a man sustains any apparent damage in his vigor or constitution. As by selling him bad provisions or wine w; by the exercise of a noisome trade, which infects the air in his neighbourhood/x; or by the neglect or unskillful management of his physician, surgeon, or apothecary. For it hath been solemnly resolved y, that mala praxis is a great misdemeanour and offence at common law, whether it be for curiosity and experiment, or by neglect; because it breaks the trust which the party had placed in his physician, and tends to the patient's destruction. Thus also, in the civil law z, neglect or want of skill in physicians and surgeonsculpae adnumerantur; veluti si medicus curationem dereliquerit, male quempiam secuerit, aut perperam ei medicamentum dederit. There are wrongs or injuries unaccompanied by force, for which there is a remedy in damages by a special action of trespass, upon the case. This action, of trespass, or transgression, on the case, is an universal remedy, given for all personal wrongs and injuries without force; so called, because the plaintiff's whole case or cause of complaint is set forth at length in the original writ a. For though in general there are methods prescribed and forms of action previously settled, for redressing those wrongs which most usually occur, and in which the very act itself is immediately prejudicial or
injurious to the plaintiff's person or property, as battery, non-payment of debts, detaining one's goods, or the like; yet where any special consequential damage arises which could not be fore-

w 1 Roll. Abr. 90.
y Lord Raym. 214.
z Inft 4. 3. 6 & 7.
a For example: Rex vicecomiti falutem. Si A fecerit te fecurum de clamore suo profequendo, tune pone per vadium et falsos plegios B, quod fit coram justitiariis nostri apud Westmonafterium in octabis sancti Michaelis, oftenfurus quare cum idem B ad dextrum oculum ipsius A casualiter laesium bene et competenter curandum apud S. pro quadam pecnias summa prae manibus soluta asumptiffet, idem B curam sue circa oculum praedictum tam negligenter et improvide opposuit, quod idem A defectu ipsius B visum oculi predicti totaliter amifit, ad damnum ipsius A viginti librarum, ut dicit. Et habeas ibi nomina plegiorum et hoc breve. Tefle meipso apud Westmonafterium & c. (Regiftr. Brev. 105.)

seen and provided for in the ordinary course of justice, the party injured is allowed, both by common law and the statute of Westm. 2. c. 24. to bring a special action on his own case, by a writ formed according to the peculiar circumstances of his own particular grievance b. For wherever the common law gives a right or prohibits an injury, it also gives a remedy by action c; and therefore, wherever a new injury is done, a new method of remedy must be pursued d. And it is a settled distinction e, that where an act is done which is in itself an immediate injury to another's person or property, there the remedy is usually by an action of trespass vi et armis; but where there is no act done, but only a culpable omission; or where the act is not immediately injurious, but only by consequence and collaterally; there no action of trespass vi et armis will lie, but an action on the special case, for the damages consequent on such omission or act.

5. LASTLY; injuries affecting a man's reputation or good name are, first, by malicious, scandalous, and slanderous words tending to his damage and derogation. As if a man, maliciously and falsely, utter any slander or false tale of another: which may either endanger him in law, by impeaching him of some heinous crime, as to say that a man hath poisoned another, or is perjured f; or which may exclude him from society, as to charge him with having an infectious disease; or which may
impair or hurt his trade or livelihood, as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave. /g Words spoken in derogation of a peer, a judge, or other great officer of the realm, which are called scandalum magnatum, are held to be still more heinous; /h and, though they be such as would not be actionable in the case of a common person, yet when spoken in disgrace of such high and respectable characters, they amount to an atrocious injury: which is redressed by an action on the case

b See pag 51.
c 1 Salk. 20. 6 Mod. 54.
d Cro. Jac. 478.
e 11 Mod. 180. Lord Raym. 1402. Stra. 635.
f Finch. L. 185.
g Ibid. 186.
h 1 Ventr. 60.

founded on many ancient statutes i; as well on behalf of the crown, to inflict the punishment of imprisonment on the slanderer, as on behalf of the party, to recover damages for the injury sustained. Words also tending to scandalize a magistrate, or person in a public trust, are reputed more highly injurious than when spoken of a private man k. It is said, that formerly no actions were brought for words, unless the slander was such, as (if true) would endanger the life of the object of it l. But, too great encouragement being given by this lenity to false and malicious slanderers, it is now held that for scandalous words of the several species before-mentioned, that may endanger a man in law, may exclude him from society, may impair his trade, or may affect a peer of the realm, a magistrate, or one in public trust, an action on the case may be had, 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, import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened; which is called laying his action with a per quod. As if I say that such a clergyman is a bastard, he cannot for this bring any action against me, unless he can shew some special loss by it; in which case he may bring his action against me, for saying he was a bastard, per quod he lost the presentation to such a living m. In like manner to slander another man’s title, by spreading such injurious reports as, if true, would deprive him of his estate (as to call the issue in tail, or one who hath land by descent, a bastard) is actionable,
provided any special damage accrues to the proprietor thereby; as if he
loses an opportunity of selling the land. But mere scurrility, or
opprobrious words, which neither in themselves import, nor are in fact
attended with, any injurious effects, will not support an action. So
scandals, which concern matters

i Westm. 1. 3 Edw. I. c. 34. 2 Ric. II. c. 5. 12 Ric. II. c. 11.
k Lord Raym. 1369.
l 2 Vent. 28.
m 4 Rep. 17. 1 Lev. 248.

merely spiritual, as to call a man heretic or adulterer, are cognizable only
in the ecclesiastical court; unless any temporal damage ensues, which
may be a foundation for a per quod. Words of heat and passion, as to call
man rogue and rascal, if productive of no ill consequence, and not of any
of the dangerous species before-mentioned, are not actionable: neither
are words spoken in a friendly manner, as by way of advice, admonition, or
concern, without any tincture or circumstance of ill will: for, in both these
cases, they are not maliciously spoken, which is part of the definition of
slander. Neither (as was formerly hinted) are any reflecting words
made use of in legal proceedings, and pertinent to the cause in hand, a
sufficient cause of action for slander. Also if the defendant be able to
justify, and prove the words to be true, no action will lie, even though
special damage hath ensued: for then it is no slander or false tale. As if I
can prove the tradesman a bankrupt, the physician a quack, the lawyer a
knave, and the divine a heretic, this will destroy their respective actions;
for though there may be damage sufficient accruing from it, yet, if the fact
be true, it is damnum absque injuria; and where there is no injury, the law
gives no remedy. And this is agreeable to the reasoning of the civil law
t:eum, qui nocentem infamat, non est aequum et bonum ob eam rem
condemnari; delicta enim nocentium nota esse oportet et expedit.

A SECOND way of affecting a man's reputation is by printed or written
libels, pictures, signs, and the like; which set him in an odious or
ridiculous ulight, and thereby diminish his reputation. With regard to
libels in general, there are, as in many other cases, two remedies; one by
indictment and another by action. The former for the public offence; for
every libel has a tendency to break the peace, or provoke others to break it:
which offence is the same whether the matter con-
obtained be true or false; and therefore the defendant, on an indictment for publishing a libel, is not allowed to alledge the truth of it by way of justification. But in the remedy by action on the case, which is to repair the party in damages for the injury done him, the defendant may, as for words spoken, justify the truth of the facts, and shew that the plaintiff has received no injury at all. What was said with regard to words spoken, will also hold in every particular with regard to libels by writing or printing, and the civil actions consequent thereupon: but as to signs or pictures, it seems necessary always to shew, by proper innuendo's and averments of the defendant's meaning, the import and application of the scandal, and that some special damage has followed; otherwise it cannot appear, that such libel by picture was understood to be levelled at the plaintiff, or that it was attended with any actionable consequences.

A THIRD way of destroying or injuring a man's reputation is, by preferring malicious indictments or prosecutions against him; which, under the mask of justice and public spirit, are sometimes made the engines of private spite and enmity. For this however the law has given a very adequate remedy in damages, either by an action of conspiracy, which cannot be brought but against two at the least; or, which is the more usual way, by a special action on the case for a false and malicious prosecution. In order to carry on the former (which gives a recompense for the danger to which the party has been exposed) it is necessary that the plaintiff should obtain a copy of the record of his indictment and acquittal; but, in prosecutions for felony, it is usual to deny a copy of the indictment, where there is any, the least, probable cause to found such prosecution upon. For it would be a very great discouragement to the public justice of the kingdom, if prosecutors, who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictments

w 5 Rep. 125.
miscarried. But an action for a malicious prosecution may be founded on such an indictment whereon no acquittal can be; as if it be rejected by the grand jury, or be coram non judice, or be insufficiently drawn. For it is not the danger of the plaintiff, but the scandal, vexation, and expense, upon which this action is founded b. However, any probable cause for preferring it is sufficient to justify the defendant.

II. WE are next to consider the violation of the right of personal liberty. This is effected by the injury of false imprisonment, for which the law has not only decreed a punishment, as a heinous public crime, but has also given a private reparation to the party; as well by removing the actual confinement for the present, as, after it is over, by subjecting the wrongdoer to a civil action, on account of the damage sustained by the loss of time and liberty.

TO constitute the injury of false imprisonment there are two points requisite: 1. The detention of the person; and, 2. The unlawfulness of such detention. Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets c. Unlawful, or false, imprisonment consists in such confinement or detention without sufficient authority: which authority may arise either from some process from the courts of justice; or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment d; or from some other special cause warranted, for the necessity of the thing, either by 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 apprehending of wagoners for misbehaviour in the public service, or the apprehending of wagoners for misbehaviour in the public highways e. False imprisonment also may arise by executing a lawful warrant or process at an unlaw-
ful time, as on a sunday; or in a place privileged from arrests, as in the
verge of the king's court. This is the injury. Let us next see the remedy:
which is of two sorts; the one removing the injury, the other making
satisfaction for it.

THE means of removing the actual injury of false imprisonment, are
fourfold. 1. By writ of mainprize. 2. By writ de odio et atia. 3. by writ de
hominreplegiando. 4. By writ of habeas corpus.

1. THE writ of mainprize, manucaptio, is a writ directed to the sheriff,
(either generally, when any man is imprisoned for a bailable offence, and
bail hath been refused; or specially, when the offence or cause of
commitment is not properly bailable below) commanding him to take
sureties for the prisoner's appearance, usually called mainpernors, and to
set him at large. Mainpernors differ from bail, in that a man's bail may
imprison or surrender him up before the stipulated day of appearance;
main-pernor can do neither, but are barely sureties for his appearance at
the day: bail are only sureties, that the party be answerable for the special
matter for which they stipulate; main-pernors are bound to produce him
to answer all charge whatsoever.

2. THE writ de odio et atia was anciently used to be directed to the sheriff,
commanding him to enquire whether a prisoner charged with murder was
committed upon just cause of suspicion, or merely propter odium et atiam,
for hatred and ill-will; and, if upon the inquisition due cause of suspicion
did not appear, then there issued another writ for the sheriff to admit him
to bail. This writ, according to Braction i, ought not to be denied to any
man; it being expressly ordered to be made out gratis, without any denial,
by magna carta, c. 26. and statute Westm. 2.

f Stat. 29 Car. II. c. 7.
g F. N. B. 250. 1 Hal. P. C. 141. Coke on bail and mainpr. Ch. 10.
h Co. ibid. ch. 3.
i l. 3. tr. 2. c. 8.

13 Edw. I. c. 29. But the statute of Glocester, 6 Edw. I. c. 9. restrained it in
the case of killing by misadventure or self-defence, and the statute 28 Edw.
III. c. 9. abolished it in all cases whatsoever: but as the statute 42 Edw.
III. c. 1. repealed all statutes then in being, contrary to the great charter, sir Edward Coke is of opinion k that the writ de otio et atia was thereby revived.

3. THE writ de homine replegiando l lies to replevy a man out of prison, or out of the custody of any private person, (in the same manner that chattels taken in distress may be replevied, of which in the next chapter) upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him. And, if the person be conveyed out of the sheriff's jurisdiction, the sheriff may return that he is eloigned, elongatus ; upon which a process issues (called a capias in withernam) to imprison the defendant himself, without bail or mainprize m, till he produces the party. But this writ is guarded with so many exceptions n, that it is not an effectual remedy in numerous instances, especially where the crown is concerned. The incapacity therefore of these three remedies to give complete relief in every case hath almost entirely antiquated them, and hath caused a general recourse to be had, in behalf of persons aggrieved by illegal imprisonment, to

4. THE writ of habeas corpus, the most celebrated writ in the English law. Of this there are various kinds made use of by the courts at Westminster, for removing prisoners from one court into another for the more easy administration of justice. Such is the habeas corpus ad respondendum, when a man hath a cause of action against one who is confined by the process of some inferior court ; in order to remove the prisoner, and charge him with

k 2 Inst. 43. 55. 315.
l F. N. B. 66.
m Raym. 474.
n Nisi captus eft per speciale praeceptum nostrum, vel capitalis justifiarii noftri, vel pro morte hominus, vel pro forefiet nostra, vel pro aliquo alio retto, quare secundum confuctudinem Angliae non fint replegiabilis. (Regiftr. 77.)

this new action in the courts above o. Such is that ad satisfaciendum, when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution p. Such also are those ad prosequendum, testificandum, deliberandum, deliberandum, & c ; which issue when it is
necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed. Such is, lastly the common writ ad faciendum et recipiendum, which issues out of any of the courts of Westminster-hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer (whence the writ is frequently denominated an habeas corpus cum causa) to do and receive whatsoever the king's court shall consider in that behalf. This is a writ grantable of common right, without any motion in court q; and it instantly supersedes all proceedings in the court below. But, in order to prevent the surreptitious discharge of prisoners, it is ordered by statute 1 & 2 P. & M. c. 13. that no habeas corpus shall issue to remove any prisoner out of any gaol, unless signed by some judge of the court out of which it is awarded. And, to avoid vexatious delays by removal of frivolous causes, it is enacted by statute 21 Jac. I. c. 23. that, where the judge of an inferior court of record is a barrister of three years standing, no cause shall be removed from thence by habeas corpus or other writ, after issue or demurrer deliberately joined: that no cause, if once remanded to the inferior court by writ of procedendo or otherwise, shall ever afterwards be again removed: and that no cause shall be removed at all, if the debt or damages laid in the declaration do not amount to the sum of five pounds. But an expedient r having been found out to elude the latter branch of the statute, by procuring a nominal plaintiff to bring another action for five pounds or upwards, (and then by the course of the court

o 2 Mod. 198.
p 2 Lilly prac. Reg. 4.
q 2 Mod. 306.
r Bohun instituted. Legal. 85. edit. 1708.

the habeas corpus removed both actions together) it is therefore enacted by statute 12 Geo. I. c. 29. that the inferior court may proceed in such actions as are under the value of five pounds, notwithstanding other actions may be brought against the same defendant to a greater amount.

BUT the great and efficacious writ in all manner of illegal confinement, is that of habeas corpus ad subjiciendum; directed to the person detaining another; and commanding him to produce the body of the prisoner with the day and cause of his caption and detention, ad faciendum,
subjiciendum, et recipiendum, to do, submit to, and receive, whatsoever the judge or court awarding such writ shall consider in that behalf. This is a high prerogative writ, and therefore by the common law issuing out of the court of king's bench not only in term-time, but also during the vacation, by a fiat from the chief justice or any other of the judges, and running into all parts of the king's dominions: for the king is at all times intitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted. If it issues in vacation, it is usually returnable before the judge himself who awarded it, and he proceeds by himself thereon; unless the term should intervene, and then it may be returned in court. Indeed, if the party were privileged in the courts of common pleas and exchequer, as being an officer or suitor of the court, an habeas corpus ad subjiciendum might also have been awarded from thence: and, if the cause of imprisonment were palpably illegal, they might have discharged him; but, if he were committed for any criminal matter, they could only have remanded him, or taken bail for his appearance in the court of king's bench; which occasioned the common pleas to discountenance such applications. It hath also been said, and by very respectable authorities, that the like habeas corpus may issue out of the court of chancery in vacation: but, upon the famous application to lord Nottingham by Jenks, notwithstanding the most diligent searches, no precedent could be found where the chancellor had issued such a writ in vacation, and therefore his lordship refused it.

IN the court of king's bench it was, and is still, necessary to apply for it by motion to the court, as in the case of all other prerogative writs.
(certiorari, prohibition, mandamus, & c) which do not issue as of mere course, without shewing some probable cause why the extraordinary power of the crown is called in to the party's assistance. For, as was argued by lord chief justice Vaughan e, it is granted on motion, because it cannot be had of course; and there is therefore no necessity to grant it: for the court ought to be satisfied that the party hath a probable cause to be delivered. And this seems the more reasonable, because (when once granted) the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner f. So that, if it issued of mere course, without shewing to the court or judge some reasonable ground for awarding it, a traitor or felon under sentence of death, a soldier or mariner in the king's service, a wife, a child, a relation, or a domestic, confined for insanity or other prudential reasons, might obtain a temporary enlargement by suing out an habeas corpus, though sure to be remanded as soon as brought up to the court. And therefore sir Edward Coke, when chief justice, did not scruple in 13 Jac. I. to deny a habeas corpus to one confined by the court of admiralty for piracy; there appearing, upon his own shewing, sufficient grounds to confine him g. On the other hand, if a probable ground be shewn, that the party is imprisoned without just cause, and therefore hath a right to be delivered, the writ of habeas corpus is then a writ of right, which may not be denied, but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained, though it be by the command of the king, the privy council, or any other i.

IN a former part of these commentaries k we expatiated at large on the personal liberty of the subject. It was shewn to be a natural inherent right, which could not be surrendered or forfeited unless by the commission of some great and atrocious crime, nor ought to be abridged in any case without the special permission of law. A doctrine co-eval with the first
rudiments of the English constitution; and handed down to us from our Saxon ancestors, notwithstanding all their struggles with the Danes, and the violence of the Norman conquest: asserted afterwards and confirmed by the conqueror himself and his descendants: and though sometimes a little impaired by the ferocity of the times, and the occasional despotism of jealous or usurping princes, yet established on the firmest basis by the provisions of magna carta, and a long succession of statutes enacted under Edward III. To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty, by rendering its protection impossible: but the glory of the English law consist in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This induces an absolute necessity of expressing upon every commitment the reason for which it is made; that the court upon an habeas corpus may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.

h 2 Inst. 615.  
i Com. journ. 1 Apr. 1628.  
k Book I. ch. 1.

AND yet, early in the reign of Charles I, the court of king's bench, relying on some arbitrary precedent (and those perhaps misunderstood) determined lthat they could not upon an habeas corpus either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council. This drew on a parliamentary enquiry, and produced the petition of right, 3 Car. I. which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when, in the following year, Mr Selden and others were committed by the lords of the council, in pursuance of his majesty's special command, under a general charge of notable contempts and stirring up sedition against the king and government,? the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge was bailable. And, when at length they agreed that it was, they however annexed a condition of finding sureties for the good behaviour, which still protracted their imprisonment; the chief justice, sir Nicholas Hyde, at the same time declaring m, that if they were again remanded for that cause, perhaps the court would not afterwards grant a habeas corpus, being
already made acquainted with the cause of the imprisonment. But this was
heard with indignation and astonishment by every lawyer present;
according to Mr Selden's own account of the matter, whose resentment
was not cooled at the distance of four and twenty years n.

THESE pitiful evasions gave rise to the statute 16 Car. I. c. 10. 8. whereby
it was enacted, that if any person be committed by the king himself in
person, or by his privy council, or by any

l State Tr. Vii. 136.
m Ibid. 240.
n Efiam mdicum tone primaries, nisi illud faceremus, referipii illius
forenys, qui libertates personalis omnimodae vindex legitimus eft fere
flous, usum omnimdum palam pronuntia vit (fui femper fimiis) nobis
perpetuo in pofterum denegandum. Quod, ul odioffimum juris
A.D.1653.)

of the members thereof, he shall have granted unto him, without any delay
upon any pretence whatsoever, a writ of habeas corpus, upon demand or
motion made to the court of king's bench or common pleas; who shall
thereupon, within three court days after the return is made, examine and
determine the legality of such commitment, and do what to justice shall
appertain, in delivering, bailing, or remanding such prisoner, Yet still in
the case of Jenks, before alluded to o, who in 1676 was committed by the
king in council for a turbulent speech at Guildhall p, new shists and
devices were made use of to prevent his enlargement by law; the chief
justice (as well as the chancellor) declining to award a writ of habeas
corpus ad subjiciendum in vacation, though at last he thought proper to
award the usual writs ad deliberandum, & c, whereby the prisoner was
discharged at the Old Bailey. Other abuses had also crept into daily
practice, which had in some measure defeated the benefit of this great
constitutional remedy. The party imprisoning was at liberty to delay his
obedience to the first writ, and might wait till a second and a third, called
an alias and a pluries, were issued, before he produced the party: and
many other vexatious shists were practiced to detain state-prisoners in
custody. But whoever will attentively consider the English history may
observe, that the flagrant abuse of any power, by the crown or its minister,
has always been productive of a struggle; which either discovers the
exercise of that power to be contrary to law, or (if legal) restrains it for the
future. This was the case in the present instance. The oppression of an obscure individual gave birth to the famous habeas corpus act, 31 Car. II. c. 2, which is frequently considered as another magna carta q of the kingdom; and by consequence has also in subsequent times reduced the method of proceeding on these writs (though not within the reach of that statute, but issuing merely at the common law) to the true standard of law and liberty.

o pag. 132.
p State Trials. VII. 471.
q See book I. ch. 1.

`THE statute itself enacts, 1. That the writ shall be returned and the prisoner brought up within a limited time according to the distance, not exceeding in any case twenty days. 2. That such writs shall be endorsed as granted in pursuance of this act, and signed by the person awarding them r. 3. That on complaint and request in writing by or on behalf of any person committed and charged with any crime (unless committed for treason or felony expressed in the warrant, or for suspicion of the same, or as accessory thereto before the fact, or convicted or charged in execution by legal process) the lord chancellor or any of the twelve judges, in vacation, upon viewing a copy of the warrant or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a habeas corpus for such prisoner, returnable immediately before himself or any other of the judges; and upon the return made shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature. 4. That officers and keepers neglecting to make due returns, or not delivering to the prisoner of his agent within six hours after demand a copy of the warrant of commitment, or shisting the custody of a prisoner from one to another, without sufficient reason or authority (specified in the act) shall for the first offence forfeit 100 l. and for the second offence 200 l. to the party grieved, and be disabled to hold his office. 5. That no person, once delivered by habeas corpus, shall be recommitted for the same offence on penalty of 500 l. 6. That every person committed for treason or felony shall, if he requires it the first week of the next term or the first day of the next session of oyer and terminer, be indicted in that term or session, or else admitted to bail; unless the king's witnesses cannot be produced at that time: and if acquitted, or if not indicted and tried in the second term or feffio, he shall be discharged from his
imprisonment for such imputed offence: but that no person, after the assises shall be

These two clauses seem to be transposed, and should properly be placed after the following provisions.

opened for the county in which he is detained, shall be removed by habeas corpus, till after the assises are ended; but shall be left to the justice of the judges of assise. 7. That any such prisoner may move for and obtain his habeas corpus, as well out of the chancery or exchequer, as out of the king's bench or common pleas; and the lord chancellor or judges denying the same, on sight of the warrant or oath that the same is refused, forfeit severally to the party grieved the sum of 500 l. 8. That this writ of habeas corpus shall run into the counties palatine, cinque ports, and other privileged places, and the islands of Jersey and Guernsey. 9. That no inhabitant of England (except persons contracting, or convicts praying, to be transported; or having committed some capital offence in the place to which they are sent) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the king's dominions: on pain that the party committing, his advisors, aiders, and assistants shall forfeit to the party grieved a sum not less than 500 l. to be recovered with treble costs; shall be be disabled to bear any office of trust or profit; shall incur the penalties of praemunire; and shall be incapable of the king's pardon.

THIS is the substance of that great and important statute: which extends (we may observe) only to the case of commitments for such criminal charge, as can produce no inconvenience to public justice by a temporary enlargement of the prisoner: all other cases of unjust imprisonment being left to the habeas corpus at common law. But even upon writs at the common law it is now expected by the court, agreeable to ancient precedents s and the spirit of the act of parliament, that the writ should be immediately obeyed, without waiting for any alias or pluries; otherwise an attachment will issue. By which admirable regulations, judicial as well as parliamentary, the remedy is now complete for removing the injury of unjust and illegal confinement. A remedy the more necessary, because the oppression does not always arise from the ill-nature, but sometimes from the mere inattention, of govern-

s 4 Burr. 856.
ment. For it frequently happens in foreign countries, (and has happened in England during temporary suspensions t of the statute) that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten.

THE satisfactory remedy for this injury of false imprisonment, is by an action of trespass, vi et armis, usually called an action of false imprisonment; which is generally, and almost unavoidably, accompanied with a charge of assault and battery also: and therein the party shall recover damages for the injury he has received; and also the defendant is, as for all other injuries committed with force, or vi et armis, liable to pay a fine to the king for the violation of the public peace.

III. WITH regard to the third absolute right of individuals, or that of private property, though the enjoyment of it, when acquired, is strictly a personal right; yet as its nature and original, and the means of its acquisition or loss, fell more directly under our second general division, of the rights of things; and as, of course, the wrongs that affect these rights must be referred to the corresponding division in the present book of our commentaries; I conceive it will be more commodious and easy to consider together, rather than in a separate view, the injuries that may be offered to the enjoyment, as well as to the rights, of property. And therefore I shall here conclude the head of injuries affecting the absolute rights of individuals.

WE are next to contemplate those which affect their relative rights; or such as are incident to persons considered as members of society, and connected to each other by various ties and relations; and, in particular, such injuries as may be done to persons under the four following relations; husband and wife, parent and child, guardian and ward, master and servant.


I. INJURIES that may be offered to a person, considered as a husband, are principally three: abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her. 1. As to the first sort, abduction or taking her away, this may either be by fraud and persuasion, or open violence: though the law in both cases
supposes force and constraint, the wife having no power to consent; and therefore gives a remedy by writ of ravishment, or action of trespass vi et armis, de uxorae rapta et abducta u. This action lay at the common law; and thereby the husband shall recover, not the possession of his wife, but damages for taking her away: and by statute Westm. 1. 3 Edw. I. c. 13. the offender shall also be imprisoned two years, and be fined at the pleasure of the king. Both the king and the husband may therefore have this action/x: and the husband is also intitled to recover damages in an action on the case against such as persuade and intice the wife to live separate from him without a sufficient causey. The old law was so strict in this point, that, if one's wife missed her way upon the road, it was not lawful for another man to take her into his house, unless she was benighted and in danger of being lost or drowned/z: but a stranger might carry her behind him on horseback to market, to a justice of the peace for a warrant against her husband, or to the spiritual court to sue for a divorce.

2. Adultery, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury, (and surely there can be no greater) the law gives a satisfaction to the husband for it by an action of trespass vi et armis against the adulterer, wherein the damages recovered are usually very large and exemplary. But these are properly increased or diminished by circumstances b; as the rank and fortune of the plaintiff and defendant; the relation or connection between them; the seduction or otherwise of the wife, founded on her previous behaviour and character; and the husband's obligation by settlement or otherwise to provide for those children, which he cannot but suspect to be spurious.

3. The third injury is that of beating a man's wife or otherwise ill using her; for which, if it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages, by action of trespass vi et armis, which must be brought in the names of the husband and wife jointly: but if the beating or other
maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a separate remedy by an action upon the case for this ill-usage, per quod consortium amifit, in which he shall recover a satisfaction in damages c.

II. INJURIES that may be offered to a person considered in the relation of a parent were likewise of two kinds ; 1. Abduction, or taking his children away ; and 2. Marrying his son and heir without the father's consent, whereby during the continuance of the military tenures he lost the value of his marriage. But this last injury is now ceased, together with the right upon which it was grounded : for, the father being no longer entitled to the value of the marriage, the marrying his heir does him no sort of injury, for which a civil action will lie. As to the other, of abduction or taking away the children from the father, that is also a matter of doubt whether it be a civil injury, or no ; for, before the abolition of the tenure in chivalry, it was equally a doubt whether an action would lie for taking and carrying away any other child besides the heir : some holding that it would not, upon the supposition that the only ground or cause of action was losing the value of the heir's marriage ; and others holding that an action would lie for taking away any of the children, for that the parent hath an interest in them all, to provide for their education d. If therefore before the abolition of these tenures it was an injury to the father to take away the rest of his children, as

d Cro. Eliz. 770.

well as his heir, (as I am inclined to think it was) it still remains an injury, and is remediable by a writ of ravishment, or, action of trespass vi et armis, de filio, vel filia, rapto vel abducto e ; in the same manner as the husband may have it, on account of the abduction of his wife.

III. OF a similar nature to the last is the relation of guardian and ward ; and the like actions mutatis mutandis, as are given to fathers, the guardian also has for recovery of damages, when his ward is stolen or ravished away from him f. And though guardianship in chivalry is now totally abolished, which was the only beneficial kind of guardianship to the guardian, yet the guardian in focage was always g and is still intitled to an action of ravishment, if his ward or pupil be taken from him : but then he must
account to his pupil for the damages which he so recovers h. And, as
guardian in focage was also intitled at common law to a writ of right of
ward, de custodia terrae et haercdis, in order to recover the possession and
custody of the infant i, so I apprehend that he is still intitled to sue out this
antiquated writ. But a more speedy and summary method of redressing all
complaints relative to wards and guardians hath of late obtained, by an
application to the court of chancery; which is the supreme guardian, and
has the superintendent jurisdiction, of all the infants in the kingdom. And
it is expressly provided by statute 12 Car. II. c. 24. that testamentary
guardians may maintain an action of ravishment or trespass, for recovery
of any of their wards, and also for damages to be applied to the use and
benefit of the infants k.

IV. To the relation between master and servant, and the rights accruing
therefrom, there are two species of injuries incident. The one is, retaining
a man's hired servant before his time is expired; the other, beating or
confining him in such a manner

e F. N. B. 90.
f Ibid. 139.
g Ibid.
h Hale on F. N. B. 139.
i F. N. B. Ibid.
k 2 P. Wms. 108.

that he is not able to perform his work. As to the first; the retaining
another person's servant during the time he has agreed to serve his
present master; this, as it is an ungentlemanlike, so it is also an illegal act.
For every master has by his contract purchased for a valuable
consideration the service of his domestics for a limited time: the
inveigling or hiring his servant, which induces a breach of this contract, is
therefore an injury to the master; and for that injury the law has given
him a remedy by a special action on the case: and he may also have an
action against the servant for the non-performance of his agreement l. But,
if the new master were not apprized of the former contract, no action lies
against him m, unless he refuse to restore the servant upon demand. The
other point of injury, is that of beating, confining, or disabling a man's
servant, which depends upon the same principle as the last; viz. the
property which the master has by his contract acquired in the labour of the
servant. In this case, besides the remedy of an action of battery or
imprisonment, which the servant himself as an individual may have against the aggressor, the master also, as a recompense for his immediate loss, may maintain an action of trespass, vi et armis; in which he must allege and prove the special damage he has sustained by the beating of his servant, per quod servitium amifit n; and then the jury will make him a proportionable pecuniary satisfaction. A similar practice to which, we find also to have obtained among the Athenians; where masters were entitled to an action against such as beat or ill treated their servants o.

WE may observe that, in these relative injuries, notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this: that the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband, for she hath no separate interest in any thing during her coverture. The child hath no property in his father or guardian; as they have in him, for the sake of giving him education and nurture. Yet the wife or the child, if the husband or parent be slain, have a peculiar species of criminal prosecution allowed them, in the nature of a civil satisfaction; which is called an appeal, and which will be considered in the next book. And so the servant, whose master is disabled, does not thereby lose his maintenance or wages. He had no property in his master; and, if he receives his part of the stipulated contract, he suffers no injury, and is therefore intitled to no action, for any battery or imprisonment which such master may happen to endure.

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CHAPTER THE NINTH.
OF INJURIES TO PERSONAL PROPERTY.
IN the preceding chapter we considered the wrongs or injuries that affected the rights of persons, either considered as individuals, or as related to each other; and are at present to enter upon the discussion of such injuries as affect the rights of property, together with the remedies which the law has given to repair or redress them.

AND here again we must follow our former division of property into personal and real: personal, which consists in goods, money, and all other moveable chattels, and things thereunto incident; a property, which may attend a man's person wherever he goes, and from thence receives its denomination: and real property, which consists of such things as are permanent, fixed, and immoveable; as lands, tenements, and hereditaments of all kinds, which are not annexed to the person, nor can be moved from the place in which they subsist.

FIRST then we are to consider the injuries that may be offered to the rights of personal property; and, of these, first the rights of personal property in possession, and then those that are in action only.

I. THE rights of personal property in possession are liable to two species of injuries: the amotion or deprivation of that possession; and the abuse or damage of the chattels, while the possession continues in the legal owner. The former, or deprivation of possession, is also divisible into two branches; the unjust and unlawful taking them away; and the unjust detaining them, though the original taking might be lawful.

1. AND first of an unlawful taking. The right of property in all external things being solely acquired by occupancy, as has been formerly stated, and preserved and transferred by grants, deeds, and wills, which are a continuation of that occupancy; it follows as a necessary consequence, that when I once have gained a rightful possession of any goods or chattels, either by fraud or force dispossesses me of them is guilty of a transgression against the law of society, which is a kind of secondary law of nature. For there must be an end of all social commerce between man and man, unless private possessions be secured from unjust invasions: and, if an acquisition of goods by either force or fraud were allowed to be a sufficient
title, all property would soon be confined to the most strong, or the most cunning; and the weak and simpleminded part of mankind (which is by far the most numerous division) could never be secure of their possessions.

The wrongful taking of goods being thus most clearly an injury, the next consideration is, what remedy the law of England has given for it. And this is, in the first place, the restitution of the goods themselves so wrongfully taken, with damages for the loss sustained by such unjust invasion; which is effected by action of replevin: an institution, which the mirror c ascribes to Glanvil, chief justice to king Henry the second. This obtains only in one instance of an unlawful taking, that of a wrongful distress; and this and the action of detinue (of which I shall presently say more) are almost the only actions, in which the actual specific possession of the identical personal chattel is restored to the proper owner. For things personal are looked upon by the law as of a nature so transitory and perishable, that it is for the most part impossible either to ascertain their identity, or to restore them in the same condition as when they came to the hands of the wrongful possessor. And, since it is a maxim that lex neminem cogit ad vana, feu impossibilia, it therefore contents itself in general with restoring, not the thing itself, but a pecuniary equivalent to the party injured; by giving him a satisfaction in damages. But in the case of a distress, the goods are from the first taking in the custody of the law, and not merely in that of the distreinor; and therefore they may not only be identified, but also restored to the first possessor, without any material change in their condition. And, being thus in the custody of the law, the taking them back by force is looked upon as an atrocious injury, and denominated a refocus, for which the distreinor has a remedy in damages, either by writ of refocus d, in case they were going to the pound, or by writ de parco fracto, or pound-breath e, in case they were actually impounded. He may also at his option bring an action on the case for this injury: and shall therein, if the distress were taken for rent, recover treble damages f. The term, refocus, is likewise applied to the forcible delivery so a defendant, when arrested, from the officer who is carrying him to prison. In which circumstances the plaintiff has a similar remedy by action on the case, or of refocus g: or, if the sheriff makes a return of such refocus to the
court out of which the process issued, the rescuer will be punished by attachment h.

d F. N. B. 101.
e Ibid. 100.
f Stat. 2 W. & M. Seff. 1. c. 5.
g 6 Mod. 211.

AN action of replevin, the regular way of contesting the validity of the transaction, is founded, I said, upon a distress taken wrongfully and without sufficient cause: being a re-delivery of the pledge i, or thing taken in distress, to the owner; upon his giving security to try the right of the distress, and to restore it if the right be adjudged against him k. And formerly, when the party distreined upon intended to dispute the right of the distress, he had no other process by the old common law than by a writ of replevin, replegiari facias l; which issued out of chancery, commanding the sheriff to deliver the distress to the owner, and afterwards to do justice in respect of the matter in dispute in his own county-court. But this being a tedious method of proceeding, the beasts or other goods were long detained from the owner, to his great loss and damage m. For which reason the statute of Marlbridge n directs, that (without suing a writ out of the chancery) the sheriff, immediately upon complaint to him made, shall proceed to replevy the goods. And, for the greater ease of the parties, it is farther provided by statute 1 P. & M. c. 12. that the sheriff shall make at least four deputies in each county, for the sole purpose of making replevins. Upon application therefore, either to the sheriff, or one of his said deputies, security is to be given, in pursuance of the statute of Westm. 2. 13 Edw. I. c. 2. 1. That the party replevying will pursue his action against the distreinor, for which purpose he puts in plegios de prosequendo, or pledges to prosecute; and, 2. That if the right be determined against him, he will return the distress again; for which purpose he is also bound to find plegios de retorno habendo. Besides these pledges, which are merely discretionary in the sheriff, the statute 11 Geo. II. c. 19. requires 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 distreined; which bond shall be assigned to the avowant of person making cognizance

i See pag. 13.
k Co. Litt. 145.
on request made to the sheriff; and, if forfeited, may be sued in the name of the assignee. And certainly, as the end of all distresses is only to compel the party distreined upon to satisfy the debt or duty owing from him, this end is as well answered by such sufficient sureties as by retaining the very distress, which might frequently occasion great inconvenience to the owner; and that the law never wantonly inflicts. 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 distreined upon; unless the distreinor claims a property in the goods so taken. For if, by this method of distress, the distreinor happens to come again into possession of his own property in goods which before he had lost, the law allows him to keep them, without any reference to the manner by which he thus has regained possession; being a kind of personal remitter. If therefore the distreinor claims any such property, the party replevying must sue out a writ de proprietate probanda, in which the sheriff is to try, by an inquest, in whom the property previous to the distress subsisted. And if it be found to be in the distreinor, the sheriff can proceed no farther; but must return the claim of property to the court of king’s bench or common pleas, to be the farther prosecuted, if thought advisable, and there finally determined.

BUT if no claim of property be put in, or if (upon trial) the sheriff’s inquest determines it against the distreinor; then the sheriff is to replevy the goods (making use of even force, if the distreinor 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, elongata, 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; a term which signifies a

o See pag. 19.
p Finch. L. 316.
q Co. Litt. 145. Finch. L. 450.
r Inst. 193.
second or reciprocal distress s, in lieu of the first which was eloigned. It is therefore a command to the sheriff to take other goods, of the distreinor, in lieu of the distress formerly taken, and eloigned, or withheld from the owner t. So that here is now distress against distress; one being taken to answer the other, by way of reprisal u, and as a punishment for the illegal behaviour of the original distreinor. For which reason goods taken in withernam cannot be replevied, till the original distress is forth-coming w.

BUT, in common cases, the goods are delivered back to the party replevying, who is then bound to bring his action of replevin; which may be prosecuted in the county court, be the distress of what value it may x. But either party may remove it to the superior courts; the plaintiff at pleasure, the defendant upon reasonable cause/y: and also if in the course of proceeding any right of freehold comes in question, the sheriff can proceed no farther/z; so that it is usual to carry it up in the first instance to the courts of Westminster-hall. Upon this action brought, the distreinor, who is now the defendant, makes avowry; that is, he avows taking the distress in his own right, or the right of his wife a; and sets forth the reason of it, as for rent arrere, 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

s Smith's commonw. b.3.c.10. 2Inst. 141.
t F. N. B. 69. 73.
u In the old northern languages the word withernam is used as equivalent to reprisals. (Stiernhook, de jure Sueon. l. 1. c. 10)
w Raym. 475. The substance of this rule composed the terms of that famous question, with which sir Thomas More (when a student on his travels) is said to have puzzled a pragmatical professor in the university of Bruges in Flanders; who gave a universal challenge to dispute with any person in any science: in omni feibili, et de quolibet ente. Upon which Mr More sent him this question, utrum averia carucae, capta in vetito namio, sint irreplegibili; whether beasts of the plough, taken in withernam, are incapable of being replevied. (Hoddefd. c. 5.)
x 2 Inst. 139.
y F. N. B. 69. 70.
Z Finch. L. 317.
a 2 Saund. 195.
to distrein: 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 goods back into his
own possession, and shall keep them, and moreover recover damages b.
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 distreined 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-arreere, 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 c: but otherwise, if, pending a replevin for a
former distress, a man distreins again for the same rent or service, then
the party is not driven to his action of replevin, but shall have writ of
recaption d, and recover damages for the defendant's contempt of the
process of the law.

IN like manner, other remedies for other unlawful taking of a man's goods
consist only in recovering a satisfaction in damages. As if a man take the
goods of another out of his actual or virtual possession, without having a
lawful title so to do, it is an injury; which, though it doth not amount to
felony unless it be done animo furandi, is nevertheless a transgression, for
which an action of trespass vi et armis will lie; wherein the plaintiff shall
not recover the thing itself, but only damages for the loss of it. Or, if
committed without force, the party may, at his choice have another
remedy in damages by action of trover and conversion, of which I shall
presently say more.

2. DEPRIVATION of possession may also be by an unjust detainer of
another's goods, though the original taking was lawful.

b F. N. B. 69.
c Stat. 17 Car. II. c. 7.
d F. N. B. 71.

As if I distrein another's cattle damage-feasant, and he tenders me
sufficient amends; now, though the original taking was lawful, my
subsequent detainment of them after tender of amends is wrongful, and he
shall have an action of replevin against me to recover them e: in which he
shall recover damages only for the detention and not for the caption, because the original taking was lawful. Or, if I lend a man a horse, and he afterwards refuses to restore it, this injury consists in the detaining, and not in the original taking, and the regular method for me to recover possession is by action of detinue. In this action, of detinue, it is necessary to ascertain the thing detained, in such manner as that it may be specifically known and recovered. Therefore it cannot be brought for money, corn, or the like: for that cannot be known from other money or corn; unless it be in a bag or a sack, for then it may be distinguishably marked. In order therefore to ground an action of detinue, which is only for the detaining, these points are necessary: 1. That the defendant came lawfully by the goods, as either by delivery to him, or finding them; 2. That the plaintiff have a property; 3. That the goods themselves be of some value; and 4. That they be ascertained in point of identity. But there is one disadvantage which attends this action; viz. that the defendant is herein permitted to wage his law, that is, to exculpate himself by oath, and thereby defeat the plaintiff of his remedy: which privilege is grounded on the confidence originally reposed in the bailee by the bailor, in the borrower by the lender, and the like; from whence arose a strong presumptive evidence, that in the plaintiff's own opinion the defendant was worthy of credit. But for this reason the action itself is of late much disused, and has given place to the action of trover.

THIS action, of trover and conversion, was in its original an action of trespass upon the case, for recovery of damages against such person as had found another's goods, and refused to deliver

e F. N. B. 69.
f Ibid. 138.
g Co. Litt. 286.
h Ibid. 295.

them on demand, but converted them to his own use; from which finding and converting it is called an action of trover and conversion. The freedom of this action from wager of law, and the less degree of certainty requisite in describing the goods, gave it so considerable an advantage over the action of detinue, that by a fiction of law actions of trover were at length permitted to be brought against any man, who had in his possession by any means whatsoever the personal goods of another, and sold them or used them without the consent of the owner, or refused to deliver them
when demanded. The injury lies in the conversion: for any man may take
the goods of another into possession, if he finds them; but no finder is
allowed to acquire a property therein, unless the owner be for ever
unknown k: and therefore he must not convert them to his own use, which
the law presumes him to do, if he refuses to restore them to the owner; for
which reason such refusal alone is, prima facie, sufficient evidence of a
conversion l. The fact of the finding, or trover, is therefore now totally
immaterial: for the plaintiff needs only to suggest (as words of form) that
he lost such goods, and that the defendant found them; and, if he proves
that the goods are his property, and that the defendant had them in his
possession, it is sufficient. But a conversion must be fully proved: and
then in this action the plaintiff shall recover damages, equal to the value of
the thing converted, but not the thing itself; which nothing will recover
but an action of detinue or replevin.

As to the damage that may be offered to things personal, while in the
possession of the owner, as hunting a man’s deer, shooting his dogs,
poisoning his cattle, or in any wise taking from the value of any of his
chattels, or making them in a worse condition than before, these are
injuries too obvious to need explication. I have only therefore to mention
the remedies given by the law to redress them, which are in two shapes:
by action of trespass wi et armis, where the act is in itself immediately in-

i Salk. 654.
l 10 Rep. 56.

jurious to another's property, and therefore necessarily accompanied with
some degree of force; and by special action on the case, where the act is in
itself indifferent, and the injury only consequential, and therefore arising
without any breach of the peace. In both of which suits the plaintiff shall
recover damages, in proportion to the injury which he proves that his
property has sustained. And it is not material whether the damage be done
by the defendant himself, or his servants by his direction; for the action
will lie against the master as well as the servant m. And, if a man keeps a
dog or other brute animal, used to do mischief, as by worrying sheep, or
the like, the owner must answer for the consequence, if he knows of such
evil habit n.
II. HITHERTO of injuries affecting the right of things personal, in possession. We are next to consider those which regard things in action only; or such rights as are founded on, and arise from contracts; the nature and several divisions of which were explained in the preceding volume. The violation, or non-performance, of these contracts might be extended into as great a variety of wrongs, as the rights which we then considered: but I shall now endeavour to reduce them into a narrow compass, by here making only a twosold division of contracts; viz. contracts express, and contracts implied; and considering the injuries that arise from the violation of each, and their respective remedies.

EXPRESS contracts include three distinct species, debts, convenants, and promises.

1. THE legal acceptation of debt is, a sum of money due by certain and express agreement. As, by a bond for a determinate sum; a bill or note; a special bargain; or a rent reserved on a lease; where the quantity is fixed and unalterable, and does not depend upon any after-calculation to settle it. The non-payment

\[ \text{Noy's Max. c. 44.} \]
\[ \text{Con. Car 254. 487.} \]
\[ \text{See book II. ch. 30.} \]

of these is an injury, for which the proper remedy is by action of debt, to compel the performance of the contract and recover the specifical sum due. This is the shortest and surest remedy; particularly where the debt arises upon a specialty, that is, upon a deed or instrument under seal. So also, if I verbally agree to pay a man a certain price for a certain parcel of goods, and fail in the performance, an action of debt lies against me; for this is also a determinate contract: but if I agree for no settled price, I am not liable to an action of debt, but a special action on the case, according to the nature of my contract. And indeed actions of debt are now seldom brought but upon special contracts under seal: wherein the sum due is clearly and precisely expressed: for in case of such an action upon a simple contract, the plaintiff labours under two difficulties. First, the defendant has here the same advantage as in an action of detinue, that of waging his law, or purging himself of the debt the plaintiff must recover the whole debt he claims, or nothing at all. For the debt is one single cause of action, fixed and determined; and which therefore, if the proof varies
from the claim, cannot be looked upon as the same contract whereof the performance is sued for. If therefore I bring an action of debt for 30 l, I am not at liberty to prove a debt of 20 l. and recover a verdict thereon s; any more than if I bring an action of detinue for a horse, I can thereby recover an ox. For I fail in the proof of that contract, which my action or complaint has alleged to be specific, express, and determinate. But in an action on the case, on what is called an indebitatus assumpsit, which is not brought to compel a specific performance of the contract, but to recover damages for its non-performance, the implied assumpsit, and consequently the damages for the breach of it, are in their nature indeterminate; and will therefore adapt and proportion themselves to the truth of the case which shall be proved, without being confined to the precise demand stated in the declaration. For if any debt be proved,

p F. N. B. 119.
q See appendix, No III. N.
r 4 Rep. 94.
s Dyer. 219.

however less than the sum demanded, the law will raise a promise pro tanto, and the damages will of course be proportioned to the actual debt. So that I may declare that the defendant, being indebted to me in 30 l, undertook or promised to pay it, but failed; and lay my damages arising from such failure at what sum I please: and the jury will, according to the nature of my proof, allow me either the whole in damages, or any inferior sum.

THE form of the writ of debt is sometimes in the debet and detinet, and sometimes in the detinet only: that is, the writ states, either that the defendant owes and unjustly detains the debt or thing in question, or only that he unjustly detains it. It is brought in the debet as well as detinet, when sued by one of the original contracting parties who personally gave the credit, against the other who personally incurred the debt, as by the obligee against the obligor, the landlord against the tenant, & c. But, if it be brought by or against an executor for a duty due to or from the testator, this, not being his own debt, shall be sued for in the detinet only t. So also if the action be for goods, for corn, or an horse, the writ shall be in the detinet only; for nothing but a sum of money, for which I have personally contracted, is properly considered as my debt. And indeed a writ of debt in the detinet only, is neither more nor less than a mere writ of detinue: it
might therefore perhaps be more easy (instead of distinguishing between the debet and detinet, and the detinet only, in an action of debt) to say at once that in the one case an action of debt may be had, in the other an action of detinue.

2. A COVENANT also, contained in a deed, to do a direct act or to omit one, is another species of express contracts, the violation or breach of which is a civil injury. As if a man covenants to be at York by such a day, or not to exercise a trade in a particular place, and is not at York at the time appointed, or carries on his trade in the place forbidden, these are direct breaches of his covenant; and may be perhaps greatly to the disadvantage and loss of the covenantee. The remedy for this is by writ of covenant u; which directs the sheriff to command the defendant generally to keep his covenant with the plaintiff (without specifying the nature of the covenant) or shew good cause to the contrary: and if he continues refractory, or the covenant is already so broken that it cannot now be specifically performed, then the subsequent proceedings set forth with precision the covenant, the breach, and the loss which has happened thereby; whereupon the jury will give damages, in proportion to the injury sustained by the plaintiff, and occasioned by such breach of the defendant's contract.

THERE is one species of covenant, of a different nature from the rest; and that is a covenant real, to convey or dispose of lands, which seems to be partly of a personal and partly of a real nature w. For this the remedy is by a special writ of covenant, for a specific performance of the contract, concerning certain lands particularly described in the writ. It therefore directs the sheriff to command the defendant, here called the deforciant, to keep the covenant made between the plaintiff and him concerning the indentical lands in question: and upon this process it is that fines of land are usually levied at common law/x; the plaintiff, or person to whom the fine is levied, bringing a writ of covenant, in which he suggests some agreement to have been made between him and the deforciant, touching those particular lands, for the completion of which he brings this action. And, for the end of this supposed difference, the fine or finalis concordia is made, whereby the deforciant (now called the cognizor) acknowledges the tenements to be the right of the plaintiff, now called the cognizee. And
moreover, as leases for years were formerly considered only as
contracts/for covenants for the enjoyment of the rents and profits, and
not as the conveyance of any real interest in the land, the ancient remedy
for the lessee, if ejected, was by writ of covenant against the lessor, to
recover the term

u F. N. B. 145.
w lial. On F. N. B. 146.
x See book II. ch. 21.
y Ibid. ch. 9.

(if in being) and damages, in case the ouster was committed by the lessor
himself; or, if the term was expired, or the ouster was committed by a
stranger, then to recover damages only z.

3. 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 much as
any covenant; and the breach of it is an equal injury. The remedy indeed is
not exactly the same: since instead of an action of covenant, there only lies
an action upon the case, for what is called the assumpsit or undertaking of
the defendant; the failure of performing which is the wrong or injury done
to the plaintiff, the damages whereof a jury are to estimate and settle. As if
a builder promises, undertakes, or assumes to Caius, that he will build and
cover his house within a time limited, and fails to do it; Caius has an
action on the case against the builder, for this breach of his express
promise, undertaking, or assumpsit; and shall recover a pecuniary
satisfaction for the injury sustained by such delay. So also in the case
before-mentioned, of a debt by simple contract, if the debtor promises to
pay it and does not, this breach of promise entitles the creditor to his
action on the case, instead of being driven to an action of debt. Thus
likewise a promissory note, or note of hand not under seal, to pay money
at a day certain, is an express assumpsit; and the payee at common law, or
by custom and act of parliament the indorsee a, may recover the value of
the note in damages, if it remains unpaid. Some agreements indeed,
though never so expressly made, are deemed of so important a nature, that
they ought not to rest in verbal promise only, which cannot be proved but
by the memory (which sometimes will induce the perjury) of witnesses. To
prevent which, the statute of frauds and perjuries, 29 Car. II. c. 3. enacts,
that in the five following cases no verbal promise shall be sufficient no
ground an action upon, but at the least some note or memorandum of it shall be made in writing, and signed

z Ero. Abr. t. covenant. 33. F. N. B. 145.
a See book II. ch. 30.

by the party to be charged therewith: 1. Where an executor or administrator promises to answer damages out of his own estate. 2. Where a man undertakes to answer for the debt, default, or miscarriage of another. 3. Where any agreement is made, upon consideration of marriage. 4. Where any contract or sale is made of lands, tenements, or hereditaments, or any interest therein. 5. And, lastly, where there is any agreement that is not to be performed within a year from the making thereof. In all these cases a mere verbal assumpsit is void.

FROM these express contracts the transition is easy to those that are only implied by law. Which are such as reason and justice dictate, and which therefore the law presumes that every man has contracted to perform; and, upon this presumption, makes him answerable to such persons, as suffer by his non-performance.

OF this nature are, first, such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party. And thus it is that every person is bound and hath virtually agreed to pay such particular sums of money, as are charged on him by the sentence, or assessed by the interpretation, of the law. For it is part of the original contract, entered into by all mankind who partake the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that state, of which each individual is a member. Whatever therefore the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge. And this implied agreement it is, that gives the plaintiff a right to institute a second action, founded merely on the general contract, in order to recover such damages, or sum of money, as are assessed by the jury and adjudged by the court to be due from the defendant to the plaintiff in any former action. So that if he hath once obtained a judgment against another for a certain sum, and neglects to take out execution thereupon, he may afterwards bring an action of debt upon this judgment b, and shall not be put upon the proof of the original cause of action; but upon shewing the judgment once obtained, still in full force,
and yet unsatisfied, the law immediately implies, that by the original contract of society the defendant hath contracted a debt, and is bound to pay it. This method seems to have been invented, when real actions were more in use than at present, and damages were permitted to be recovered thereon; in order to have the benefit of a writ of capias to take the defendant's body in execution for those damages, which process was allowable in an action of debt (in consequence of the statute 25 Edw. III. c. 17.) but not in an action real. Wherefore, since the disuse of those real actions, actions of debt upon judgment in personal suits have been pretty much discountenanced by the courts, as being generally vexatious and oppressive, by harrassing the defendant with the costs of two actions instead of one.

ON the same principle it is, (of an implied original contract to submit to the rules of the community, whereof we are members) that a forfeiture imposed by the by-laws and private ordinances of a corporation upon any that belong to the body, or an amercement set in a court-leet or court-baron upon any of the suitors to the court (for otherwise it will not be binding c) immediately create a debt in the eye of the law: and such forfeiture or amercement, if unpaid, work an injury to the party or parties intitled to receive it; for which the remedy is by action of debt d.

THE same reason may with equal justice be applied to all penal statutes, that is, such acts of parliament whereby a forfeiture is inflicted for transgressing the provisions therein enacted. The party offending is here bound by the fundamental contract of society to obey the directions of the legislature, and pay the forfeiture incurred to such persons as the law requires. The usual application of this forfeiture is either to the party grieved, or else to any of the king's subjects in general. Of the former sort is the forfeiture inflicted by the statute of Winchester e (explained and enforced by several subsequent statutes f) upon the hundred wherein a man is robbed, which is meant to oblige the hundredors to make hue and cry after the felon; for, if they take him, they stand excused. But otherwise the party robbed is intitled to prosecute them, by a special action on the case, for damages equivalent to his loss. And of the same nature is the

b 1 Rool. Abr. 600, 601.
c Law of nisi prius. 155.
d 5 Rep. 64. Hob. 279.
action given by statute 9 Geo. I. c. 22. commonly called the black act, against the inhabitants of any hundred, in order to make satisfaction in damages to all persons who have suffered by the offences enumerated and made felony by that act. But, more usually, these forfeitures created by statute are given at large, to any common informer; or, in other words, to any such person or persons as will sue for the same: and hence such actions are called popular actions, because they are given to the people in general g. Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor; and then the suit is called a qui tam action, because it is brought by a person who feipso in hac parte sequitur. If the king therefore himself commences this suit, he shall have the whole forfeiture. But if any one hath begun a qui tam, or popular, action, no other person can pursue it; and the verdict passed upon the defendant in the first suit is a bar to all others, and conclusive even to the king himself. This has frequently occasioned offenders to procure their own friends to begin a suit, in order to forestall and prevent other actions: which practice is in some measure prevented by a statute made in the reign of a very sharp-sighted prince in penal laws; 4 Hen. VII. c. 20. which enacts, that no recovery, otherwise than by verdict, obtained by collusion in an action popular, shall be a bar to any other action prosecuted bona side. A provision, that seems borrowed from

e 13 Iidw. J. c. 1.
f 27Eliz. c. 13. 29Car. II. c. 7. 8Geo. II. c. 16. 22 Geo. II. c. 24.
g See book II. ch. 29.
h 2 Hawk. P. C. 268.

the rule of the Roman law, that if a person was acquitted of any accusation, merely by the prevarication of the accuser, a new prosecution might be commenced against him i.

A SECOND class, of implied contracts, are such as do not arise from the express determination of any court, or the positive direction of any statute; but from natural reason, and the just construction of law. Which class extends to all presumptive undertakings or assumpsits; which, though never perhaps actually made, yet constantly arise from this general implication and intendment of the courts of judicature, that every man hath engaged to perform what his duty or justice requires. Thus,
1. IF I employ a person to transact any business for me, or perform any work, the law implies that I undertook, or assumed to pay him so much as his labour deserved. And if I neglect to make him amends, he has a remedy for this injury by bringing his action on the case upon this implied assumpsit; wherein he is at liberty to suggest that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury; who will assess such a sum in damages as they think he really merited. This is called an assumpsit on a quantum meruit.

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

i Ff. 47. 15. 3.

3. A THIRD species of implied assumpsits is when one has had and received money of another's, without any valuable consideration given on the receiver's part: for the law construes this to be money had and received for the use of the owner only; and implies that the person so receiving promised and undertook to account for it to the true proprietor. And, if he unjustly detains it, an action on the case lies against him for the breach of such implied promise and undertaking; and he will be made to repair the owner in damages, equivalent to what he has detained in such violation of his promise. This is a very extensive and beneficial remedy, applicable to almost every case where the defendant has received money which ex aequo et bono he ought to refund. It lies for money paid by mistake, or on a consideration which happens to fail, or through imposition, extortion, or oppression, or where undue advantage is taken of the plaintiff's situation k.

4. WHERE a person has laid out and expended his own money for the use of another, at his request, the law implies a promise of repayment, and an action will lie on this assumpsit l.
5. LIKEWISE, fifthly, upon a stated account between two merchants, or other persons, the law implies that he against whom the balance appears has engaged to pay it to the other; though there be not any actual promise. And from this implication it is frequent for actions on the case to be brought, declaring that the plaintiff and defendant had settled their accounts together, infimul computassent, (which gives name to this species of assumpsit) and that the defendant engaged to pay the plaintiff the balance, but has since neglected to do it. But if no account has been made up, then the legal remedy is by bringing a writ of account, de computo m; commanding the defendant to render a just account to the plaintiff, or shew the court good cause to the

k 4 Burr. 1012.
l Carth. 446. 2 Keb. 99.
m F. N. B. 116.

Contrary. In this action, if the plaintiff succeeds, there are two judgments: the first is, that the defendant do account (quod computet) before auditors appointed by the court; and, when such account is finished, then the second judgment is, that he do pay the plaintiff so much as he is found in arrear. This action, by the old common law n, lay only against the parties themselves, and not their executors; because matters of account rested solely in their own knowledge. But this defect, after many fruitless attempts in parliament, was at last remedied by statute 4 Ann. c. 16. which gives an action of account against the executors and administrators. But however it is found by experience, that the most ready and effectual way to settle these matters of account is by bill in a court of equity, where a discovery may be had on the defendant’s oath, without relying merely on the evidence which the plaintiff may be able to produce. Wherefore actions of account, to compel a man to bring in and settle his accounts, are now very seldom used; though, when an account is once stated, nothing is more common than an action upon the implied assumpsit to pay the balance.

6. THE last class of contracts implied by reason and construction of law arises upon this supposition, that every one who undertakes any office, employment, trust, or duty, contracts with those who employ or entrust him, to perform it with integrity, diligence, and skill. And, if by his want of either of those qualities any injury accrues to individuals, they have therefore their remedy in damages by a special action on the case. A few
instances will fully illustrate this matter. If an officer of the public is guilty of neglect of duty, or a palpable breach of it, of non-feasance or of misfeasance; as, if the sheriff does not execute a writ sent to him, or if he willfully makes a false return thereof; in both these cases the party aggrieved shall have an action on the case, for damages to be assessed by a jury. If a sheriff or gaoler suffers a prisoner, who is taken upon mesne process (that is, during the pendency of a suit) to escape, he is liable to an action on the case. But if after judgment, a gaoler or a sheriff permits a debtor to escape, who is charged in execution for a certain sum; the debt immediately becomes his own, and he is compellable by action of debt, being for a sum liquidated and ascertained, to satisfy the creditor his whole demand: which doctrine is grounded on the equity of the statutes of Westm. 2. 13 Edw. I. c. 11. and 1 Ric. II. c. 12. An advocate or attorney that betray the cause of their client, or, being retained, neglect to appear at the trial, by which the cause miscarries, are liable to an action on the case, for a reparation to their injured client. There is also in law always an implied contract with a common inn-keeper, to secure his guest’s goods in his inn; with a common carrier or bargemaster, to be answerable for the goods he carries; with a common farrier, that he shoes a horse well, without laming him; with a common taylor, or other workman, that he performs his business in a workmanlike manner: in which if they fail, an action on the case lies to recover damages for such breach of their general undertaking. But if I employ a person to transact any of these concerns, whose common profession and business it is not, the law implies no such general undertaking; but in order to charge him with damages, a special agreement is required. Also if an inn-keeper, or other victualler, hangs out a sign and opens his house for travellers, it is an implied engagement to entertain all persons who travel that way; and upon this universal assumpsit an action on the case will lie against him for damages, if he without good reason refuses to admit a traveler. If any one cheats me with false cards or dice, or by false weights and measures, or by selling me one commodity for another, an action on the case also lies against him for damages, upon the contract which the law always implies, that every transaction is fair and honest. In contracts likewise for sales, it is constantly understood that the seller undertakes that the commodity he sells is his own; and if it proves otherwise,
an action on the case lies against him to exact damages for this deceit. In contracts for provisions it is always implied that they are wholesome; and, if they be not, the same remedy may be had. Also if he, that selleth any thing, doth upon the sale warrant it to be good, the law annexes a tacit contract to this warranty, that if it be not so, he shall make compensation to the buyer: else it is an injury to good faith, for which an action on the case will lie to recover damages w. The warranty must be upon the sale; for if it be made after, and not at the time of the sale, it is a void warranty/x: for it is then made without any consideration; neither does the buyer then take the goods upon the credit of the vendor. Also the warranty can only reach to things in being at the time of the warranty made, and not to things in futuro: as, that a horse is sound at the buying of him; not that he will be sound two years hence. But if the vendor knew the goods to be unsound, and hath used any art to disguise them y, or if they are in any shape different from what he represents them to be to the buyer, this artifice shall be equivalent to an express warranty, and the vendor is answerable for their goodness. A general warranty will not extend to guard against defects that are plainly and obviously the object of one's senses, as if a horse be warranted perfect, and wants either a tail or an ear, unless the buyer in this case be blind. But if cloth is warranted to be of such a length, when it is not, there an action on the case lies for damages; for that cannot be discerned by sight, but only by a collateral proof, the measuring it z. Also if a horse is warranted sound, and he wants the sight of an eye, though this seems to be the object of one's senses, yet as the discernment of such defects is frequently matter of skill, it hath been held that an action on the case lieth, to recover damages for this imposition a.

BESIDES the special action on the case, there is also a peculiar remedy, entitled an action of deceit b, to give damages in some

w F. N. B. 94.
particular cases of fraud; and principally where one man does any thing in
the name so another, by which he is deceived or injured c; as if one brings
an action in another's name, and then suffers a nonsuit, whereby the
plaintiff becomes liable to costs: or where one suffers a fraudulent
recovery of land or chattels to the prejudice of him that hath right. It also
lies in the cases of warranty before-mentioned d, and the other injuries
committed contrary to good faith and honesty. But the action on the case,
in nature of deceit, is more usually brought upon these occasions.

THUS much for the non-performance of contracts express or implied;
which includes every possible injury to what is by far the most
considerable species of personal property; viz. that which consists in
action merely, and not in possession. Which finishes our enquiries into
such wrongs as may be offered to personal property, with their several
remedies by suit or action.

c Law of nisi prius. 29.
d F. N. B. 98.

CHAPTER THE TENTH.
OF INJURIES TO REAL PROPERTY, AND
FIRST OF DISPOSSESSION, OR OUSTER,
OF THE FREEHOLD.

I COME now to consider such injuries as affect that species of property
which the laws of England have denominated real; as being of a more
substantial and permanent nature than those transitory rights of which
personal chattels are the object.

REAL injuries then, or injuries affecting real rights, are principally fix; 1.
OUSTER, or dispossession, is a wrong or injury that carries with it the amotion of possession: for thereby the wrongdoer gets into the actual occupation of the land or hereditament, and obliges him that hath a right to seek his legal remedy; in order to gain possession, and damages for the injury sustained. And such ouster, or dispossession may either be of the freehold, or of chattels real. Ouster of the freehold is effected by one of the following methods: 1. Abatement; 2. Intrusion; 3. Disfeifin; 4. Discontinuance; 5. Deforcement. All of which in their order, and afterwards their respective remedies, will be considered in the present chapter.

1. AND, first, an abatement is where a person dies seised of an inheritance, and before the heir or devisee enters, a stranger who has no right makes entry, and gets possession of the freehold: this entry of him is called an abatement, and he himself is denominated an abator a. It is to be observed that this expression, of abating, which is derived from the French and signifies to quash, beat down, or destroy, is used by our law in three senses. The first, which seems to be the primitive sense, is that of abating or beating down a nuisance, of which we spoke in the beginning of this book b: and in a like sense it is used in statute Westm. 1. 3 Edw. I. c. 17. where mention is made of abating a castle or fortress; in which case it clearly signifies to pull it down, and level it with the ground. The second signification of abatement is that of abating a writ or action, of which we shall say more hereafter: here it is taken figuratively, and signifies the overthrow or defeating of such writ, by some fatal exception to it. The last species of abatement is that we have now before us; which is also a figurative expression, to denote that the rightful possession or freehold of the heir or devisee is overthrown by the rude intervention of stranger.

THIS abatement of a freehold is somewhat similar to an immediate occupancy in a state of nature, which is effected by taking possession of the land the same instant that the prior occupant by his death relinquishes it. But this however agreeable to natural justice, considering man merely as an individual, is diametrically opposite to the law of society, and particularly the law of England: which, for the preservation of public peace, hath prohibited as far as possible all acquisitions by mere occupancy; and hath directed that lands, on the death of the present possessor, should immediately vest either in some person, expressly named and appointed by the deceased, as his devisee; or, on default of
such appointment, in such of his next relations as the law hath selected and pointed out as his natural representative or

a Finch. L. 195.
b page 5.

heir. Every entry therefore of a mere stranger, by way of intervention between the ancestor and heir or person next entitled, which keeps the heir or devisee out of possession, is one of the highest injuries to the rights of real property.

2. THE second species of injury by ouster, or amotion of possession from the freehold, is by intrusion: which is the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion. And it happens where a tenant for term of life dieth seised of certain lands and tenements, and a stranger entereth thereon, after such death of the tenant, and before any entry of him in remainder or reversion.

c This entry and interposition of the stranger differ from an abatement in this; that an abatement is always to the prejudice of the heir, or immediate devisee; an intrusion is always to the prejudice of him in remainder or reversion. For example; if A dies seised of lands in fee-simple, and, before the entry of B his heir, C enters thereon, this is an abatement; but if A be tenant for life, with remainder to B in fee-simple, and, after the death of A, C enters, this is an intrusion. Also if A be tenant for life on lease from B, or his ancestors, or be tenant by the curtesy, or in dower, the reversion being vested in B; and after the death of A, C enters and keeps B out of possession, this is likewise an intrusion. So that an intrusion is always immediately consequent upon the determination of a particular estate; an abatement is always consequent upon the descent or devise of an estate in fee-simple. And in either case the injury is equally great to him whose possession is defeated by this unlawful occupancy.

3. THE third species of injury by ouster, or privation of the freehold, is by disfeifin. Disfeifin is a wrongful putting our of him that is seised of the freehold. The two former species of injury were by a wrongful entry where the possession was vacant; but his is an attack upon him who is in actual possession, and turning him out of it. Those were an ouster from a freehold in

c Co. Litt. 277. F. N. B. 203, 204.
law; this is an ouster from a freehold in deed. This may be effected either
in corporeal inheritances, or incorporeal. Disfeifin, of things corporeal, as
of houses, land, &c, must be by entry and actual dispossession of the
freehold e; as if a man enters either by force or fraud into the house of
another, and turns, or at least keeps, him and his servants out of
possession. Disfeifin of incorporeal hereditaments cannot be an actual
dispossession; for the subject itself is neither capable of actual bodily
possession, nor dispossession: but is depends on their respective natures,
and various kinds; being in general nothing more than a disturbance of the
owner in the means of coming at, or enjoying them. With regard to
freehold rent in particular, our ancient law-books fmentioned five
methods of working a disfeifin thereof: 1. By enclosure; where the tenant
so encloseth the house or land, that the lord cannot come to distrein
thereon, or demand it: 2. By forestaller, or lying in wait; when the tenant
besetteth the way with force and arms, or by menaces of bodily hurt
affrights the lessor from coming: 3. BY refcous; that is, either by violently
retaking a distress taken, or by preventing the lord with force and arms
from taking any at all: 4. By replevin; when the tenant replevies the
distress at such time when his rent is really due: 5. By denial; which is
when the rent being lawfully demanded is not paid. All, or any of these
circumstances work a disfeifin of rent: that is, they wrongfully put the
owner out of the only possession, of which the subject-matter is capable,
namely, the receipt of it. And all these disfeifins, of hereditaments
incorporeal, are only so at the election and choice of the party injured; if,
for the sake of more easily trying the right, he is pleased to suppose
himself disseised g. Otherwise, as there can be no actual dispossession, he
cannot be compulsively disseised of any incorporeal hereditament.

AND so too, even in corporeal hereditaments, a man may frequently
suppose himself to be disseised, when he is not so in

e Co. Litt. 181.
f Finch. L. 165, 166. Litt. 237, &c.
g Litt. 588, 589.

fact, for the sake of intitling himself to the more easy and commodious
remedy of an assise of novel disfeifin, (which will be explained in the
sequel of this chapter) instead of being driven to the more tedious process
of a writ of entry h. The true injury of compulsive disfeifin seems to be that of dispossessing the tenant, and substituting oneself to be the tenant of the lord in his stead; in order to which in the times of pure feodal tenure the consent or connivance of the lord, who upon every descent or alienation personally gave, and who therefore alone could change, the seisin or investiture, seems to have been ancienly necessary. But when in process of time the feodal form of alienations wore off, and the lord was no longer the instrument of giving actual seisin, it is probable that the lord's acceptance of rent or service, from him who had dispossessed another, might constitute a complete disfeifin. Afterwards, no regard was had to the lord's concurrence, but the dispossessor himself was considered as the sole disseisor: and this wrong was then allowed to be remedied by entry only, without any form of law, as against the disseisor himself; but required a legal process against his heir or alienee. And when the remedy by assise was introduced under Henry II, to redress such disfeifins as had been committed within a few years next preceding, the facility of that remedy induced others, who were wrongfully kept out of the freehold, to feign or allow themselves to be disseised, merely for the sake of the remedy.

THESE thee species of injury, abatement, intrusion, and disfeifin, are such wherein the entry of the tenant ab initio, as well as the continuance of his possession afterwards, is unlawful. But the two remaining species are where the entry of the tenant was at first lawful, but the wrong consists in the detaining of possession afterwards.

4. SUCH is, fourthly, the injury of discontinuance; which happens when he who hath an estate-tail, maketh a larger estate of the land than by law he is intitled to do i: in which case the

h Hengh. paru. c. 7. 4 Burr. 110.
i Finch. L. 190.

estate is good, so far as his power extends who made it, but no farther. As if tenant in tail makes a feoffment in fee-simple, or for the life of the feoffee, or in tail; all which are beyond his power to make, for that by the common law extends no farther than to make a lease for his own life: here the entry of the feoffee is lawful during the life of the feoffor; but if he retains the possession after the death of the feoffor, it is an injury, which is termed a discontinuance; the ancient legal estate, which ought to have survived to the heir in tail, being gone, or at least suspended, and for a
while discontinued. For, in this case, on the death of the alienors, neither the heir in tail, nor they in remainder or reversion expectant on the determination of the estate-tail, can enter on and possess the lands so alienated. Also, by the common law, the alienation of an husband who was seised in the right of his wife, worked a discontinuance of the wife's estate: till the statute 32 Hen. VIII. c. 28. provided, that no act by the husband alone should work a discontinuance of, or prejudice, the inheritance or freehold of the wife; but that, after his death, she or her heirs may enter on the lands in question. Formerly also, if an alienation was made by a sole corporation, as a bishop or dean, without consent of the chapter, this was a discontinuance j. But this is now quite antiquated by the disabling statutes of 1 Eliz. c. 19. and 13 Eliz. c. 10. which declare all such alienations absolutely void ab initio, and therefore at present no discontinuance can be thereby occasioned.

5. THE fifth and last species of injuries by ouster or privation of the freehold, where the entry of the present tenant or possessor was originally lawful, but his detainer is now unlawful, is that by deforcement. And this, in its most extensive sense, is nomen generalissimum; being a much larger and more comprehensive expression than any of the former, and signifying the holding of any lands or tenements to which another person have a right k. So that this includes as well an abatement, an intrusion, a disfeifin, or a discontinuance, as any other species of wrong

j F. N. B. 194.
k Co. Litt. 277.

whatsoever, whereby he that hath right to the freehold is kept out of possession. But, as contradistinguished from the former, it is only such a detainer of the freehold, from him that hath the right of property, but never had any possession under that right, as falls within none of the injuries which we have before explained. As in case where a lord hath a seignory, and lands escheat to him propter defectum sanguinis, but the seisin of the lands is withheld from him: here the injury is not abatement, for the right vests not in the lord as heir or devisee; nor is it intrusion, for it vests not in him in remainder or reversion; nor is it disfeifin, for the lord was never seised; nor does it at all bear the nature of any species of discontinuance; but, being neither of these four, it is therefore a deforcement l. If a man marries a woman, and during the coverture is seised of lands, and alienes, and dies; is disseised, and dies; or dies in
possession; and the alieenee, disseisor, or heir, enters on the tenements and
doeth not assign the widow her dower; this is also a deforcement to the
widow, by withholding lands to which she hath a right m. In like manner,
if a man lease lands to another for term of years, or for the life of a third
person, and the term expires by surrender, efflux of time, or death of the
cestui que vie; and the lessee or any stranger, who was at the expiration
of the term in possession, holds over, and refuses to deliver the possession to
him in remainder or reversion, this is likewise a deforcement n.
Deforcements may also arise upon the breach of a condition in law: as if a
woman gives lands to a man by deed, to the intent that he marry her, and
he will not when thereupon required, but continues to hold the lands: this
is such a fraud on the man's part, that the law will not allow it to devest the
woman's right; though it does devest the possession, and thereby becomes
a deforcement o. Deforcements may also be grounded on the difability of
the party deforced: as if an infant, or his ancestors being within age, do
make an alienation of his lands, and the alieenee enters and keeps
possession; now, as the alienation is voidable, this possession as

l F. N. B. 143.
m Ibid. 8. 147.
n Finch. L. 263. F. N. B. 201. 205, 6, 7.
o F. N. B. 205.

against the infant is wrongful, and therefore a deforcement p. The same
happens, when one of nonsane memory alieenes his lands or tenements,
and the alieenee enters and holds possession, this is also a deforcement q.
Another species of deforcement is, where two persons have the same title
to land, and one of them enters and keeps possession against the other: as
where the ancestor dies seised of an estate in fee-simple; which descends
to two sisters as coparceners, and one of them enters before the other, and
will not suffer her sister to enter and enjoy her moiety; this is also a
deforcement r. Deforcement may also be grounded on the non-
performance of a covenant real: as if a man, seised of lands, covenants to
convey them to another, and neglects or refuses so to do, but continues
possession against him; this possession, being wrongful, is a deforcement
s. And hence, in levying a fine of lands, the person, against whom the
fictitious action is brought upon a supposed breach of covenant, is called
the deforciant. Thus, lastly, keeping a man by any means out of a freehold
office is a deforcement: and, indeed, from all these instances it fully
appears, that whatever injury, (withholding the possession of a freehold) is
not included under one of the four former heads, is comprized under this of deforcement.

THE several species and degrees of injury by ouster being thus ascertained and defined, the next consideration is the remedy: which is, universally, the restitution or delivery of possession to the right owner; and, in some cases, damages also for the unjust amotion. The methods, whereby these remedies, or either of them, may be obtained, are various.

I. THE first is that extrajudicial and summary one, which we slightly touched in the first chapter of the present book t, of entry by the legal owner, when another person, who hath no right, hath previously taken possession of lands or tenements. In this case the

q Finch. ibid. F. N. B. 202.
r Finch. L. 293, 294. F. N. B. 197.
s F. N. B. 146.
t See pag. 5.

party entitled may make a formal, but peaceable, entry thereon, declaring that thereby he takes possession; which notorious act of ownership is equivalent to a feodal investiture by the lord v: or he may enter on any part of it in the same county, declaring it to be in the name of the whole u: but if it lies in different counties he must make different entries; for the notoriety of such entry or claim to the pares or freeholders of Westminster, is not any notoriety to the pares or freeholders of Sussex. Also if there be two disseisors, the party disseised must make his entry on both; or if one disseisor has conveyed the lands with livery to two distinct feoffees, entry must be made both w: for as their seisin is distinct, so also must be the act which devests that seisin. If the claimant be deterred from entering by menaces or bodily fear, he may make claim, as near to the estate as he can, with the like forms and solemnities: which claim is in force for a year and a day only x. And therefore this claim, if it be repeated once in the space of every year and day, (which is called continual claim) has the same effect with, and in all respects amounts to, a legal entry y. Such an entry gives a man seisin z, or puts him into immediate possession that hath right of entry on the estate, and thereby makes him complete owner, and capable of conveying it from himself by either descent or purchase.
THIS remedy by entry takes place in three only of the five species of ouster, viz. abatement, intrusion, and disfeifin a: for, as in these the original entry of the wrongdoer was unlawful, they may therefore be remedied by the mere entry of him who hath right. But, upon a discontinuance or deforcement, the owner of the estate cannot enter, but is driven to his action: for herein the original entry being lawful, and thereby an apparent right of possession being gained, the law will not suffer that right to be overthrown by the mere act or entry of the claimant.

u Litt. 417.
w Co. Litt. 252.
x Litt. 422.
y Ibid. 419. 423.
z Co. Litt. 15.
a Ibid. 237.

ON the other hand, in case of abatement, intrusion, or disfeifin, where entries are generally lawful, this right of entry may be tolled, that is, taken away, by descent. Descents, which take away entries b, are when any one, seised by any means whatsoever of the inheritance of a corporeal hereditament, dies, whereby the same descends to his heir: in this case, however feeble the right of the ancestor might be, the entry of any other person who claims title to the freehold is taken away; and he cannot recover possession against the heir by this summary method, but is driven to his action to gain a legal seisin of the estate. And this, first, because the heir comes to the estate by act of law, and not by his own act; the law therefore protects his title, and will not suffer his possession to be devested, till the claimant hath proved a better right. Secondly, because the heir may not suddenly know the true state of his title: and therefore the law, which is ever indulgent to heirs, takes away the entry of such claimant as neglected to enter on the ancestor, who was well able to defend his title; and leaves the claimant only the remedy of a formal action against the heir c. Thirdly, this was admirably adapted to the military spirit of the feudal tenures, and tended to make the feudatory bold in war; since his children could not, by any mere entry of another, be dispossessed of the lands whereof he died seised. And, lastly, it is agreeable to the dictates of reason and the general principles of law.
FOR, in every complete title o to lands, there are two things necessary; the possession or seisin, and the right or property therein e: or, as it is expressed in Fleta, the juris et seisinae conjunctio f. Now, if the possession be severed from the property, if A has the jus proprietas, and B by some unlawful means has gained possession of lands, this is an injury to A; for which the law gives a remedy, by putting him in possession, but does it by different means according to the circumstances of the case. Thus, as B, who was himself the wrongdoer, and hath obtained the possession by either fraud or force, hath only a bare or naked possession, without any shadow of right; A therefore, who hath both the right of property and the right of possession, may put an end to his title at once, b the summary method of entry. But, if B the wrongdoer dies seised of the lands, then B's heir advances one step farther towards a good title: he hath not only a bare possession, but also an apparent jus possessionis, or right of possession. For the law presumes, that the possession, which is transmitted from the ancestor to the heir, is a rightful possession, until the contrary be shewn: and therefore the mere entry of A is not allowed to evict the heir of B; but A is driven to his action at law to remove the possession of the heir, though his entry alone would have dispossessed the ancestor.

SO that in general it appears, that no man can recover possession by mere entry on lands, which another hath by descent. Yet this rule hath some exceptions g; wherein those reasons cease, upon which the general doctrine is grounded; especially if the claimant were under any legal disabilities, during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, or being out of the realm: in all which cases there is no neglect or laches in the claimant, and therefore no descent shall bar, or take away his entry h. And this title, of taking away entries by descent, is still farther narrowed by the statute 32 Hen. VIII. c. 33. which enacts, that if any person disseises or turns another out of possession, no descent to the heir of the disseisor shall take away the entry of him that has right to the land, unless the disseisor had peaceable possession five years next after the disfeifin. But the statute extendeth not to any feoffee or donee of
the disseisor, mediate or immediate I: because such a one by the genuine feodal constitutions always came into the tenure solemnly and with the

g See the particular cases mentioned by Littleton, b. 3. ch. 6. the principles of which are well explained in Gilbert’s law of tenures.
h Co. Litt. 246.
i Ibid. 256.

lord’s concurrence, by actual of seisin or open and public investiture. On the other hand, it is enacted by the statute of limitations, 21 Jac. I. c.16. that no entry shall be made by any man upon lands, unless within twenty years after his right shall accrue. And by statute 4&5 Ann. c.16. no entry shall be of force to satisfy the said statute of limitations, or to avoid a fine levied of lands, unless an action be thereupon commenced within one year after, and prosecuted with effect.

UPON an ouster, by the discontinuance of tenant in tail, we have sain that no remedy by mere entry is allowed; but that, when tenant in tail alienes the entailed, this takes away the entry of the issue in tail, and drives him to his action at law recover the possession k. For, as in the former cases the law will not suppose, without proof, that the ancestor of him in possession acquired the estate by wrong; and therefore, after five years peaceable possession, and descent cast, will not suffer the possession of the heir to be disturbed by mere without action; so here, the law will not suppose the discontinuor to have aliened the estate without power so to do, and therefore leaves the heir in tail to his action at law, and permits not his entry to be lawful. Besides, the alience, who came into possession by a lawful conveyance, which was at least good for the life of the alienor, hath not only a bare possession, but also an apparent right of possession; which is not allowed to be devested by the mere entry of the claimant, but continues in force till a better right be shewn, and recognized by a legal determination. And something also perhaps, in framing this rule of law, may be allowed to the inclination of the courts of justice, to go as far as they could in making estates-tail alienable, by declaring such alienations to be voidable only not absolutely void.

IN case of deforcements also, where the deforciant had originally a lawful possession of the land, but now detains it wrong-

k Co. Litt.325.
fully, he still continues to have the presumptive prima facie evidence of right; that is, possession lawfully gained. Which possession shall be overturned by the mere entry of another; but only by demandant’s shewing a better right in course of law.

THIS remedy by entry must be pursued, according to statute 5 Ric. II. ft. 1.c.8. in a peaceable and easy manner; and not with force or strong hand. For, if one turns or keeps another out of possession, this is an injury of both a civil and a criminal nature. The civil is remedied by immediate restitution; which puts the ancient possessor in statu quo: the criminal injury, or public wrong, by breach of the king's peace, is punished by fine to the king. For by the statute 8 Hen. VI. C.9. upon complaint made to any justice of the peace, of a forcible entry, with strong hand, on lands tenements; or a forcible detainer after a peaceable entry; he shall try the truth of the complaint by jury, and, upon force found, shall restore the possession to the party so put out: and in such case, or if any alienation be made to defraud the possessor of his right, (which is declared to be absolutely void) the offender shall forfeit, for the force found, treble damages to the party grieved, and make fine and ransom to the king. But this does not extend to such as endeavour to keep possession manu forti, after three years peaceable enjoyment of either themselves, their ancestors, or those under whom they claim; by a subsequent clause of the same statute, enforced by statute 31 Eliz. c.11.

II. THUS far of remedies, where the tenant or occupier of the land hath gained only a mere possession, and no apparent shadow of right. Next follow or occupier is advanced one step nearer to perfection; so that he hath in him not only a bare possession, which may be destroyed by entry, but also an apparent right of possession, which cannot be removed but course of law: in the process of which must be shewn, that though he hath at present possession and therefore hath the presumptive right, yet here is a right of possessio, superior to his, residing in him who brings the action.

THESE remedies are either by a writ of entry, or an assise: which are actions merely possessory; serving only to regain that possession, whereof the demandant (that is, he who sues for the land) or his ancestors have been unjustly deprived by the tenant or possessor of the freehold, or those under whom he claims, They meddle not with the right of property; only
restoring the demandant to that state or situation, in which he was (or by law ought been) before the dispossession committed. But this without any prejudice to the right of ownership: for, if the dispossessor has any legal, he may afterwards exert it, not withstanding a recovery had against him in these possessory actions. Only the law will not suffer to be his own judge, and either take or maintain possession of the lands, until he hath recovered them by legal means: rather presuming the right to have accompanied the ancient seisin, than to reside in one who had no such evidence in his favour.

1. THE first of these possessory remedies is by writ of entry; which is that which disproves the title of the tenant or possessor, by shewing the unlawful means by which he entered or continues possession. The writ is directed to the sheriff, requiring him to command the tenant of the land that he render (in Latin, praecipe quod reddat) to the demandant the premises in question, which he claims to be his right and inheritance; and into which, as he saith, the said tenant hath not entry but by a disfeifin, intrusion, or the like, made to the said demandant, within the time limited by law: or that upon refusal he do appear in court on such a day, to shew wherefore he hath not done it. This is the original process, the praecipe, upon which all the rest of the suit is grounded; and from hence it appears, that what is required of the tenant is in the alternative, either to deliver seisin of the lands, or to shew cause why he will not. Which cause may be either a denial of the fact of having entered by such means as are suggested, or a justification of his entry by reason of title in himself, or those under whom he makes claim: and hereupon the possession of the land is awarded to him who produces the clearest right to possess.

IN our ancient books we find frequent mention of the degrees, within which writs of entry are brought. If they be brought against the party himself who did the wrong, then they only charge the tenant himself with the injury; non habuit ingressum nisi per intrusinam quam ipse fecit. But if the intruder, disseisor, or the like, has made any alienation of the land to a third person, or it has descended to his heir, that circumstance must be alleged in the writ, for the defect of his possessory title, whether arising
from his own wrong or that of those under whom he claims, must be set forth. One such alienation or descent makes the first o degree, which is called the per, because then the form of a writ of entry is this ; that the tenant had no right of entry, but by the original wrongdoer, who alienated the land, or from whom it decended, to him: non habuit ingressum, nisi per Guilielmum, qui se in illud intrusit, et illud tenenti dimisit p. A second alienation or descent makes an other degree called the per and cui ; because the form of a writ of entry, in that case, is, that the tenant had no title to enter, but by or under a prior alience, to whom the intruder demised it ; non habuit ingressum, nisi per Ricardum, cui Guilielmus illud dimisit, qui se in illud intrusit q. These degrees thus state the

n See Vol. II. append. No.V.1.
o Finch. L.262. Booth indeed (of real actions.172.) makes the first degree to consist in the original wrong done, the second in the per, and the third in the per and cui. But the difference is immaterial.
p Booth.181.
q Finch. L.263. F. N.B. 203, 204.

original wrong, and the title of the tenant who claims under such wrong. If more than two degrees, that is, two alienations or descents were past, there lay no writ of entry at the common law. For, as it was porvided, for the quietness of men's inheritances, that no none, even though he had the true right of possession, should enter upon him who had the apparent right by descent or otherwise, but was driven to his writ of entry to gain possession ; so, after more than two descents or two conveyances were passed, the demandant, even though he had the right both of possession and property, was not allowed this possessory action ; but was driven to his writ of right, a long and final remedy, to punish his neglect on not sooner putting in his claim, while the degrees subsisted, and for the ending of suits, and quieting of all controversies r. But by the statute of Marbridge 52 Hen. III. c.30. it was provided, that when the number of alienations or descents exceeded the usual degrees, a new writ should be allowed without any mention of degrees at all. And accordingly a new writ has been framed, called a writ of entry in the post, which only alleges the injury of the wrongdoer, without deducing all the intermediate title from him to the tenant : stating it in this manner ; that the tenant had no legal entry unless after, or subsequent to, the ouster or injury done by the original dispossession ; non habuit ingressum nisi post intrusionem quam
Guilielmus in illud fecit ;? and rightly concluding, that if the original title
was wrongful all claims derived from thence must participate of the same
wrong. Upon the latter of these writs it is (the writ of entry fur disfeifin in
the post) that the form of our common recoveries of landed estates is
usually grounded ; which, we may remember, were observed in the
preceding volumes to be fictitious actions, brought against the tenant of
the freehold (usually called the tenant to the praecipe, or writ of entry) in
which by collusion the demandant recovers the land.

THIS remedial instrument, of writ of entry, is applicable to all the case of
ouster before-mentioned, except that of discon-

r 2 Inst. 153.
s Book II. ch.21.

tinuance by tenant in tail, and some peculiar species of deforcements.
Such is that deforcement of dower, by not assigning any dower to the
widow within the time limited by law ; for which she has her remedy by a
writ of dower, unde nihil t. But if she be deforced of part only of her dower,
she cannot then say that nihil havet ; and therefore she may have recourse
to another action, by writ of right of dower : which is a more general
remedy, extending either to part or the whole ; and is (with regard to her
claim) of the same nature as the grand writ of right, whereof we shall
presently speak, is with regard to claims in fee-simple u. But in general the
writ of entry is the universal remedy to recover possession, when
wrongfully withheld from the owner. It were therefore endless to recount
all the several divisions of writs of entry, which the different circumstances
of the respective demandants may require, and which are furnished by the
laws of England v : being plainly and clearly chalked out in that most
ancient and highly venerable collection of legal forms, the registrum
omnium brevium, or register of such writs as are suable out of the king's
court. upon which Fitzherbert's natura brevium is a comment ; and in
which

t F.V.B.147.
u Ibid. 16.
v See Britton. c.114. fol. 264. The most usual were. 1. The writs of entry fur
diffcifin and of intrusion : (F.N.B.191.203.) which are brought to remedy
either of those species of ouster. 2. The writs of dum suit infra aetatem,
and dum suit non compos mentis : (Ibid.192.202.) which lie for a person
of full age, or one who hath recovered his understanding, after having (when under age or infane) aliened his lands; or for the heirs of such alienor. 3. The writs of cui in vita and cui ante divortium: (Ibid. 193.204.) for a woman, when a widow or divorced, whose husband during the coverture (cui in vita sua, vel cui ante divortium, ipfa contradicere non potuit) hath aliened her estate. 4. The writ ad coomunem legem: (Ibid.207.) for the reversioner, after the alienation and death of the particular tenant for life. 5. The writs in cafu proviso and in confimili cafu: (Ibid. 205.206) which lay not ad communem legem, but are given by flat. Glo. 6 Edw. I. c.7. and Westm. 2.13 Edw. I. c.24. for the reversioner after the alienation, but during the life, of the tenant in dower or other tenant for life. 6. The writ ad terminum qui praeteriit: (Ibid.201.) for the reversioner, when the recovery is withheld by the lessee or a stranger, after the determination of a lease for years. 7. The writ caufa matrimonii praelocuti: (Ibid.205.) for a woman who giveth land to a man in fee or for life, to the intent that he may marry her, and he doth not. And the like case of other deforcements.

every man who is injured will be to find a method of relief, exactly adapted to his own case, described in the compass of a few lines, and yet without the omission of any material circumstance. So that the wise and equitabel provision of the statute Westm.2. 13.Edw. I.c.24. for framing new writs when wanted w, is almost rendered useless by the very great perfection of the ancient forms. And indeed I know not whether it is a greater credit to our law, to have such a provision contained in them, or not to have occasion, or at least very rarely, to use it.

IN the times of our Saxon ancestors, the right of possession seems only to have been recoverable by writ of entry/; which was then usually brought in the county court. And it is to be observed, that the proceedings in these actions were not then so tedious, when the courts were held, and process issued every three weeks, as after the conquest, when all causes were drawn into the king's courts, and process issued from term to term; which was found exceeding dilatory, being at least four times as slow as the other, And hence a new remedy was invented in many cases, to do justice to the people and to determine the possession, in the proper counties, and yet by the king's judges. This was the remedy by assise, of which we next to speak.
2. THE writ of assise is said to have been invented by Glanvil, chief justice to Henry the second/y; and, if so, it seems to owe its introduction to the parliament held at Northampton, in the twenty second year of that prince's reign: when justices in eyre were appointed to go round the kingdom in order to take these assises; and the assises themselves (particularly those of mort d' ancestor and novel disfeifin) were clearly oibted out and described z. As

w See pag.51.
x Gilb. Ten.42.
y Mirror.c.2.25.
z 9. Si dominus feodi negat haeredibus defuncti faifiram ejufdem feodi, justitiarii domini regis faciant inde fieri recognitionem perxii legales homines, qualem faifinam defunctus inde habuit, die qua suit vivus et mortuus; et, ficut recognitum suerit, ita haeredibus ejus restituant.
10.Tuftitiarii domini regis faciant fieri recognitionem de diffaifinis factis super affifam, a tempore quo dominus rex venit in Angliam proxime poft pacem factam inter ipsum et regem filium fuum. (Spelm.Cod.3303.)

a writ of entry is a real action, which disproves the title of the tenant, by shewing the unlawful commencement of his possession; so an assise is a real action, which proves the title of the demandant, merely by shewing his, or his ancestor's so totally alike, that a judgment or recovery in one is a bar against the other: so that when a man's possession is once established by either of these possessory actions, it can never be disturbed by the same antagonist in any other of them. The word, assise, is derived by sir Edward Coke b from the Latin assideo, to sit together; and it signifies, originally, the jury who try the cause, and sit together for that purpose. By a figure it is now made to signify the court or jurisdiction, which summons this jury to together by a commission of assise, or a assisas capiendas; and hence the judicial assemblies held by the king's commission in every county, as well to take these writs of assise, as to try causes at nisi prius, are termed in common speech the assises. By another somewhat for recovering possession of lands: for the reason, saith Littleton c, why such writs at the beginning were called assises, was, for that in these writs the sheriff is ordered to summon a jury, or assise; which is not expresed in any other original writ d.

THIS remedy, by writ of assise, is only applicable to two species of injury by ouster, viz. abatement, and a recent or novel disfeifin. If the abatement
happened upon the death of the nephew or niece, the remedy is by an
assise of mort d' ancestor, or the death of one's ancestor: and the general
purport of this writ is to direct 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. And, in a short time after, the

a Finch. L.284.
b 1 Inst.153.
c 234.
d Co. Litt.159.
e F.N.B.195. finch. L.290.

judges usually come down by the king's commission to take the
recognition of assise: when, if these points are found in the affirmative,
the law immediately transfers the possession from the tenant to the
demandant. If the abatement happened on the death of one's grandfather
or grandmother, then an assise of mort d' ancestor no longer lies, but a
writ of ayle, or de avo; if on the death of the great grandfather or great
grandmother, then a writ of besayle, or de proavo; but if it mounts one
degree higher, to the tresayle or grandfather's grandfather, or if the
abatement happened upon the death of any collateral relation, other than
those before-mentioned, the writ is called a writ of cosinage, or de
consanguineo. And the same points shall be enquired of in all these
actions ancestral, as in an assise of mort d' ancestor; they being of the very
same nature: though they differ in this point of form, that these
ancestral writs (like all other writs of praecipe) the assise asserts nothing
directly, but only prays an enquiry whether those points be so. There is
also another ancestral writ, denominated a nuper obiit, to establish an
equal division of the land in question, where on the death of an ancestor,
who has several heirs, one enters and holds the others out of possession.
But a man is not allowed to have any of these possessory actions for an
abatement consequent on the death of any collateral relation, beyond the
fourth degree; though in the lineal ascent he may proceed ad infinitum.
For the law will not pay any regard to the possession of a collateral
relation, so very distant as hardly to be any at all.

IT was always held to be law, that where lands were devisable in a man's
last will by the custom of the place, there an assise of mort d' ancestor did
not lie. For, where lands were so devisable, the right of possession could never be determined by

f Fich. L.266,267.
h 2 Inst.399.
i F.N.B.197. Finch. L.293.
j Hale on F.N.B 221.
k Fitzh. Abr. tit. confinage.15.
l Bracton. l.4. de affif. mortis antecefforis, c.13.3. F.N.B.196.

a process, which enquired only of these two points, the seisin of the ancestor, and the heirship of the demandant. And hence it might be reasonable to conclude, that when the statute of wills, 32 Hen. VIII. c.1. made all socage lands devisabel, an assise of mort d' ancestor no longer could be brought of lands held in focage n; and that now, since the statute 12 Car. II.c.24. which converts all tenures, a few only excepted, into free and common focage, it should follow, that no assise of mort d' ancestor can be brought of any lands in the kingdom; but in case of abatements, recourse must be properly had to the more ancient writs of entry.

AN assise of novel (or recent) disfeifin is an action of the same nature with the affie of mort d' ancestor before-mentioned, in that herein the demandant's possession must be shewn. But it differs considerably in other points: particularly in that it recites a complaint by the demandant of the disfeifin committed, in terms of direct averment; whereupon the sheriff is commanded to reseise the land and all the chattels thereon, and keep the same in his custody till the arrival of the justices of assise; (which since the introduction of giving damages, as well as the possession, is now omitted o) and in the mean time to summon a jury to view the premises and make recognition of the assise before the justices p. And, if, upin the trial, the demandant can prove, first, a title; next, his actual seisin in consequence thereof; and, lastly, his disfeifin by the present tenant; he shall have judgment to recover his seisin, and damages for the injury sustained.

THE process of assises in general is called, by statute Westm.2.13.Edw. I.c.24. feftinum remedium, in comparison of that by writ of entry; it not admitting of many dilatory pleas and proceedings, to which other real actions are subject q. Costs and damages were annexed to these possessory
actions by the statute of Glocester, 6Edw. I.c.1. before which the tenant in possession was allowed to retain the intermediate profits of the land,

n See 1 Leon.267.
o Both.211.
p F.N.B.177.
q Booth.262.

to enable him to perform the feodal burdens incident thereunto. And, to prevent frequent and vexatious disfeifins, it is enacted by the statute of Merton, 20 Hen. III. c.3. that if a person disseised recover seisin of the land again by assise of novel disfeifin, and be again disseised of the same tenements by the same disfeffor, he shall have a writ of re-disfeifin ; and, if he recover therein, the re-disfeffor shall be imprisoned ; and, by the statute of Marbridge, 52 Hen.III.c.8. shall also pay a fine to the king : to which the statute Westm. 2. 13. Edw. I. c.26. hath super added double damages to the party aggrieved. In like manner, by the same statute of Merton, when any lands or tenements are recovered by assise of mort d'ancestor, or other jury, or any judgment of the court, if the party be afterwards disseised by the same person against whom judgment was obtained, he shall have a writ of post-disfeifin against him ; which subject the post-disfeffor to the same penalties as a re-disfeffor. The reason of all which, as given by sir Edward Coke r, is because such proceeding is a contempt of the king's court, and in despite of the law ; or, as Bracton more fully expresses it, talis qui its convictus suerit, dupliciter delinquit contra regem : quia facit disfeifinam et roberiam contra pacem suam ; et etiam aufu temerario irrita facita ea, quae in curiadorum regis rite acta sunt : et propter duplex delictum merito sustinere debet poenam duplicatam.

IN all these possessory actions there is a time of limitation settled ; beyond which no man shall avial himself of the possession of himself or his ancestors, or take advantage of the wrongful possession of his adversary. For if he be negligent for a long and unreasonable time the law refuses afterwards to lend him any assistance, to recover the possessio merly ; both to punish his neglect, (nam leges vigilantibus, non dormientibus, subveniunt) and also becuse it is presumed that the supposed wrongdoer has in such a length of time procured a legal title, otherewise he would sooner have been sued. This time of limitation by the statute of Merton, 20 Hen.III.c.8. and Westm.1.3 Edw. I.c.39.
was successively dated from particular eras, viz. from the return of king John from Ireland, and from the coronation, &c, of king Henry the third. But this date of limitation continued so long unaltered, that it became indeed no limitation at all, it being above three hundred years from Henry the third's coronation to the year 1540, when the present statute of limitations t was made. This, instead of limiting actions from the date of a particular event, as before, which in process of years grew absurd, took another and more direct course, which might endure for ever; by limiting a certain period, as fifty years for lands, and the like period u for customary or prescriptive rents, suits, and services (fro there is no time of limitation upon rents reserved by deedw) and enacting that no person should bring any possessory action, to recover possesson thereof merely upon the seisin, or dispossession, of his ancestors, beyond such certain period. And all writs, grounded upon the possession of the demadant himself, are directed to be sued out within thirty years af ter the disfeifin complained of; for if it be an older date, it can with no propriety he called a fresh, recent, or novel disfeifin: which name sir Edward Coke informs us was originally given to this proceeding, because the disfeifin must have been since the last eyre or circuit of the justices, which happened once in seven years, otherwise the action was gone x. And we may observe y, that the limitation, prescribed by Henry the second at the first institution of the assise of novel disfeifin, was from his own return into England after the peace made between him and the young king his son; which was but the year before.

WHAT has been observed may throw some light on the doctrine of remitter, which we spoke of in the second chapter

t 32 Hen.VIII.c.2.
u So Berthelet's original edition of the statute, A.D.1540: and Cay's, Pickering's, and Fufshead's editions, examined with the record. Raftell's, and other intermediate editions, which sir Edward Coke (2 Inst.95.) and other subsequent writers have followed. make it only forty years for rents, &c.

w 8 Rep. 65.
x 1 Inst. 153. Booth.210
of this book/z; and which, we may remember, was, where one who hath a right to lands, but is out of possession, hath afterwards the freehold cast upon him by some subsequent defective title, and enters by virtue of that title. In this case the law remits him to his ancient and more certain right, and by an equitable fiction supposes him to have gained possession in consequence, and by virtue, thereof: and this, because he cannot possibly obtain judgment at law to be restored to his prior right, since he is himself the tenant of the land, and therefore hath nobody against whom to bring his action. This determinatin of the law might seem superfluous to an hasty observer; who perhaps would imagine, that since the hath now both the right and also the possession, it little signifies by what means such possession shall be said to be gained. But the wisdom of our ancient law determined nothing in vain. As the tenant's possession was gained by a defective title, it was liable to be overturned by shewing that defect in a writ of entry; and then he must have been driven to his writ of right, to recover his just inheritance: which would have been doubly hard, because, during the time he was himself tenant, he could not establish his prior title by any possessory action. The law therefore remits him to his prior title puts him in the same condition as if he had recoverd the land by writ of entry. Without the remitter he would have had jus, et seisinam, separate; a good right, but a bsd possession: now, by the remitter, he hath the most perfect of all titles, juris et seisinae conjunctinem.

III. By these several possessory remedies the right of possession may be restored to him, that is unjustly deprive thereof. But the right of possession (though it carrierw with it a strong presumptin) is not always conclusive evidence of the right of property, whic may stil subsist in another man. For, as one man may have the possession, and another the right of possession, which is recovered by these possessory actions; so one man may have

the right of possession, and cannot therefore be evicted by any possessory action, and another may have the right of property, which cannot be otherwise asserted than by the great and final remedy of a writ of right, or such correspondent writs as are in the nature of a writ of right.
THIS happens principally in fur cases: 1. Upon discontinuance by the alienation of tenant in tail: whereby he, who had the right of possession, hath remainder or reversion, shall not be allowed to recover by virtue of that possesson, which the tenant hath so voluntarily transferred. 2. In case of judgment given against either party by his own default; or, 3. Upon trial of the merits, in any possessory action: for such judgment, if obtained by him who hath not the true ownership, is held to be a species of deforcement; which however binds the right of possession, and suffers it not be ever again disputed, unless the right of property be also proved. 4. In case the demandant, who claims the right, is barred from these possessory actions by length of time and the statute of limitations before-mentioned: for an undisturbed possession for fifty years, ought not to be devsted by any thing, but very clear proof of the absolute right of propriety. In these four case the law applies the remedial instrument of either the writ of right itself, or such other writs, as are said to be of the same nature.

1. AND first, upon an alienation by tenant in tail, whereby the etate-tail is discontinued, and the remainder or reversion is by failure of the particular estate displaced, and turned into a mere right, the remedy is by action of formedon, (fecundum formam doni) which is in the nature of a writ of right a, and is the highest action that tenant in tail can have b. For he cannot have an absolute writ of right, which is confined only to such as claim in fee-simple: and for that reason this writ of formedon was granted a Finch. L.267. b Co. Litt.316.

him by the statute de donis or Westm.2 13 Edw. I.c.1. which is therefore emphatically called his writ of right c. This writ is distinguished into three species; a formedon in the descender, in the remainder, and in the reverter. A writ of formedon in the descender lieth, where a gift in tail is made, and the tenant in tail alienes the lands entailed, or is disseised of them, and dies; in this case the heir in tail shall have this writ of formedon in the descender, to recover these lands, so given in tail, against him who is then the actual tenant of the freehold d. In which action the demandant is bound to state the manner and form of the gift in tail, and to prove himself heir secundum formam doni. A formedon in the remainder lieth, where a man 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 c. In this case the remainder-man shall have his writ of formedon in the remainder, wherein the whole form of the gift is stated, and the happening of the event upon which the remainder depended. This writ is not given in express words by the statute de donis; but is founded upon the equity of the statute, and upon this maxim in law, that if any one hath a right to the land, he ought also to have an action to recover it. A formedon in the reverter lieth, 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 heris, or assigns: in such case the reversioner shall have this writ to revoer the lands, wherein he shall suggest the gift, his own title to the reversion minutely deriv'd from the donor, and the failure of issue upon which his reversion takes place f. This lay at common law, before the statute de donis, if the donee aliened before he had performed the condition of the gift, by having issue, and afterwards died without any g. The time of limitation in a formedon by statute 21Jac.I.c.16. is twenty years; within

c F.N.B.255.
d Ibid. 211,212.
e Ibid.217.
f Ibid.219. 8 Rep.88.
g Finch.L.268.

which space of time after his title accrues the demandant must bring his action, or else is for ever barred.

2. IN the second case; if the owners of a partucular estae, as for life, in dower, by the curtesy, or in fee-tail, are barred of the right of possession by a recovery had against them, through their default or non-appearance in a possessory action, they were absolutely without any remedy at the common law; as a writ of right does not lie for any but such as claim to be tenants of the fee-simple. Therefore the statute Westm. 2. 13 Edw. I.c.4. gives a new writ for such persons, after their lands have been so recovered against them by default, called a quod ei deforceat; which, though not strictly a writ of right, so far partakes of the nature of none, as that it will restore the right to him, who has been thus unwarily deforced by his own default h. But in case the recovery were not had by his own default, but upon defence in the inferior possessory action, this still remains final with regard to these particular estates, as at the common law: and hence it is,
that common recovery (on a writ of entry in the poft) had, not by default of the tenant himself, but (after his defence made and voucher of a third person to warranty) by default of such vouchee, is now the usual bar to cut off an estate-tail i.

3,4. THIRDLY, in case the right of possession be barred by a recovery upon the merits in a possessory action, or, lastly, by the stute of limitations, a claimant in fee-simple may have a mere writ of right; which is in its nature the highest writ in the law k, and lieth only an estate in fee-simple, and not for him who hath a less estate. This writ lies concurrently with all other real actions, in which an estate of fee-simple may be recovered; and it also lies after them, being as it were an appeal to the mere right, when judgment hath been had as to the possession in an

h F.N.B.155.
i See book II. ch.21.
k F.N.B.1.

inferior possessory action l. But though a writ of right may be brought, where the demandant is entitled to the possession, yet it rarely is advisable to be brought in such case; as more expeditious and easy remedy is had, without meddling with the property, by proving the demandant's own, or his ancestor's, possession, and their illegal ouster, in one of the possessory actions. But in case the right of possession be lost length of time, or by judgment against the true owner in one of these inferior suits, there is no other choice: this is then the only remedy that can be had; and it is of so forcible a nature, that it overcomes all obstacles, and clears all objections that may have arisen to cloud and obscure the title. And, after issue once joined in a writ of right, the judgment is absolutly final; so that a recovery had in this action may be pleaded in bar of any other claim or demand m.

THE pure, proper, or mere writ of right lies only, we have said, to recover lands in fee-simple, unjustly withheld from the true proprietor. But there are also other writs which are said to be in the nature of a writ of right, because their process and proceedings do mostly (though not entirely) agree with the writ so right: but in some of them the fee-simple is not demandant; and in others not land, but some incorporeal hereditament. Some of these have been already mentioned, as the writ of right of dower,
of formedon, &c: and the others will hereafter be taken notice of, under their proper divisions. Nor is the mere writ of right alone, or always, applicable to very case of a claim of lands in fee-simple: for if the lord's tenant in fee-simple dies without heir, whereby an escheat accrues, the lord shall have a writ of escheat n, which is in the nature of a writ of right o. And if one of two or more coparceners deforces the other, by usurping the sole possession, the party aggrieved shall have a writ of right de rationabili parte p: which may be grounded on the feifm of the ancestor at any time during his life; whereas in a nuper obiit (which is a possessory q) he must be seised at the time of his death. But, waving these and other minute distinctions, let us now return to the general writ of right.

THIS writ ought to be first brought in the court-baron r of the lord, of whom the lands are holden; and then it is open or patent: but if he holds no court, or hath waived his right, remisit curiam suam, it may be brought in the king's courts by writ of praecipe originally s; and then it is a writ of right close t, being directed to the sheriff and not the lord u. Also, when one of the king's immediate tenants in capite is deforced, his writ of right is called a writ of praecipe in capite (the improper use of which, as well as of the former praecipe, quia dominus remisit curiam, so as to oust the lord of his jurisdiction, is restrained by magna carta w) and, being directed to the sheriff and originally returnable in the king's court, is also a writ of right close x. There is likewise a little writ of right close, secundum consuetudinem manerii, which lies for the king's tenants in ancient demesne y, and others of a similar nature z, to try the right of their lands and tenements in the court of the lord exclusively a. But the writ of right patent itself may also at any time be removed into the county court, by writ of tolt b, and from thence into the king's courts, by writ of pone c or recordari facias, at the suggestion of either party that there is a delay or defect of justice d.

IN the progress of this action e, the demandant must allege foem seisin of the lands tenements in himself, or else in some
person under whom he claims, and then derive the right from the person so seised to himself; to which the tenant may answer by denying the demandant's right, and averring that he has more right to hold the lands than the demandant has to demand them; which puts the demandant upon the proof of his title: in which if he fails, or if the tenant can shew a better, the demandant and his heirs are perpetually barred of their claim; but if he can make it appear that his right is superior to the tenant's he shall recover the land against the tenant and his heirs for ever. But even this writ of right, however superior to any other, cannot be sued out at any distance of time. For by the ancient law no seisin could be alleged by the demandant, but from the time of Henry the first; by the statute of Merton, 20 Hen. III. c.8. from the time of Henry the second; by the statute of westm. 1. 3 Edw. I.c.39. from the time of Richard the first; and now, by statute 32 Hen. VIII. c.2. seisin in a writ of right shall be within sixty years. So that the possession of lands in fee-simple uninterruptedly, for three score years, is at present a sufficient title against all the world; and cannot be impeached by any dormant claim whatsoever.

I HAVE now gone through the several species of injury by ouster or dispossession of the freehold, with the remedies applicable to each. In considering which I have been unavoidably led to touch upon much obsolete and abstruse learning, as it lies intermixed with, and alone can explain the reason of, those parts of the law which are now more generally
in use. For, without contemplating the whole fabric together, it is impossible to form any clear idea of the meaning and connection of those disjointed parts, which still form a considerable branch of the modern law; such as the doctrine of entries and remitter, the levying of fines, and the suffering of common recoveries. Neither indeed is any considerable part of that, which I have selected in this chapter from among the venerable monuments of our ancestors, so absolutely antiquated as to be out of force, though they are certainly out of use: there being, it must be owned, but a very few instances for more than a century past of prosecuting any real action for land by writ of entry, assise, formedon, writ of right, or otherwise. The forms are indeed preserved in the practice of common recoveries: but they are forms, and nothing else; for which the very clerks that pass them are seldom capable to assign the reason. But the title of lands is now usually tried upon actions of ejectment, or trespass.

CHAPTER THE ELEVENTH.
OF DISPOSSESSION, OR OUSTER, OF CHATTELS REAL.

HAVING in the preceding chapter considered with some attention the several species of injury by dispossession or ouster of the freehold, together with the regular and well-connected scheme of remedies by actions real, which are given to the subject by the common law, either to recover the possession only, or else to recover at once the possession, and also to establish the right of property; the method which I there marked out leads me next to consider injuries by ouster, or dispossession, of chattels real; that is to say, by amoving the possession of the tenant either from an estate by statute-merchant, statute-staple, or elegit; or from an estate for years.

I. OUSTER, or amotion of possession, from estates held by either statute or eligit, is only liable to happen by a species of disfeifin, or turning out of the legal proprietor, before his estate is determined by raising the sum for which it is given him in pledge. And for such ouster, though the estate merely a chattel interest, the owner shall have the same remedy as for an
injury to a freehold; viz. by assise of novel disfeifin a. But this depends upon the several statutes, which create these respective
interests b, and which expressly provide and allow this remedy in case of dispossession. Upon which account it is that sir Edward Coke observes c, that these tenants are said to hold their estates ut liberum tenementum, until their debts be paid: because by the statutes they shall have an assise, as tenant of the freehold shall have; and in that respect they have the similitude of a free-hold d.

II. As for ouster, or amotion of possession, from an estate for years; this happens only by a like kind of disfeifin, ejection, or turining out, of the tenant from the occupation of the land during the continuance of his term. For this injury the law has provided him with two remedies, according to the circumstances and situation of the wrongdoer: the writ of ejectione firmae; which lies against any one, the lessor, reversioner, remainderman, or any stranger, who is himself the wrongdoer and has committed the injury complained of: and the writ of quare ejectit infra terminum; which lies not against the wrongdoer or ejector himself, but his feoffee or other person claiming under him. These are mixed actions, somewhat between real and personal; for therein are two things recovered, as well restitution of the term of years, as damages for the ouster or wrong.

1. A WRIT then of ejectione firmae, or action of trespass in ejectment, lieth, where lands or tenements are let for a term of years; and afterwards the lessor, reversioner, remainder-man, or any stranger, dothe eject or oust the lessee of his term e. In this case he shall have this writ of ejection, to call the defendant to answer for entering on the lands so demised to the plaintiff for a term that is not yet expired, and ejecting him f. And by this writ it, with damages.

c 1 Inst. 43.
d See book II. ch.10.
e F.N.B.220.
f See appendix, No.II. 1.
SINCE the disuse of real actions, this mixed proceeding is become the common method of trying the title to lands or tenements. It may not therefore be improper to delineate, with some degree of minuteness, its history, the manner of its process, and the principles whereon it is grounded.

WE have before seen g, that the writ of covenant, for breach of the contract contained in the lease for years, was anciently the only specific remedy for recovering against the lessor term from which he had ejected his lessee, together with damages for the ouster. But if the lessee was ejected by a stranger, claiming under a title superior h to that of the lessor, or by a grantee of the reversion, (who might at any time by a common recovery have destroyed the term i) though the lessee might still maintain an action of covenant against the lessor, for non-performance of his contract or lease, yet he could not by any means recover the term itself. If the ouster was committed by a mere stranger, without any title to the land, the lessor might indeed by a real action recover possession of the freehold, but the lessee had no other remedy against the ejector but in damages, by a writ of ejectione firmae, for the trespass committed in ejecting him from his farm k. But afterwards, when the courts of equity began to oblige the ejector to make a specific restitution of the land to the party immediately injured, the courts of law also adopted the same method of doing complete justice; and, in the prosecution of a writ of ejectment, introduced a species of remedy not warranted by the original writ nor prayed by the declaration (which go only for

g See pag.150.
h F.N.B. 145.
i See book II. ch.9.
k p.6. Ric.II. Ejectione firmae n'eft que un action de trespass en son nature, et le plaintiff ne recovera son terme que eft a venir, nient plus que en trespass home recovera damages pur ftefpass nient fait, mes a fefer ; mes il convient a suer par action de covenant al comen law a recoverer son terme : quod tota curia conceffit. Et per Belknap, la comen ley eft, lou home eft ouste de don terme per estranger, il avera ejectione firmae verfus cefty que luy onfte ; et fil foit ouste par son lessor, briefe de covenant ; et fi par lessee ou grantee de reversion, briefe de covenant verdus son lessor, et countera especial count, & c. (Fitz. abr. t. eject. firm.2.)
damages merely, and are silent as to any restitution) viz. a judgment to recover the term, and a writ of possession thereupon l. This method seems to have been settled as early as the reign of Edward IV m: though it hath been said n to have first begun under Henry VII, because it probably was then first applied to its present principal use, that of trying the title to the land.

THE better to apprehend the contrivance, whereby this end is effected, we must recollect that the remedy by ejectment is in its original an action brought by one who hath a lease for years, to repair the injury done him by dispossession. In order therefore to convert it into a method of trying titles to the freehold, it is first necessary that the claimant do take possession of the lands, to empower him to constitute a lesse for years, that may be capable of receiving this injury of dispossession. For it would be an offence, called in our law maintenance, (of which in the next book) to convey a title to another, when the grantor is not in possession of the land: and indeed it was doubted at first, whether this occasional possession, taken merely for the purpose of conveying the title, excused the lessor from the legal guilt of maintenance o. When therefore a person, who hath right of entry into lands, determines to acquire that possession, which is wrongfully withheld by the present tenant, he makes (as by law he may) a formal entry on the premises; and being so in possession of the soil, he there, upon the land, seals and delivers a lease for years to some third person or lesse: and, having thus given him entry, leaves him in possession of the premises. This lessee is to stay upon the land, till the prior tenant, or he who had the previous possession, enters thereon afresh and ousts him; or till some other person (either by accident or by agreement beforehand) comes upon the land, and turns him out or ejects him.

l See append. No.II. 4. prope fin.
m 7 Edw. IV.6. Per Fairfax ; f: home part ejectione le plaintiff recovera son terme qui eft arere, fibien come in quare ejecit infra terminum ; et, fi nul foit arere, donques tout in damages. (Bro Abr. t.quare ejecit infra termnum.6.).
n F.N.B.220.
o 1 Ch. Rep. append.39.

For this injury the lessee is entitled to his action of ejectment against the tenant, or this casual ejector, whichever it was that ousted him, to recover
back his term and damages. But where this action is brought against such a casual ejector as is before mentioned, and not against the very tenant in possession, the court will not suffer the tenant to lose his possession without any opportunity to defend it. Wherefore it is a standing rule, that no plaintiff shall proceed in ejectment to recover lands against a casual ejector, without notice given to the tenant in possession (if any order to maintain the action, the plaintiff must, in case of any defence, make out four points before the court; viz. title, lease, entry, and ouster. First, he must shew a good title in his lessor, which brings the matter of right entirely before the court; then, that the lessor, being seised by virtue of such title, did make him the lease for the present term; thirdly, that he, the lessee or plaintiff, did enter or take possession in consequence of such lease; and then, lastly, that the defendant ousted or ejected him. Whereupon he shall have judgment to recover his term and damages; and shall, in consequence, have a writ of possession, which the sheriff is to execute, by delivering him the undisturbed and peaceable possession of his term.

THIS is the regular method of bringing an action of ejectment, in which the title of the lessor moves collaterally and incidentally before the court, in order to shew the injury done to the lessee by this ouster. This method must be still continued in due form and strictness, save only as to the notice to the tenant, whenever the possession is vacant, or there is no actual occupant of the premises; and also in some other cases. But, as much trouble and formality were found to attend the actual making of the lease, entry, and ouster, a new and more easy method of trying titles by writ of ejectment, where there is any actual tenant or occupier of the premiss in dispute, was invented somewhat more than a century ago, by the lord chief justice Rolle, who then sat in the court of upper bench; so called during the exile of king Charles the secund. This new method entirely depends upon a string of legal fictions: no actual lease is made, no actual entry by the plaintiff, no actual ouster by the defendant; but all are merely ideal, for the sole purpose of trying the title. To this end, in the proceedings a lease for a term of years is stated to have been action; as by John Rogers to Richard Smith; which plaintiff ought to be some real person, and not merely and idea fictitious one who has no existence, as frequently though unwarrantably practised q; it is also stated that Smith, the lesse, entered; and that the defendant William styles, who is called the casual ejector, ousted him; for which ouster he brings this action. As soon as this action is brought, and the
complaint fully stated in the declaration r, styles, the casual ejector, or
defendant, sends a written notice to the tenant in possession of the lands,
as George Saunders, informing him of the action brought by Richard
Smith, and transmitting him a copy of the declaration ; withal assuring
him that he, styles the defendant, has no title at to the premises, and shall
make no defence ; and therefore advising the tenant to appear in court and
defend his own title : otherwise the casual ejector will suffer judgment to
be had against him ; and thereby he, the actual tenant Saunders, will
inevitably be turned out of possession s. On receipt of this friendly caution,
if the tenant in possession does not within a limited time apply to the court
to be admitted a defendant in the stead of styles, he is supposed to have no
right at all ; and, upon judgment being had against styles the casual
ejector, Saunders the real tenant will be turned out of possession by the
sheriff.

BUT if the tenant in possession applies to be made defendant, it is allowed
him upon this condition ; that he enter into a rule of court t to confess, at
the trial of the cause, three of the four requisites for the maintenance of
the plaintiff’s action ; viz.

| p | See appendix, No.II. 1,2. |
| q | 6 Mod.309. |
| r | Append. No.II. 2. |
| s | Ibid. |
| t | Ibid. 3. |

the lease of Rogers the lessor, the entry of Smith the plaintiff, and his
ouster by Saunders himself, now made the defendant instead of styles : which requisites, as they are wholly fictitious, should the defendant put the
plaintiff to prove, he must of course be nonsuited for want of evidence ;
but by such stipulated confession of lease, entry, and ouster, the trial will
now stand upon the merits of he title only. This done, the declaration is
altered by inserting the name George Saunders instead of William styles,
and the cause goes down to trial under the name of Smith (the plaintiff) on
the demise of Rogers, (the lessor) against Saunders, the newe defendant.
And therein the lessor of the plaintiff is bound to make out a clear title,
otherwise his fictitious lessee cannot obtain judgment to have possession
of the land for the term supposed to be granted. But, if the lessor makes
out his title in a satisfactory manner, then judgment and a writ of
possession shall go fro Richard Smith the nominal plaintiff, who by this
trial has proved the right of John Rogers his supposed lessor. Yet, to prevent fraudulent recoveries of the possession, by collusion with the tenant of the land, all tenants are obliged by statute 11 Geo.II. c.19. on pain of forfeiting three years rent, to give notice to their landlord, when served with any declaration id ejectment: and any landlord may by leave of the court be made a co-defendant to the action; which indeed he had a right to demand, long before the provision of this statute u: in like manner as (previous to the statute of Westm. 2. c.3.) if in a real action the tenant of the freehold made default, the remainder-man or reversioner had a right to come in and defend the possession; lest, if judgment were had against the tenant; the estate of those behind should be turned to a naked right w. But if the new defendant fails to appear at the trial, and to confess lease, entry, and couster, the plaintiff Smith must indeed be there nonsuited, for want of proving those requisites; but judgment will in the end be entered against the casual ejector styles: for the condition on which Saunders was admitted a defendant is broken, and therefore the plaintiff is put

u 7 Mod.70. Salk.257.
w Bracton l.5.c.10. 14.

again in the same situation as if he never had appeared at all; the consequence of which (we have seen) would have been, that judgment would have been entered for the plaintiff, and the sheriff, by virtue of a writ for that purpose, would have turned out Saunders, and delivered possession to Smith. The same process therefore as would have been had, provided no conditional rule had been made, must now be pursued as soon as the condition is broken. But execution shall be stayed, if any landlord after the default of his tenant applies to be made a defendant, and enters into the usual rule, to confess lease, entry, and ouster x.

THE damages recovered in these actions, though formerly their only intent, are now usually (since the title has been considered as the principal question) very small and inadequate; amounting commonly to one shilling or some other trivial sum. In order therefore to complete the remedy, when the possession has been long detained from him that has right, an action of trespass also lies, after a recovery in ejectment, to recover the mesne profits which the tenant in possession ah{s wrongfully received. Which action may be brought in the name of either the nominal plaintiff in the judgment, or his lessor, against the tenant in possession;
whether he be made party to the judgment, or suffers judgment to go by default y.

SUCH is the modern way, of obliquely bringing in question the title to lands tenements, in order to try it in this collateral manner; a method which is now universally adopted on almost every case. It is founded on the same principle as the ancient writs of assise, being calculated to try those real actions, as being infinitely more convenient for attaining the end of justice; because, the form of the proceeding being entirely fictitious, it is wholly in the power of the court to direct the application of that fiction, so as to prevent fraud and chicane, and eviscerate the very truth of the title. The writ of ejectment and its nominal parties (as

x Stat. 11.Geo.II.c.19.
y 4 Burr.668.

was resolved by all the judges z) are judicially to be considered as the fictitious form of an action, really brought by the lessor of the plaintiff against the tenant in possession: invented, under the control and power of the court, for the advancement of justice in many respects; and to force the parties to go to trial on the merits, without being intangled in the nicety of pleadings on either side.

BUT a writ of ejectment is not an adequate means to try the title of all estates; for on such things whereon an entry cannot in fact be made, no entry shall be supposed by any fiction of the parties. Therefore an ejectment will not lie of an advowson, a rent, a common, or other incorporeal hereditament a; except for tithes in the hands of lay appropriators, by the express purview of statute 32 Hen. VIII. c.7. which doctrine hath since been extended by analogy to tithes in the hands of the clergy b: nor will it lie in such cases, where the entry of him that hath right is taken away by descen, discontinuance, twenty years dis-possession, or otherwise.

THIS action of ejectment is however rendered a very easy and expeditious remedy to landlords whose tenant are in arrear, by statute 4 Geo.II.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 upon some notorious part of the premises, which
shall be valid, without any formal re-entry or previous demand of rent. And a recovery id such ejectment shall be final and conclusive, both in law and equity, unless the rent and all costs be paid or tendered within six calendar months afterwards.

2. THE writ of quare ejecit infra terminum lieth, by the ancient law, where the wrongdoer or ejector is not himself in possession of the lands, but another who claims under him. As where a man leaseth lands to another for years, and, after, the lessor or reversioner entereth and maketh a feoffment in fee or for life of the same lands to a stranger: now the lessee cannot bring a writ of ejectioe firmae or ejectment against the feoffee; because he did not eject him, but the reversioner: neither can he have any such action to recover his term against the reversioner, who did oust him; because he is not now in possession. And upon that account this writ was devised, upon the equity of the statute Westm.2.c.24. as in case where no adequate remedy was already provided. And the action is brought against the feoffee for deforc; or keeping out, the original lessee during the continuance of his term: and herein, as in the ejectment, the plaintiff shall recover of much of the term as remains, and also damages for that portion of it, whereof he has been unjustly deprived. But since the intruduction of fictitious ousters, whereby the title may be tried against any tenant in possession (by what means soever he acquired it) this action is fallen into disuse.

c F.N.B.198.

CHAPTER THE TWELFTH.
OF TRESPASS.

IN the two preceding chapters we have considered such injuries to real property, as convicted in an ouster, or amotion of the possession. Those which remain to be discussed are such as may be offered to a man’s real property without any amotion from it.
THE secund species therefore of real injuries, or wrongs that affect a man's lands, tenements, or hereditaments, is by trespass. Trespass, in its largest and most extensive sense, signifies any transgression or offence against the law of nature, of society, or of the country in which we live; whether it relates to a man's person, or his property. Therefore beating another is a trespass; for which (as we have formerly seen) an action of trespass vi et armis in assault and battery will lie: taking or detaining a man's goods are respectively trespasses; for which an action of trespass vi et armis, or on the case in trover and conversion, is given by the law: so also non-performance of promises or undertakings is a trespass; upon which an action of trespass on the case in assumpsit is grounded: and, in general, any misfeasance, or act of one man whereby another is injuriously treated or damned, is a transgression, or trespass in its largest sense; for which we have already seen a, that whenever the act itself is directly and immediately injurious to the person or property of another, and therefore necessarily accompanied with some force, and action of trespass vi et armis will lie; but, if the injury is only consequential, a special action of trespass on the case may be brought.

BUT in the limited and sense, in which we are at present to consider it, it signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property. For the right of meum and tuum, or property, in lands being once established, it follows as a necessary consequence, that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil: every entry therefore thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression. The Roman law seem to have made a direct prohibition necessary, in order to constitute this injury: qui alienum fundum ingreditur, potest a domino, if is praeviderit, porhiberi ne ingrediatur b. But the law of England, justly considering that much inconvenience may happen to the owner, before he has an opportunity to forbid the entry, has carried the point much farther, and has treated every entry upon another's lands, (unless by the owner's leave, or in some very particular cases) as an injury or wrong, for satisfaction of which an action of trespass will lie; but determines the quantum of that satisfaction, by considering how far the

a See pag.123.
offence was willful or inadvertent, and by estimating the value of the actual damage sustained.

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

ONE must have a property (either absolute or temporary) in the soil, and actual possession by entry, to be able to maintain an action of trespass: or at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land. Thus if a meadow be divided annually among the parishioners by lot, then, after each person's several portion is allotted, they may be respectively capable of maintaining an action for the breach of their several closes; for they have an exclusive interest and freehold therein for time. But before entry and actual possession, one cannot maintain an action of trespass, though he hath the freehold in law. And therefore an heir before entry cannot have this action against an abator; though a disfeiffee might have it against a disseisor, for the injury done by the disfeifin itself, at which time the plaintiff was seised of the land: but he cannot have it for any act done after the disfeifin, until he hath gained possession by re-entry, and then he may well maintain it for the intermediate damage done; for after his re-entry the law, by a kind of jus postliminii, supposes the freehold to have all case of an intrusion or deforcement, could the party kept out of possession sue the wrongdoer by a mode of redress, which was calculated merely for injuries committed against the land while in the possession of the owner. But by the statute 6 Ann. c.18. if guardian or trustee for any infant, a husband seised jure uxoris, or a person having any estate or interest determinable upon a life or lives, shall, after the determination of their
respective interests, hold over an continue in possession of the lands or
tenements, they are now adjudged to be trespassors ; and the reversioner
or remainder-man once in every year, by motion to the court of chancery,
procure the cestuy que vie to be produced by the tenant of land, or may
enter thereon in case of his refusal or willful neglect. And, by the statutes
of 4 Geo. II. c.28. and 11 Geo. II. c.19. in case after the determination of
any term of life, lives, or years, any person shall willfully hold over the
same, the feffor is entitled to recover by action of debt, either a rent of
double the annual value of the premises, in case he himself hath
demanded and given notice in writing to deliver the possession ; or else
double the usual rent, in case the notice of quitting proceeds from any
tenant having power to determine his lease, and he afterwards neglects to
carry it into due execution.

A MAN is answerable for not only his own trespass, but that of his cattle
also : for by his negligent keeping they stray upon the land of another (and
much more if he permits, or drives them on) and they there tread down his
neighbour's herbage, and spoil his corn or his trees, this is a trespass for
which the owner must answer in damages. And the law gives the party
injured a double remedy in this case ; by permitting him to distrein the
cattle thus damage-feasant, or doing damage, till the owner shall make
him satisfaction ; or else by leaving him to the common remedy in foro
contentiofo, by action. And the action that lies in either of these cases, of
trespass committed upon another's land either by a man himself or his
cattle, is the action of trespass vi et armis ; whereby a man is called upon
to answer, quare vi et armis clausum ipfius A. apud B. fregit, et blada
ipfius A. ad valentiam centum solidorum ibidem nuper crefcentia cum
quibusdam averiis depaftus suit, conculavit, et consumpfit, &c h : for the
law always couples the idea of force with that of intrusion upon the
property of another. And herein, if any unwarrant-
able act of the defendant or his beasts coming upon the land be proved, it
is an act of trespass for which the plaintiff must recover some damage;
such however as the jury shall think proper to assess.

IN trespasses of a permanent nature, where the injury is continually
renewed, (as by spoiling or consuming the herbage with the defendant's
cattle) the declaration may allege injury to have been committed by
continuation from one given day to another, (which is called laying the
action with a continuando) and the plaintiff shall not be compelled to
bring separate actions for every day's separate offence i. But where the
trespass is by one or several acts, each of which terminates in itself, and
being once done cannot be done again, it cannot be laid with a
continuando; yet if there be repeated act of trespass committed, (as
cutting down a certain number or trees) they may be laid to be done, not
continually, but at divers days and times within a given period k.

IN some cases trespass is justifiable; or, rather, entry on another's land or
house shall not in those cases be accounted trespass: as if a man comes
there to demand or pay money, there payable; or to execute, in legal
manner, the process of the law. Also a man may justify entering into an
inn or public house, without the leave of the owner first specially asked;
because, when a man professes the keeping of such inn or public house, he
thereby gives a general licence to any person to enter his doors. So a
landlord may justify entering to distrein for rent; a commoner to attend
his cattle, communing on the estate; for the apparent necessity of the
thing l. Also it hath been said, that by the common law and custom of
England the poor are allowed to enter and glean upon another's ground
after the har-

i 2 Roll. Abr. 545. Lord Raym.240. 7 Mod.152.
k Salk.638,639. Lord Raym.823.
l 8Rep.146.
vest, without being guilty of trespass m: which humane provision seems
borrowed from the mosaical law n. In like manner the common law
warrants the hunting of ravenous beasts of prey, as badgers and foxes, in
another man's land; because the destroying such creatures is profitable to
the public o. But in cases where a man disdemeans himself, or makes an ill
use of the authority with which the law entrusts him, he shall be accounted
a trespasser ab initio p: as if one comes into a tavern and will not go out in
reasonable time, but tarries there all night contrary to the inclinations of the owner; this wrongful act shall affect and have relation back even to his first entry, and make the whole a trespass q. But a bare non-feasance, as not paying for the wine he calls for, will not make him a trespasser; for this is only a breach of contract, for which the taverner shall have an action of debt or assumpsit against him r. So if a landlord distreined for rent, and willfully killed the distress, this by the common law made him a trespasser ab initio s: and so indeed would any other irregularity have done, till the statute 11 Geo. II. c.19. which enacts that no subsequent irregularity of the landlord shall make his first entry a trespass; but the party injured shall have a special action on the case for the real specific injury sustained, unless tender of amends hath been made. But still, if a reversioner, who enters on pretence of seeing waste, breaks the house, or stays there all night; or if the commoner who comes to tend his cattle, cuts down a tree; in these and similar cases the law judges that he entered for this unlawful purpose, and therefore, as the act which demonstrates such his purpose is a trespass, he shall be esteemed a trespasser ab initio t. So also in the case of hunting the fox or the badger, a man cannot justify breaking the soil, and digging him out of his earth: for though

m Gilb. Ev. 253. Trials per pais. ch.15. pag.438.
o Cro. Jac.321.
q 2 Roll. Abr.561.
r 8 Rep.147.
s Finch. L.47.
t 8 Rep.146.

the law warrants the hunting of such noxious animals for the public good, yet it is held u that such things must be done in an ordinary and usual manner; therefore that being an ordinary cause to kill them viz. by hunting the court held that the digging for them was unlawful.

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

IN order to prevent trifling and vexatious actions of trespass, as well as other personal actional actions, it is (inter alia) enacted by statutes 43 Eliz. c.6. and 22 and 23 Car. II. c.9. 136. that where the jury who try an action of trespass, give less damages than forty shillings, the plaintiff shall be allowed no more costs than damages; unless the judge shall certify under his hand that the freehold or title of the land came chiefly in question. But this rule now admits of two exceptions more, which have been made by subsequent statutes. One is by statute 8&9 W. III. c.11. which enacts, that in all actions of trespass, wherein it shall appear that the trespass was willful and malicious, and it be so certified by the judge, the plaintiff shall recover full costs. Every trespass is willful, where the defendant has notice, and is especially forewarned not to come on the land amount to forty shillings, where the intent of the defendant plainly appears to be to harrass and distress the plaintiff. The other exception is by statute 4&5 W.&M. c.23. which gives full against any inferior tradesman, apprentice, or other dissolute person, who is convicted of a trespass in hawking, hunting, fishing, or fowling upon another's land. Upon this statute it has been adjudged, that if a person be an inferior tradesman, as a clothier for instance, it matters not what qualification he may have in point of estate; but, if he be guilty of such trespass, he shall be liable to pay full costs w.

w Lord Raym.149.

CHAPTER THE THIRTEENTH.
OF nuisance.

A THIRD species of real injuries to a man's land and tenements, is by nuisance. nuisance, nocumentum, or annoyance, signifies any thing that worketh hurt, inconvenience, or damage. And nuisances are of two kinds; public or common nuisances, which affect the public, and are an annoyance to all the king's subjects; for which reason we must refer them to the class of public wrongs, or crimes and misdemesnor; and private
nuisances; which are the objects of our present consideration, and may be defined, any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of anothera. We will therefore, first, mark out the several kinds of nuisances, and then their respective remedies.

I. IN discussing the several kinds of nuisances, we will consider, first, such nuisances as may affect a man’s corporeal hereditaments, and then those that may damage such as are incorporeal.

1. FIRST, as to corporeal inheritances. If a man builds a house so close to mine that his roof overhangs my roof, and throws the water off his roof upon mine, this is a nuisance, for which an action will lie b. Likewise to erect a house or other building so near to mine, that it stops up my ancient lights and windows, is a nuisance of a similar nature c. But in this latter case it is necessary that the windows be ancient, that is, have subsisted there time out of mind; otherwise there is no injury done. For he hath much right to build a new edifice upon his ground, as I have upon mine: since every man do what he pleases upon the upright or perpendicular of his own soil; and it was my folly to build so near another's ground d. Also, if a person keeps his hogs, or other noisome animals, so near the house of another, that the stench of them incommodes him and makes the air unwholesome, this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house e. A like injury is, if one's neighbour sets up and exercises any offensive trade; as a tanner's a tallowchandler's or the like: for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is, sic utere tuo, ut alienum non laedas: f this therefore is an actionable nuisance. So that the nuisances which affect a man's dwelling may be reduced to these three: 1. Overhanging it, which is also a species of trespass, for cujus est solum ejus est usque ad coelum: 2. Stopping ancient light and air are two indispensable requisites to every dwelling. But depriving one of a mere matter of pleasure, as of a fine prospect, by building a wall, or the like; this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable nuisance g.
AS to nuisances to one's lands: if one erects a smelting house for lead so near the land of another, that the vapor and smoke kills his corn and grass, and damages his cattle therein, this is held to be a nuisance. And by consequence it follows, that if one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance: for it is incumbent on him to find some other

c 9 Rep.58.
e 9 Rep.58.
f Cro. Car. 510.
g 9 Rep.58.
h 1 Roll. Abr.89.

place to do that act, where it will be less offensive. So also, if may neighbour ought to scour a ditch, and does not, whereby my land is overflowed, this in an actionable nuisance.

WITH regard to other corporeal hereditaments: it is a nuisance to stop or divert water that uses to run to another's meadow or mill; to corrupt or poison a water-course, by erecting a dye-house or a lime-pit for the use of trade, in the upper part of the stream; or in short to do any act therein, that in its consequences must necessarily tend to the prejudice of one's neighbour. So closely does the law of England enforce that excellent rule or gospel-morality, of doing to others, as we would they should do unto ourselves.

2. As to incorporeal hereditments, the law carries itself with the same equity. If I have a way, annexed to my estate, across another's land, and he obstructs me in the use of it, either by totally stopping it, or putting logs across it, or ploughing over it, it is a nuisance: for in the first case I cannot enjoy my right at all, and in the latter I cannot enjoy it so commodiously as I ought. Also, if I am entitled to hold a fair or market, and another person sets up a fair or market so near mine that it does me a prejudice, it is a nuisance to the freehold which I have in my market or fair. But in order to make this out to be a nuisance, it is necessary, 1. That my market or fair be the elder, otherwise the nuisance lies at my own door. 2. That the market be erected within the third part of twenty miles from mine. For sir Matthew Hale o construes the dieta, or reasonable day's journey,
mentioned by Bracton p, be twenty miles: as indeed it is usually understood not only in our own law q, but also in the civil r, from which we probably borrowed it. So that if the new market be

/i Hale on F.N.B.427.
/k F.N.B.184.
/l 9 Rep. 59. 2Roll. Abr.141.
/m F.N.B.183. 2Roll. Abr.140.
/n F.N.B.184. 2Roll. Abr.141.
/o on F.N.B.184.
/p l.3. c.16.
/q 2 Inst.567.
/r Ff.2.11.1.

not within seven miles of the old one it is no nuisance; for it is held reasonable that every man should have a market within one third of a day’s journey from his own home; that, the day being divided into three parts, he may spend one part in going, another in returning, and the third in transacting his necessary business there. If such market or fair be on the same day with mine, it is prima facie a nuisance to mine, and there needs no proof of it, but the law will intend it to be so: but if it be on any other day, it may be a nuisance; though whether it is so or not, cannot be intended or presumed, but I must make proof of it to the jury. If a ferry is erected on a river, so near another ancient ferry as to draw away its custom, it is nuisance to the owner of the old one. For where there is a ferry by proscription, the owner is bound to keep it always in repair and readiness, for the ease of all the king’s subject; otherwise he maybe grievously amerced s: it would be therefore extremely hard, if a new ferry were to share his profits, which does not also share his burden. But, where the reason ceases, the law also ceases with it: therefore it is no nuisance to erect a mill so near mine, as to draw away the custom, unless the miller also intercepts the water. Neither is it a nuisance to set up any trade, or a school, in neighbourhood or rivalship with another: for by such emulation the public are like to be gainers; and, if the new mill or school occasion a damage to the old one, it is damnum absque injuria t.

II. LET us next attend to the remedies, which the law has given for this injury of nuisance. And here I must premise that the law gives no private remedy for any thing but a private wrong. Therefore no action lies for a public or common nuisance, but an indictment only: because the damage
being common to all the king's subjects, no one can assign his particular proportion of it; or, he could, it would be extremely hard, if every subject in the kingdom were allowed to harass the offender with separate actions. For this reason, no person, natural

/s 2 Roll. Abr.140.
/t Hale on F.N.B.184.

or corporate, can have an action for a public nuisance, or punish it; but only the king in his public capacity of supreme governor, and paterfamilias of the kingdom. Yet this rule admits of one exception; where a private person suffers some extraordinary damage, beyond the rest of the king's subjects, by a public nuisance: in which case shall have a private satisfaction by action. As if, by means of a ditch dug across a public way, which is a common nuisance, a man or his horse suffer any injury by falling therein; there, for this particular damage, which is not common to others, the party shall have his action. Also if a man hath abated, or removed, a nuisance which offended him (as we may remember it was stated, in the first chapter of this book, that the party injured hath a right to do) in this case he is entitled to no action. For he had choice of two remedies; either without suit, by abating it himself, by his own mere act and authority; or by suit, in which he may both recover damages, and remove it by the aid of the law: but having made his election of one remedy, he is totally precluded from the other.

THE remedies by suit, are, 1. By action on the case for damages; in which the party injured shall only recover a satisfaction for the injury sustained; but cannot thereby remove the nuisance. Indeed every continuance of a nuisance is held to be a fresh one; and therefore a fresh action will lie, and very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardiness to continue it. Yet the founders of the law of England did not rely upon probabilities merely, in order to give relief to the injured. They have therefore provided two other actions; the assise of nuisance, and the writ of quod permittat prosternere: which not only give the plaintiff satisfaction for his injury past, but also strike at the root and remove the cause itself, the nuisance that occasioned the injury. These two actions however can only be brought by the

/u Vaugh. 341,342.
/w Co. Litt.56. 5Rep.73.
tenant of the freehold; so that a lessee for years is confined to his action upon the case z.

2. AN assise of nuisance is a writ, wherein it is stated that the party injured complains of some particular fact done, ad nocumentum liberi tenementi sui, and therefore commanding the sheriff to summon an assise, that is, a jury, and view the premises, and have them at the next commission of assises, that justice may be done therein a: and, if the assise is found for the plaintiff, he shall have judgment of two things; 1. To have the nuisance abated; and 2. To recover damages b. Formerly an assise of nuisance only lay against the very wrongdoer himself who levied, or did, the nuisance; and did not lie against any person to whom he had aliened the tenements, whereon the nuisance was situated. This was the immediate reason for making that equitable provision in statute Westm. 2. 13 Edw. I. c.24. for granting a similar writ, in casu consimili, where no former precedent was to be found. The statute enacts, that de caetero non recedant querentes a curia domini Regis, por eo quod tenementum transfertur de uno in alium; and then gives the form of a new writ in this case; which only differs from the old one in this, that, where the assise is brought against the very person only who levied the nuisance, it is said, quod A. (the wrongdoer) injuste levavit take nocomentum; but, where the lands are aliened to another person, the complaint is against both; quod A. (the wrongdoer) et B. (the alienee) levaverunt c. For every continuation, as was before said, is a fresh nuisance; and therefore the complaint is as well grounded against the alienee who continues it, as against the alienor who first levied it.

3. BEFORE this statute, the party injured, upon any alienation of the land wherein the nuisance was set up, was driven to his quod permittat prosternere; which is in the nature of a

/z Finch. L. 289.
/a F.N.B.183.
/b 9Rep.55.
/c Ibid.
writ or right, and therefore subject to greater delays d. This is a writ commanding the defendant to permit the plaintiff to abate, quod permittat prosternere, the nuisance complained of ; and, unless he so permits, to summon him to appear in court, and thew cause why he will not e. And this writ lies as well for the alienee of the party first injured, as against the alienee of the party first injuring ; as hath been determined by all the judges f. And the plaintiff shall have judgment herein to abate the nuisance, and to recover damages against the defendant.

BOTH these actions, of assise of nuisance, and of quod permittat prosternere, are now out of use, and have given way to the action on the case ; in which, as was before observed, no judgment can be had to abate the nuisance, but only to recover damages. Yet, as therein it is not necessary that the freehold should be in the plaintiff and defendant respectively, as it must be in these real actions, but it is maintainable by one that hath possession only, against another that hath like satisfaction, the process is therefore easier : and the effect will be much the same, unless a man has a very obstinate as well as an ill-natured neighbour ; who had rather continue to pay damages, than remove his nuisance. For in such case, recourse must at last be had to the old and sure remedies, which will effectually conquer the defendant's perverseness, by sending the sheriff with his posse conmitatus, or power of the county, to level it.

/d 2 Inst.405.
/e F.N.B.124.

CHAPTER THE FOURTEENTH.
OF WASTE
THE fourth species of injury, that may be offered to one's real property, is by waste, or destruction in lands tenements. What shall be called waste was considered at large in a former volume a, as it was a means of forfeiture, and thereby of transferring the property of real estates. I shall therefore here only beg leave to remind the student, that waste is a spoil and destruction of the estate, either in houses, woods, or lands ; by demolishing not the temporary profits only, but the very substance of the thing ; thereby rendering it wild and desolate ; which the common law expresss very significantly by the word vastum : and that this vastum, or waste, is either voluntary or permissive ; the one by actual and designed
demolition of the lands, woods, and houses; the other arising from mere negligence, and want of sufficient care in reparations, fences, and the like. So that my only business is at present to shew, to whom this waste is an injury; and of course who is entitled to any, and what, remedy be action.

I. THE persons, who may be injured by waste, are such as have some interest in the estate wasted: for if a man be the absolute tenant in fee-simple, without any incumbrance or charge on the premises, he may commit whatever waste his own indiscretion may prompt to, without being impeachable or accountable for it to any one. And, though heir is sure to be the sufferer, yet nemo est haeres viventis: no man is certain of succeeding him, as well on account of the uncertainty which shall die first, as also because he has it in his own power to constitute what heir he pleases, according to the civil notion so an haeres natus and an haeres factus; or, in the more accurate phraseology of our English law, he may alienate or devise his estate to whomever he thinks proper, and by such alienation or devise may disinherit his al law. Into whose hands soever therefore the estate wasted comes, after a tenant in fee-simple, though the waste in undoubtedly damnum, it is absque injuria.

/a See Vol. II. ch.18.

creation may prompt to, without being impeachable or accountable for it to any one. And, though heir is sure to be the sufferer, yet nemo est haeres viventis: no man is certain of succeeding him, as well on account of the uncertainty which shall die first, as also because he has it in his own power to constitute what heir he pleases, according to the civil notion so an haeres natus and an haeres factus; or, in the more accurate phraseology of our English law, he may alienate or devise his estate to whomever he thinks proper, and by such alienation or devise may disinherit his al law. Into whose hands soever therefore the estate wasted comes, after a tenant in fee-simple, though the waste in undoubtedly damnum, it is absque injuria.

ONE species of interest, which in injured by waste, is that of a person who has a right of common in the place wasted; especially if it be common of estovers, or a right of cutting and carrying away wood for house-bote, plough-bote, &c. Here, if the owner of the woodk demolishes the whole wood, and thereby destroys all possibility of taking estoves, this is an injury to the commoner, amounting to no less than a disfeifin of his common of estovers, if he chooses so to consider it; for which he has his remedy to recover possession and damages by assise, if intitled to a freehold in such common: but if he has only a chattel interest, then he can only recover damages by an action on the case for this waste and destruction of the woods, out of which his estovers were to issue b.

BUT the most usual and important interest, that is hurt by this commission of waste, is that of him who hath the remainder or reversion of the inheritance, after a particular estate for life or years in being. Here, if the particular tenant, (be it the tenant in dower or by curtesy, who was
answerable for waste at the common law c, or the lessee for life or years, who was first

/b F.N.B.59. 9 Rep.112.
/c 2 Inst.299.

made liable by the statutes of Marlbridge d and of Glocester e) if the particular tenant, I say, commits or suffers any waste, it is a manifest injury to him that has the inheritance, as it tends to mangle and dismember it of its most desirabel incidents and ornaments, among which timber and houses may justly be reckoned the principal. To him therefore in remainder or reversion the law hath given a remedy; that is, to him to whom the inheritance appertains in expectancy f. For he, who hath the remainder for life only, is not entitled to sue for waste; since his interest may never perhaps come into possession, and then hath suffered no injury. Yet a parson, vicar, arch-deacon, prebendary, and the like, who are seised in right of their churches of any remainder or reversion, may have an action of waste; for they, in many cases, have for the benefit of her church and of the successor a fee-simple qualified: and yet, as they are not seised in their own right, the writ of waste shall not say, ad exhaeredationem ipsius, as for other tenants in fee-simple; but ad exhaeredationem ecclesiae, in whose right the fee-simple is holden. /g

II. THE redress for this injury of waste is of two kinds, priventive, and corrective: the former of which is by writ of estrepement, the latter by that of waste.

1. ESTREPEMENT is an old French word, signifying the same as waste or extirpation: and the writ of estrepelement lay at the common law, after judgment obtained in any action real h, and before possession was delivered by to sheriff; stop any waste which the vanquished party might be tempted to commit in lands, which were determined to be no longer his. But, as in some cases the defendant may be justly apprehensive, that the tenant may make waste or estrepelement pending the suit, well knowing the weakness of his title, therefore the statute of Glocester i gave another writ of estrepelement, pendente placito, com-

/d 52 Hen.III. c.23.
/e 6 Edw. l. c.5.
/f Co. Litt.53.
manding the sheriff firmly to inhibit the tenant faciat vastum vel estrepamentum pendente placito dicto indificufso. And, by virtue of either of these writs the sheriff may resist them that do, or offer to do, waste; and, if otherwise he cannot prevent them, he may lawfully imprison the wasters, or make a warrant to others to imprison them: or, if necessity require, he may take the posse comitatus to his assistance. So odious in the sight of the law is waste and destruction. In suing out these two writs this difference was formerly observed; that in actions merely possessory, where no damages are recovered, a writ of estrepement might be had at any time pendente lite, nay even at the time of suing out the original writ, or first process: but, in an action where damages were recovered, the defendant could only have a writ of estrepement, if he was apprehensive of waste after verdict had m; for, with regard to waste done before the verdict was given, it was presumed the jury would consider that in assessing the quantum of damages. But now it seems to be held, by an equitable construction of the statute of Glocester, and in advancement of the remedy, that a writ of estrepement, to prevent waste, may be had in every stage, as well of such actions wherein damages are recovered, as so those wherein only possession is had of the lands: for peradventure, saithe the law, the tenant may not be of ability to satisfy the demandant his full damages n. And therefore now, in an action of waste itself, to recover the place wasted and also damages, a writ of estrepement will lie, as well before as after judgment. For the plaintiff cannot recover damages for more waste than is contained in his original complaint; neither is he at liberty to assign or give in evidence any waste mede after the suing out of the writ: it is therefore reasonable that he should have this writ of preventive justice, since he in his present suit debarred of any farther remedial o. If a writ of estrepement, forbidding waste, directed and delivered to the tenant, as it may be, and he afterwards proceeds to commit waste, and action may

/k Regift.77.
/l 2 Inst.329.
/m F.N.B.60,61.
/n Ibid.61.
/o 5 Rep.115.
be carried on upon the foundation of this writ; wherein the only plea of the tenant can be, non fecit vastum contra prohibitionem: and, if upon verdict it be found that he did, the plaintiff may recover costs and damages; or the party may proceed to punish the defendant for the contempt: for if, after the writ directed and delivered to the tenant or his servants, they proceed to commit waste, the court will imprison them for this contempt of the writ. But not so, if it be directed to the sheriff, for then it is incumbent upon him to prevent the estrepement absolutely, even by raising the posse comitatus, if it can be done no other way.

BESIDES this preventive redress at common law, the courts of equity, upon bill exhibited therein, complaining of waste and destruction, will grant an injunction or order to stay waste, until the defendant shall have put in his answer, and the court shall thereupon make farther order. Which is now become the most usual way of preventing waste.

2. A WRIT of waste is also an action, partly founded upon the common law and partly upon the statute of Glocester; 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 curtesy, or tenant for years. This action is also maintainable in pursuance of statute Westm.2. by one tenant in common of the inheritance against another, who makes waste in the estate held in common. The equity of which statute extends to joint-tenant, but not to coparceners: because by the old law coparceners might make partition, whenever either of them thought proper, and thereby prevent future waste, but tenants in common and joint-tenants could not; and therefore the statute gave them this remedy, compelling the defendant either to make partition, and take the place wasted to his own share, or to give security not to commit any farther waste. But these te-

/p Moor.100.
/q Hob. 85.
/r 6 Edw. I. c.5.
/s 13 Edw. I. c.22.
/t 2 Inst 403,404.

nants in common and joint-tenants not liable to the penalties of the statute of Glocester, which extends only to such as have life-estates, and do
waste to the prejudice of the inheritance. The waste however must be something considerable; for if it amount only to twelve pence, or some such petty sum, the plaintiff shall not recover in an action of waste: nam de minimis non curat lex.

THIS action of waste is a mixed; partly real, so far as it recovers land, and partly personal, so far as it recovers damages. For it is brought for both those purposes; and, if the waste be proved, the plaintiff shall recover the thing or place waste, and also treble damages by the statute of Gloucester. The writ of waste calls upon the tenant to appear and shew cause, why he hath committed waste and destruction in the place named, ad exhderationem, to the disinherison, of the plaintiff w. And if the defendant makes default, or does not appear at the day assigned him, then the sheriff is to take with him a jury of twelve men, go in person to the place alleged to be wasted, and there enquire of the waste done, and the damages; and make a return or report of the same to the court, upon which report the judgment is founded x. For the law will not suffer so heavy a judgment, as the forfeiture and treble damages, to be passed upon a mere default, without full assurance that the fact is according as it is stated in the writ. But if the defendant appears to the writ, and afterwards suffers judgment to go against him by default, or uu a nihil dicit, (when he makes no answer, puts in no plea, in defence) this amounts to a confession of the waste; since, having once appeared, he cannot now pretend ignorance of the charge. Now therefore the sheriff shall not go to the place to enquire of the fact, whether any waste has, or has not, been committed; for this is already ascertained by the silent confession of the defendant: but he shall only, as in defaults upon other actions, make enquiry of the quantum of damages y. The defendant, on the trial, may give in evidence any thing that proves there was no waste committed, as that the destruction happened by lightning, tempest, the king’s enemies, or other inevitable accident z. But it is no defence to say, that a stranger did the waste, for against him the plaintiff has no remedy: though the defendant is intitled to sue such stranger in an action of trespass vi et armis, and shall recover the damages he has suffered in consequence of such unlawful act a.
WHEN the waste and damages are thus ascertained, either by confession, verdict, or enquiry of the sheriff, judgment is given, in pursuance of the statute of Gloucester, c.5. that the plaintiff shall recover the place wasted; for which he has immediately a writ of seisin, provided the particular estate be still subsisting, (for, if be expired, there can be no forfeiture of the land) and also that the plaintiff shall recover treble the damages assessed by the jury; which he must obtain in the same manner as all other damages, in actions personal and mixed, are obtained, whether the particular estate be expired, or still in being.

/y Cro. Eliz.18.290.
/z Co. Litt.53.
/a Law of nisi prius.112.

CHAPTER THE FIFTEENTH.
OF SUBTRACTION.
SUBTRACTION, which is the fifth species of injuries affecting a man's real property, happens, when any person who owes any suit, duty, custom, or service to another, withdraws or neglects to perform it. It differs from a disfeifin, in that this is committed without any denial of the right, consisting merely in non-performance; that strikes at very title of the party injured, and amounts to an ouster or actual dispossession. Subtraction however, being clearly an injury, is remediable by due course of law: but the remedy differs according to the nature, or by custom only.

I. Fealty, suit of court, and rent, are duties and services usually issuing and arising ratione tenurae, being the conditions upon which the ancient lords granted out their lands to their feudatories: whereby it was stipulated, that they and their heirs should take the oath of fealty or fidelity to their lord, which was the feudal bond or commune vinculum between lord and tenant; that they should do suit, or duly attend and follow the lord's courts, and there from time to time give their assistance, by serving on juries, either to decide the property of their neighbours in the courtbaron, or correct their misdemœnsors in the court-leet; and, lastly, that they should yield to the lord certain annual stated returns, in military attendance, in provisions, in arms, in matters of ornament or pleasure, in fuftic employments or praedial labour, or (which is inftar omnium) in miney, which will provide all the rest; all which are comprised under the
one general name of reditus, return, or rent. And the subtraction or nonobservance of any these conditions, by neglecting, to swear fealty, to do suit of court, or to render the rent or service reserved, is an injury to freehold of the lord, by diminishing and depreciating the value of his seignory.

THE general remedy for all these is by distress ; and it is the only remedy at the common law for the two first of them. The nature of distresses, their incidents and consequences, we have before more than once explained a: it may here suffice to remember, that they are a taking of beasts, or other personal property, by way of pledge to enforce the performance of something due from that distresses be reasonable and moderate; but, in the case so distress fealty or suit of court, no distress can be unreasonable, immoderate, or too large b: for this is the only remedy to which the party aggrieved is intitled, and therefore it ought to be such as is sufficiently compulsory; and, be it of what value it will, there is no harm, done, especially as it cannot be sold or made away with, but must be restored immediately on satisfaction to its quantity, and may be repeated from time to time, until the stubbornness of the party is conquered, is called a distress infinite; which is also used for some other purposes, as in summoning jurors, and the like.

OTHER remedies for subtraction of rents or services are, 1. By action of debt, for the breach of this express contract, of which enough has been formerly said. This is the most usual remedy, when recouse is had to any action at all for the recovery of pecuniary rents, to which species of render almost all free

a See pag.6.147.
b Finch.L.285.

services are now reduced, since the abolition of the military tenures. But for a freehold rent, reserved on a lease for life, &c, no action of debt lay by the common law, during the continuance of the freehold out of which it issued c: for the law would not suffer a real injury to be remedied by an action that was merely personal. However by the statutes 8 Ann.c.14. and 5 Geo. III. c.17. actions of debt may now be brought at any time to recover such freehold rents. 2. An assise of mort d' ancestor or novel difeifin will lie of rents as well of land d; if the lord, for the sake of trying the possessory right, will elect to suppose himself ousted or disseised thereof.
This is now seldom heard of; and all other real actions, being in the nature of writs of right, and therefore more dilatory in their progress, are entirely disused, though not formally abolished by law. Of this species however is, 3. The writ de consuetudinis et servitiis, which lies for the lord against his tenant, who withholds from him the rents and services due by custom, or tenure, for his land e. This compels a specific payment or performance of the rent or service; but there are also others, whereby the lord shall recover the land itself in lieu of the duty withheld. As, 4. The writ of cessavit: which lies, by the statutes of Glocester, 6 Edw. I. c.4. and of Westm. 2. 13 Edw. I. c.21 & 41. when a man who holds lands of a lord by rent or other services, neglects or ceases to perform his services for two years together; or where a religious house hath lands given it, on condition of performing some certain spiritual service, as reading prayers or giving alms, and neglects it; in either of which cases, if the cesser or neglect have continued for two years, the lord or donor and his heirs shall have a writ of cessavit to recover the land itself, eo quod tenens in faciendis ferivtis per biennium jam cessavit f. And in like manner, by the civil law, if tenant, (who held lands upon payment of rent or services, or as they call it jure emphyteutico,) neglected to pay or perform them per totum triennium, he might be ejected from such emphyteutic lands g. But by the statute of Glocester, the cessa-

c 1 Roll. Abr. 595.
d F.N.B. 195.
e Ibid. 151.
f Ibid 208.
g Cod. 4. 66. 2.

vit does not lie for lands let upon fee-simple rents, unless they have lain fresh and uncultivated for two years, and there be not sufficient distress upon the premises; or unless the tenant hath so enclosed the land, that the lord cannot come upon it to distrein h. For the law prefers the simple and ordinary remedies, by distress, or by the actions just now mentioned, to this extraordinary one of forfeiture for a cessavit; and therefore the same statute of Glocester has provided farther, that upon tender of arrears and damages before judgment, and giving security for the future performance of the services, the process shall be at an end, and the tenant shall retain his land. And to this the statute of Westm. 2. conforms, so far as may stand with convenience and reason of law i. It is easy to observe, that the statute 4 Geo.II. c.28. which was mentioned in a former chapter k,
and which permits landlords who have right of re-entry for non-payment of rent, to serve an ejectment on their tenants, when half a year's rent is due, and there is no distress on the premises; it is easy, I say, to observe, that this provision is in some measure copied from the ancient writ of cessavit: especially as it may be satisfied and put an end to in a similar manner, by tender of the rent and costs within six months after. 5. There is also another very effectual remedy, which takes place when the tenant upon a writ of assise for rent, or on a replevin, disowns or disclaims his tenure, whereby the lord loses his verdict; in which case the lord may have a writ of right, for disclaimer, grounded on this denial tenure; and shall, upon proof the tenure, recover back the land itself so holden, as a punishment to the tenant for such his false disclaimer l. This piece of retaliating justice, whereby the tenant who endeavours to defraud him is himself deprived of the estate, as it evidently proceeds upon feudal principles, so it is expressly to be met with in the feudal constitutions m vassallus, qui abnegavit feudum ejusfe conditionem, exspoliabitur.

h F.N.B.209. 2 Inst. 298.
i 2 Inst. 401.460.
k See pag.206.
l Finch L.270,271.
m Feud. l.2.t.26.

AND, as on the one hand the ancient law provided these several remedies to obviate the knavery and punish the ingratitude of the tenant, so on the other hand it was equally careful to redress the oppression of the lord; by furnishing, 1. The writ of ne injuste vexes n; which is an ancient writ founded on that chapter o of magna carta, which prohibits distresses for greater services than are really due to the lord; being itself of the prohibitory kind, and yet in the nature of a writ of right p. It lies, where the tenant in fee-simple and his ancestors have held of the lord by certain services; and the lord hath obtained seisin of more or greater services, by the inadvertent payment or performance of them by the tenant himself. Here the tenant cannot in an avowry avoid the lord's possessory right, because of the seisin given by his own hands; but is driven to this writ, to devest the lord's possession, and establish the mere right of property, by ascertaining the services, and reducing them to their proper standard. But this writ does not lie for tenant in tail; for he may avoid such seisin of the lord, obtained from the payment of this ancestors, by plea to an avowry in replevin q. 2. The writ of mesne, de medio; which is also in the nature of a
writ of right r, and lies, when upon a subinfeudation the mesne or middle lord s suffer his under-tenant, or tenant paravail, to be distreined upon by lord paramount, for the rent due to him from the mesne lord t. And in such case the tenant shall have judgment to be acquitted (or andemnified) by the mesne lord; and if he makes default therein, or does not appear originally to the tenant's writ, he shall be forejudged of his mesnality, and the tenant shall hold immediately of the lord paramount himself u.

II. THUS far of the remedies for subtraction of rents or other services due by tenure. There are also other services, due by an-

ant custom and prescription only. Such is that of doing suit to another's mill: where the persons, resident in a particular place, by usage time out of mind have been accustomed to grind their corn at a certain mill; and afterwards any of them go to another mill, and withdraw their suit, (their fecta, a sequendo) from the ancient mill. This is not only a damage, but an injury, to the owner; because this not only a damage, but an injury, to the owner; because this prescription might have a very reasonable foundation; viz. upon the erection of such mill by the ancestors of the owner for the convenience of the inhabitants, on condition, that, when erected, they should all grind their corn there only. And for this injury the owner shall have a writ de fecta ad molendinum w, commanding the defendant to do his suit at that mill, quam ad illud facere debet, et folet, or shew good cause t to the contrary: in which action the validity of the prescription may be tried, and if it be found for the owner, he shall recover damages against the defendant x. In like manner, and for like reasons, the register/will inform us, that a man may have a writ of fecta ad furnum, fecta ad torrale, et ominia alia hujusmodi; for suit due to his furnum, his public oven or bakehouse; or to his torrale, his kiln, or malthouse; when a person's ancestors have erected a conveniendce of that sort for the benefit of the neighbourhood, upon an agreement (proved by immemorial custom) that
all the inhabitants should use resort to it, when erected. But besides these
special remedies for subtractions, to compel the specific performance of
the service due by custom; an action on the case will also lie all of them, to
repair the party injured in damages. And thus much for the injury of sub-
w F.N.B.123.
x Co.Entr.461.
y fol.153.

CHAPTER THE SIXTEENTH.
OF DISTURBANCE.

THE sixth and last species of real injuries is that of disturbance; which is
usually a wrong done to some incorporeal hereditament, by hindering or
disquieting the owners in their regular and lawful enjoyment of it a. I shall
consider five sorts of this injury; viz. 1. Disturbance of franchises. 2.
Disturbance of common. 3. Disturbance of ways. 4. Disturbance of tenure.
5. Disturbance of patronage.

I. DISTURBANCE of franchises happens, when a man has the franchise of
holding a court-leet, of keeping a fair or market, of free-warren, of taking
toll, seising waifs or estrays, or (in short) any other species of franchise
whatsoever; and he is disturbed or incommoded in the lawful exercise
thereof. As if another by distress, menaces, or persuasions, prevails upon
the suitors not to appear at my court; or obstructs the passage to my fair
or market; or hunts in my free-warren; or refuses to pay me the
accustomed toll; hinders me from seising the waif or estray, whereby it
escapes or is carried out of my liberty: in every case of this kind, which it
is impossible here to recite or suggest, there is an injury done to the legal
owner; his property is damnified, and the profits arising from such his
franchise are diminished. To remedy which as the law has given no other
a Finch.L.187.

writ, he is therefore entitled to sue for damages by a species action on the
case: or, in case of toll, may take a distress if he pleases b.

II. THE disturbance of common comes next to be considered; where any
act is done, by which the right of another to his common is incommoded
or diminished. This may happen, in the first place, where one who hath no right of common, put his cattle into the land; and thereby robs the cattle of the commoners of their respective shares of the pasture. Or if one, who hath a right common, puts in cattle which are not commonable as hogs and goats; which amounts to the same inconvenience. But the lord of the soil may (by custom or prescription, but not without) put a stranger's cattle into the common; and also, by a like prescription for common appurtenant, cattle that are not commonable may be put into the common. The lord also of the soil may justify making burrows therein, and putting in rabbets, so as they do not encrease to so large a number as totally to destroy the common. But in general, in case the beasts of a stranger, or the uncommanable cattle of a commoner be found upon the land, the lord or any of the commoners may distrein them damage-feasant; or the commoner may bring an action on the case to recover damages, provided injury done be any thing considerable; so that he may lay his action with a per quod, or allege that thereby he was deprived of his common. But for a trivial trespass the commoner has no action; but the lord of the soil only, for the entry and trespass committed.

ANOTHER disturbance of common is by surcharging it; or putting more cattle therein than the pasture and herbage will sustain, or the party hath a right to do. In this case he that surcharges does an injury to the right of the owners, by depriving them of their respective portions, or at least contracting them into a smaller compass. This injury by surcharging can properly speaking only happen, where the common is appurtenant or appurtenant, and of course limitable by law; or where, when in gross, it is expressly limited an certain: for where a man hath common in gross, sans nombre or without stint, he cannot be a surcharger. However, even where a man is said to have common without stint, still there must be left sufficient for the lord's own beasts: for the law will not suppose that, at the original grant of the common, the lord meant to exclude himself.

b Cro. Eliz. 558.
c 1 Roll. Abr. 396.
b Co. Litt. 122.
f 9 Rep. 112.
g Ibid.
THE usual remedies, for surcharging the common, are either by
distreining so many of the beasts as are above the number allowed, or else
by an action of trespass; both which may be had by the lord: or, lastly, by a
special action on the case for damages; in which any commoner may be
plaintiff k. But the ancient and most effectual method of proceeding is by
writ of admeasurement of pasture. This lies, either where a common
appurtenant or in gross is certain as to number, or where a man has
common appendant or appurtenant to his land, the quantity of which
common has never yet been ascertained. I either of these cases, as well the
lord, as any of the commoners, is entitled to this writ of admeasurement;
which is one of those writs, that are called vicontiel l, being directed to the
sheriff, (vice-comiti) and not to be returned to any superior court, till
finally executed by him. It recites a complaint, that the defendant hath
surcharged, superoneravit, the common: and therefore commands the
sheriff to admeasure and apportion it; that the defendant may not have
more than belongs to him, and that the plaintiff may have his rightful
share. And upon this suit all the commoners shall be admeasured, as well
those who have not, as those who have, surcharged the common; as well
the plaintiff, as the defendant m. The execution of this writ must be by a
jury of twelve, men,

h See book II. ch. 3.
i1 Roll. Abr. 399.
k Freem. 273.
l2 Inst. 369.
m F. N. B. 125.

who are upon their oaths to ascertain, under the superintendence of the
sheriff, what and how many cattle each commoner is entitled to feed. And
the rule for this admeasurement is generally understood to be, that the
commoner shall not turn more cattle upon the common, than are
sufficient to manure and stock the land to which his right of common is
annexed; or, as our ancient law expressed it, such cattle only as are levant
and couchant upon his tenement n: which being a thing uncertain before
admeasurement, has frequently, though erroneously, occasioned this
unmeasured right of common to be called a common without stint or sans
nombre o; a thing which, though possible in law, does in fact very rarely
exist.
IF, after the admeasurement has thus ascertained the right, the same
defendant surcharges the common again, the plaintiff may have a writ of
second surcharge, de secunda superoneratione, which is given by the
statute Westm. 2. 13 Edw. I. c. 8. and thereby the sheriff is directed to
enquire by a jury, whether the defendant has in fact again surcharged the
common, contrary to the tenor of the last admeasurement: and if he has,
he shall then forfeit to the king the supernumerary cattle put in, and also
shall pay damages to the plaintiff p. This process seems highly equitable:
for the first offence is held to be committed through mere inadvertence;
and therefore there are no damages or forfeiture on the first writ, which
was only to ascertain the right which was disputed: but the second offence
is a willful contempt and injustice; and therefore punished very properly
with not only damages, but also forfeiture. And herein the right, being
once settled, is never again disputed; but only the fact is tried, whether
there be any second surcharge or no: which gives this neglected
proceeding a great advantage over the modern method, by action on the
case, wherein the quantum of common belonging to the defendant must be
proved upon every fresh trial, for every repeated offence.

n Bro. Abr. t. prefeception. 28.
o Hardr. 117.
pF. N. B. 126. 2 Inst. 370.

THERE is yet another disturbance of common, when the owner of the
land, or other person, so encloses or otherwise obstructs it, that the
commoner is precluded from enjoying the benefit, to which he is by law
entitled. This may be done, either by erecting fences, or by driving the
cattle off the land, or by ploughing up the soil of the common q. Or it may
be done by erecting a warren therein, and stocking it with rabbets in such
quantities, that they devour the whole herbage, and thereby destroy the
common. For in such case, though the commoner may not destroy the
rabbets, yet the law looks upon this as an injurious disturbance of his
right, and has given him his remedy by action against the owner r. This
kind of disturbance does indeed amount to a disfeifin, and if the
commoner chooses to consider it in that light, the law has given him an
assise of novel disfeifin, against the lord, to recover the possession of his
common s. Or it has given a writ of quod permittat against any stranger, as
well as the owner of the land, in case of such a disturbance to the plaintiff
as amounts to a total deprivation of his common; whereby the defendant
shall be compelled to permit the plaintiff to enjoy his common as he ought
t. But if the commoner does not choose to bring a real action to recover seisin, or to try the right, he may (which is the easier and more usual way) bring an action on the case for his damages, instead of an assise or a quod permittat u.

THERE are cases indeed, in which the lord may enclose and abridge the common; for which, as they are no injury to any one, so no one is entitled to any remedy. For it is provided by the statute of Merton, 20 Hen. III. c. 4. that the lord may approve, that is, enclose and convert to the uses of husbandry (which is a melioration or approvement) any waste grounds, woods, or pastures, in which his tenants have common appendant to their es-

q Cro. Eliz. 198.
r Cro. Jac. 195.
s F. N. B. 179.
t Finch. L. 275. F. N. B. 123.
u Cro. Jac. 195.

tates; provided he leaves sufficient common to his tenants, according to the proportion of their land. And this is extremely reasonable: for it would be very hard if the lord, whose ancestors granted out these estates to which the commons are appendant, should be precluded from making what advantage he can of the rest of his manor; provided such advantage and improvement be no way derogatory from the former grants. The statute Westm. 2. 13 Edw. I. c. 46. extends this liberty of approving, in like manner, against all others that have common appurtenant, or in gross, as well as against the tenants of the lord, who have their common appendant; and farther enacts that no assise of novel disfeifin, for common, shall lie against a lord for erecting on the common any windmill, sheephhouse, or other necessary buildings therein specified: which, sir Edward Coke says w, are only put as examples; and that any other necessary improvements may be made by the lord, though in reality they abridge the common, and make it less sufficient for the commoners. And lastly, by statutes 29 Geo. II. c. 36. and 31 Geo. II. c. 41. it is particularly enacted, that any lords of wastes and commons, with the consent of the major part, in number and value, of the commoners, may inclose any part thereof, for the growth of timber and underwood.
III. THE third species of disturbance, that of ways, is very similar in its nature to the last: it principally happening when a person, who hath a right to a way over another's grounds, by grant or prescription, is obstructed by inclosures, or other obstacles, or by ploughing across it; by which means he cannot enjoy his right of way, or at least not in so commodious a manner as he might have done. If this be a way annexed to his estate, and the obstruction is made by the tenant of the land, this brings it to another species of injury; for it is then a nuisance for which an assise will lie, as mentioned in a former chapter x. But if the right of way, thus obstructed by the tenant, be only in gross, (that is, annexed to a man's person and unconnected with any

w 2 Inst. 476.
x ch. 13. pag. 218.

lands or testaments) or if the obstruction of a way belonging to an house or land is made by a stranger, it is then in either case merely a disturbance: for the obstruction of a way in gross is no detriment to any lands or testaments, and therefore does not fall under the legal notion of a nuisance, which must be laid, ad nocumentum liber tenemente y; and the obstruction of it by a stranger can never tend to put the right of way in dispute: the remedy therefore for these disturbances is not by assise or any real action, but by the universal remedy of action on the case to recover damages z.

IV. THE fourth species of disturbance is that of disturbance of tenure, or breaking that connexion, which subsists between the lord and his tenant, and to which the law pays so high a regard, that it will not suffer it to be wantonly dissolved by the act of a third person. The having an estate well tenanted is an advantage that every landlord must be every sensible of; and therefore the driving away a tenant from off his estate is an injury of no small consequence. If therefore there be a tenant at will of any lands or testaments, and a stranger either by menaces and threats, or by unlawful distresses, or by fraud and circumvention, or other means, contrives to drive him away, or inveigle him to leave his tenancy, this the law very justly construes to be a wrong and injury to the lord a, and gives him a reparation in damages against the offender by a special action on the case.
V. THE fifth and last species of disturbance, but by far the most considerable, is that of disturbance of patronage; which is an hindrance or obstruction of a patron to present his clerk to a benefice.

THIS injury was distinguished at common law from another species of injury, called usurpation; which is an absolute ouster or dispossession of the patron, and happens when a stranger, that hath no right, presenteth a clerk, and he is thereupon admitted

y F. N. B. 183.
z Hale on F. N. B. 183. Lutw. 111. 119.
a Hal. Anal. c. 40. 1 Roll. Abr. 108.

and instituted b. In which case, of usurpation, the patron lost by the common law not only his turn of presenting pro hac vice, but also the absolute and perpetual inheritance of the advowson, so that he could not present again upon the next avoidance, unless in the mean time he recovered his right by a real action, viz. a writ of right of advowson c. The reason given for his losing the present turn, and not ejecting the usurper's clerk, was, that the final intent of the law in creating this species of property being to have a fit person to celebrate divine service, it preferred the peace of the church (provided a clerk were once admitted and instituted) to the right of any patron whatever. And the patron also lost the inheritance of his advowson, unless he recovered it in a writ of right, because by such usurpation he was put out of possession of his advowson, as much as when by actual entry and ouster he is disseised of lands or houses; since the only possession, of which an advowson is capable, is by actual presentation and admission of one's clerk. And therefore, when the clerk was once instituted (except in the case of the king, where he must also be inducted d,) the church was absolutely full; and the usurper became seised of the advowson. Which seisin or possession it was impossible for the true patron to remove by any possessory action, or other means, during the plenary or fulness of the church; and when it became void afresh, he could not present, since another had the right of possession. The only remedy therefore, which the patron had left, was to try the mere right in a writ of right of advowson; which is a peculiar writ of right, framed for this special purpose, but in every other respect corresponding with other writs of right e: and, if a man recovered therein, he regained his advowson and was entitled to present at the next avoidance f. But in order to such recovery he must allege a presentation in
himself or some of his ancestors, which proves him or them to have been once in possession: for, as a grant of the advowson, during the fullness of the church, con-

b Co. Litt. 277.
c 6 Rep. 49.
d Ibid.
e F. N. B. 30.
f Ibid. 36.

veys no manner of possession for the present, therefore a purchaser, until he hath presented, hath no actual seisin whereon to ground a writ of right g. Thus stood the common law.

BUT bishops, in ancient times, either by carelessness or collusion, frequently instituting clerks upon the presentation of usurpers, and thereby defrauding the real patrons of their right of possession, it was in substance enacted by statute Westm. 2. 13 Edw. I. c. 5. 2. that if a possession action be brought within six months after the avoidance, the patron shall (notwithstanding such usurpation and institution) recover that very presentation; which gives back to him the seisin of the advowson. Yet still, if the true patron omitted to bring his action within six months, the seisin was gained by the usurper, and the patron to recover it was driven to the long and hazardous process of a writ of right. To remedy which it was farther enacted by statute 7 Ann. c. 18. that no usurpation shall displace the estate or interest of the patron, or turn it to a mere right; but that the true patron had happened. So that the title of usurpation is now much narrowed, and the law stands upon this reasonable foundation: that if a stranger usurps my presentation and I do not pursue my right within six months, I shall lose that turn without remedy, for the peace of the church, and as a punishment for my own negligence; but that turn is the only one I shall lose thereby. Usurpation now gains no right to the usurper, with regard to any future avoidance, but only to the present vacancy: it cannot indeed be remedied after six months are past; but, during those six months, it is only a species of disturbance.

DISTURBERS of a right of advowson may therefore be these three persons; the pseudo-patron, his clerk, and the ordinary: the pretended patron, by presenting to a church to which he has no right, and thereby
making it litigious or disputable; the clerk, by demanding or obtaining institution, which tends to and

g 2 Inst. 357.

promotes the same inconvenience; and the ordinary, by refusing to admit the real patron's clerk, or admitting the clerk of the pretender. These disturbances are vexatious and injurious to him who hath the right: and therefore, if he be not wanting to himself, the law (besides the writ of right of advowson, which is a final and conclusive remedy) hath given him two inferior possessory actions for his relief; an assise of darrein presentment, and a writ of quare impedit; in which the patron is always the plaintiff, and not the clerk. For the law supposes the injury to be offered to him only, by obstructing or refusing the admission of his nominee; and not to the clerk, who hath no right in him till institution, and of course can suffer no injury.

1. AN assise of darrein presentment, or last presentation, lies when a man, or his ancestors, under whom he claims, have presented a clerk to a benefice, who is instituted; and afterwards upon the next avoidance a stranger presents a clerk, and thereby disturbs him that is the real patron. In which case the patron shall have this writ h, directed to the sheriff to summon an assise or jury, to enquire who was the last patron that presented to the church now vacant, of which the plaintiff complains that he is deforced by the defendant: and, according as the assise determines that question, a writ shall issue to the bishop; to institute the clerk of that patron, in whose favour the determination is made, and also to give damages, in pursuance of statute Westm. 2. 13 Edw. I. c. 5. This question, it is to be observed, was, before the statute 7 Ann. before-mentioned, entirely conclusive, as between the patron or his heirs and a stranger: for, till then, the full possession of the advowson was in him who presented last and his heirs; unless, since that presentation, the clerk had been evicted within six months, or the rightful patron had recovered the advowson in a writ of right, which is a title superior to all others. But that statute having given a right to any person to bring a quare impedit, and to recover (if his title be good) notwithstanding the last presentation, by whomsoever

h F. N. B. 31.
made; assises of darrein presentment, now not being in any wise conclusive, have been totally disused, as indeed they began to be before; a quare impedit being a more general, and therefore a more usual action. For the assise of darrein presentment lies only where a man has an advowson by descent from his ancestors; but the writ of quare impedit is equally remedial whether a man claims title by descent or by purchase i.

2. I PROCEED therefore, secondly, to enquire into the nature k of a writ of quare impedit, now the only action used in case of the disturbance of patronage: and shall first premise the usual proceedings previous to the bringing of the writ.

UPON the vacancy of a living the patron, we known, is bound to present within six calendar months l, otherwise it will lapse to the bishop. But, if the presentation be made within that time, the bishop is bound to admit and institute the clerk, if found sufficient m; unless the church be full, or there be notice of any litigation. For if any position be intended, it is usual for each party to enter a caveat with the bishop, to prevent his institution of his antagonist's clerk. An institution after a caveat entered is void by the ecclesiastical law n; but this the temporal courts pay no regard to, and look upon a caveat as a mere nullity o. But if two presentations be offered to the bishop upon the same avoidance, the church is then said to become litigious; and, if nothing farther be done, the bishop may suspend the admission of either, and suffer a lapse to incur. Yet if the patron or clerk on either side request him to award a jus patronatus, he is bound to do it. A jus patronatus is a commission from the bishop, directed usually to his chancellor and others of competent learning; who are to summon a jury of six clergymen and six laymen, to enquire into and examine who is the rightful patron p; and if, upon such enquiry made and certificate thereof returned by the commissioners, he admits and institutes the clerk of that patron whom they return as the true one, the bishop secures himself at all events

I 2 Inst. 355.
k See Bofwell's case. 6 Rep. 48.
l See book II. ch. 18.
m See book I. ch. 11.
n 1 Burn. 207.
o 1 Roll. Rep. 191.

patron p; and if, upon such enquiry made and certificate thereof returned by the commissioners, he admits and institutes the clerk of that patron whom they return as the true one, the bishop secures himself at all events
from being a disturber, whatever proceedings may be had afterwards in
the temporal courts.

THE clerk refused by the bishop may also have a remedy against him in
the spiritual court, denominated a duplex querela q: which is a complaint
in the nature of an appeal from the ordinary to his next immediate
superior; as from a bishop to the arch-bishop, or from an arch-bishop to
the delegates: and if the superior court adjudges the cause of refusal to be
insufficient, it will grant institution to the appellant.

THUS far matters may go on in the mere ecclesiastical course; but in
contested presentations they seldom go so far: for, upon the first delay or
refusal of the bishop to admit his clerk, the patron usually brings his writ
of quare impedit against the bishop, for the temporal injury done to his
property, in disturbing him in his presentation. And, if the delay arises
from the bishop alone, as upon pretence of incapacity, or the like, then 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 action; or it may
be brought against the patron and clerk, leaving out the bishop; or against
the patron only. But it is most adviseable to bring it against all three: for if
the bishop be left out, and the suit be not determined till the six months
are past, the bishop is entitled to present by lapse; for he is not party to the
suit r: but, if he be named, no lapse can possibly accrue till the right is
determined. If the patron be left out, and the writ be brought only against
the bishop and the clerk, the suit is of no effect, and the writ shall abate s;
for the right of the patron is the principal question in the cause t. If the
clerk be left out,

p 1 Burn. 16, 17.
q Ibid. 113.
r Cro. Jac. 93.
s Hob. 316.
t 7 Rep. 25.

And has received institution before the action brought (as is sometimes
the case) the patron by this suit may recover his 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 allege
against it. For which reasons it is the safer way always to insert them, all
three, in the writ.
THE writ of quare impedit u commands the disturbers, the bishop, the pseudo-patron, and his clerk, to permit the plaintiff to present a proper person (without specifying the particular clerk) to such a vacant church, which pertains to his patronage; and which the defendants, as he alleges, do obstruct: and unless they so do, then that they appear in court to shew the reason why they hinder him.

IMMEDIATELY on the suing our of the quare impedit, if the plaintiff suspects that the bishop will admit the defendant's or any other clerk, pending the suit, he may have a prohibitory writ, called a ne admittas w; which recites the contention begun in the king's courts, and forbids the bishop to admit any clerk whatsoever till such contention be determined. And if the bishop doth, after the receipt of this writ, admit any person, even though the patron's right may have been found in a jure patronatus, then the plaintiff, after he has obtained judgment in the quare impedit, may remove the incumbent, if the clerk of a stranger, by writ of scire facias x: and shall have a special action against the bishop, called a quare incumbravit; to recover the presentation, and also satisfaction in damages for the injury done him by incumbering the church with a clerk, pending the suit, and after the ne admittas received y. But if the bishop has incumbered the church by instituting the clerk, before the ne admittas issued, no quare incumbravit lies; for the bishop hath no legal notice, till the writ of ne admittas is served upon him. The

u F. N. B. 32.
w Ibid. 37.
x 2 Sid. 94.
y F. N. B. 48.

patron is therefore left to his quare impedit merely; which, as was before observed, now lies (since the statute of Westm. 2.) as well upon a recent usurpation within six months past, as upon a disturbance without any usurpation had.

IN the proceedings upon a quare impedit, the plaintiff must set out his title at length, and prove at least one presentation in himself, his ancestors, or those under whom he claims; surrender he must recover by the strength of his own right, and not by the weakness of the defendant's: and he must also shew a disturbance before the action brought a. Upon
this the bishop and the clerk usually disclaim all title: save only, the one as ordinary, to admit and institute; and the other as presentee of the patron; who is left to defend his own right. And, upon failure of the plaintiff in making out his own title, the defendant is put upon the proof of his, in order to obtain judgment for himself, if needful. But if the right be found for the plaintiff, on the trial, three farther points are also to be enquired: 1. If the church be full; and, if full, then of whose presentation: for if it be of the defendant's presentation, then the clerk is removable by writ brought in due time. 2. Of what value the living is: and this in order to assess the damages which are directed to be given by the statute of Westm. 2. and, 3. In case of plenary upon a usurpation, whether six calendar b months have passed between the avoidance and the time of bringing the action: for then it would not be within the statute, which permits an usurpation to be devested by a quare impedit, brought infra tempus aemeatre. So that plenary is still a sufficient bar in an action of quare impedit, brought above six months after the vacancy happens; as it was universally by the common law, however early the action was commenced.

IF it be found that the plaintiff hath the right, and hath commenced his action in due time, then he shall have judgment

z Vaughan 7, 8.
aHob. 199.
b2 Inst. 361.

to recover the presentation; and, if the church be full by institution of any clerk, to remove him: unless it were filled pendente lite by lapse to the ordinary, he not being party to the suit; in which case the plaintiff loses his presentation pro hac vice, but shall recover two years' full value of the church from the defendant the pretended patron, as a satisfaction for the turn lost by his disturbance: or, in case of his insolvency, he shall void at the end of the suit, then whichever party the presentation is found to belong to, whether plaintiff or defendant, shall have a writ directed to the bishop ad admittendum clericum d, reciting the judgment of the court, and ordering him to admit and institute the clerk of the prevailing party; and, if upon this order he does not admit him, the patron may sue the bishop in a writ of quare non admitit e, and recover ample satisfaction in damages.
BESIDES these possessory actions, there may be also had (as hath before been incidentally mentioned) a writ of right of advowson, which resembles other writs of right: the only distinguishing advantage now attending it, being, that it is more conclusive than a quare impedit; since to an action of quare impedit a recovery had in a writ of right may be pleaded in bar.

THERE is no limitation with regard to the time within which any actions touching advowsons are to be brought; at least none later than the times of Richard I and Henry III: for by statute 1 Mar. st. 2. c. 5. the statute of limitations, 32 Hen. VIII. c. 2. is declared not to extend to any writ of right of advowson, quare impedit, or assise of darrein presentment, or jus patronatus. And this upon very good reason: because it may very easily happen that the title to an advowson may not come in question, not the right have opportunity to be tried, within sixty years, which is the longest period of limitation assigned by the statute of Henry VIII. For sir Edward Coke tells us, that there was a parson of one of his churches, that had been incumbent there above fifty years; nor are instances wanting wherein two successive incumbents have continued for upwards of a hundred years. Had therefore the last of these incumbents been the clerk of a usurper, or had been presented by lapse, it would have been necessary and unavoidable for the patron, in case of a dispute, to have recurred back above a century, in order to have shewn a clear title and seisin by presentation and admission of the prior incumbent. But though, for these reasons, a limitation is highly improper with respect only to the length of time; yet, as the title of advowsons is, for want of some limitation, rendered more precarious than that of any other hereditament, it might not perhaps be amiss if a limitation were established with respect to the number of avoidances; or, rather, if a limitation were compounded of the length of time and the number of avoidances together: for instance, if no seisin were admitted to be alleged in any of these writs of patronage, after sixty years and four avoidances were past.

IN a writ of quare impedit, which is almost the only real action that remains in common use, and also in the assise of darrein presentment,
and writ of right, the patron only, and not the clerk, is allowed to sue the
disturber. But, by virtue of several acts of parliament h, there is one
species of presentations, in which a remedy, to be sued in the temporal
courts, is put into the hands of the clerks presented, as well as of the
owners of the advowson. I mean the presentation to such benefices, as
belong to roman catholic patrons; which, according to their several
counties, are vested in and secured to the two universities of this kingdom.
And particularly by the statute of 12 Ann. st. 2. c. 14.  4. a new method of
proceeding is provided; viz. that, besides the writs of quare impedit, which
the universities as patrons are entitled to bring, they, or their clerks, may
be at liberty to file a

The two last incumbents of the rectory of Chelsfield cum Farnborough in
Kent, continued 101 years; of whom the former was admitted in 1650, the
latter in 1700, and died in 1751.


bill in equity against any person presenting to such livings, and disturbing
their right of patronage, or his cestui qui trust, or any other person whom
they have cause to suspect; in order to compel a discovery of any secret
trusts, for the benefit of papists, in evasion of those laws whereby this right
of advowson is vested in those learned bodies: and also (by the statute 11
Geo. II.) to compel a discovery whether any grant or conveyance, said to be
made of such advowson, were made bona side to a protestant purchaser,
for the benefit of protestants, and for a full consideration; without which
requisites every such grant or conveyance of any advowson or avoidance is
absolutely null and void. This is a particular law, and calculated for a
particular purpose: but in no instance but this does the common law
permit the clerk himself to interfere in recovering a presentation, of which
he is afterwards to have the advantage. For besides that he has (as was
before observed) no temporal right in him till after institution and
induction; and, as he therefore can suffer no wrong, is consequently
entitled to no remedy; this exclusion of the clerk from being plaintiff
seems also to arise from the very great honour and regard, which the law
pays to his sacred function. For it looks upon the cure of souls as too
arduous and important a task to be eagerly fought for by any serious
clergyman; and therefore will not permit him to contend openly at law for
a charge and trust, which it presumes he undertakes with diffidence.
BUT when the clerk is in full possession of the benefice, the law gives him the same possessory remedies to recover his glebe, his rents, his tithes, and other ecclesiastical dues, by writ of entry, assise, ejectment, debt, or trespass, (as the case may happen) which it furnishes to the owners of lay property. Yet he shall not have a writ of right, nor such other similar writs as are grounded upon the mere right; because he hath not in him the entire fee and right I: but he is intitled to a special remedy called a writ of juris utrum, which is sometimes styled the parson's writ

I F. N. B. 49.

of right k, being the highest writ which he can have l. This lies for a parson or a prebendary at common law, and for a vicar by statute 14 Edw. III. c. 17. and is in the nature of an assise, to enquire whether the testaments in question are frankalmoign belonging to the church of the demandant, or else the lay fee of the tenant m. And thereby the demandant may recover lands and testaments belonging to the church, which were aliened by the predecessor; or of which he was disseised; or which were recovered against him by verdict, confession, or default, without praying in aid of the patron and ordinary; or on which any person has intruded since the predecessor's death n. But since the restraining statute of 13 Eliz. c. 10. whereby the alienation of the predecessor, or a recovery suffered by him of the lands of the church, is declared to be absolutely void, this remedy is of very little use, unless where the parson himself has been deforced for more than twenty years o; for the successor, at any competent time after his accession to the benefice, may enter, or bring an ejectment.

k Booth. 221.
l F. N. B. 48.
m Regiftr. 32.
n F. N. B. 48, 49.
o Booth. 221.

CHAPTER THE SEVENTEENTH.
OF INJURIES PROCEEDING FROM, OR AFFECTING, THE CROWN.

HAVING in the nine preceding chapters considered the injuries, or private wrongs, that may be offered by the command and authority of the king,
signified by his original writs returnable in his several courts of justice, which thence derive a jurisdiction of examining and determining the complaint; I proceed now to inquire of the mode of redressing those injuries to which the crown itself is a party: which injuries are either where the crown is the aggressor, and which therefore cannot without a solecism admit of the same king of remedy a; or else is the sufferer, and which then are usually remedied by peculiar forms of process, appropriated to the royal prerogative. In treating therefore of these, we will consider first, the manner of redressing those wrongs or injuries which a subject may suffer from the crown, and then of redressing those which the crown may receive from a subject.

I. THAT the king can do no wrong, is a necessary and fundamental principle of the English constitution: meaning only, as has formerly been observed b, that, in the first place, whatever may be amiss in the conduct of public affairs is not chargeable personally on the king; nor is he, but his ministers, accountable for it to the people: and, secondly, that the prerogative of the crown extends not to do any injury; for, being created for the benefit of the people, it cannot be exerted to their prejudice c. Whenever therefore it happens, that, by misinformation or inadvertence, the crown hath been induced to invade the private rights of any of its subject, though no action will lie against the sovereign d, (for who shall command the king e?) yet the law hath furnished the subject with a decent and respectful mode of removing that invasion, by informing the king of the true state of the matter in dispute: and, as it presumes that to know of an injury and to redress it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved.

THE distance between the sovereign and his subjects is such, that it rarely can happen, that any personal injury can immediately and directly proceed from the prince to any private man: and, as it can so seldom happen, the law in decency supposes that it never will or can happen at all; because it feels itself incapable of furnishing any adequate remedy, without infringing the dignity and destroying the sovereignty of the royal person, by setting up some superior power with authority to call him to account.
The inconveniency therefore of a mischief that is barely possible, is (as Mr. Locke has observed) well recompensed by the peace of the public and security of the government, in the person of the chief magistrate being set out of the reach of coercion. But injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom the law in matters of right entertains no respect or delicacy, but furnishes various methods of detecting the errors or misconduct of those agents, by whom the king has been deceived, and induced to do a temporary injustice.

c Plowd. 487.
d Jenkins. 78.
e Finch. L. 83.
f on Gov. p. 2. 205.

THE common law methods of obtaining possession or restitution from the crown, of either real or personal property, are, 1. By petition de droit, or petition of right, which is said to owe its original to king Edward the first.

2. By monstrans de droit, manifestation or plea of right: both of which may be preferred or prosecuted either in the chancery or exchequer. The former is of use, where the king is in full possession of the hereditaments or chattels, and the party suggests such a right as controvert the title of the crown, grounded on facts disclosed in the petition itself; in which case he must be careful to state truly the whole title of the crown, otherwise the petition shall abate: and then, upon this answer being endorsed or underwritten by the king, soit droit fait al partie (let right be done to the party) a commission shall issue to inquire of the truth of this suggestion: after the return of which, the king's attorney is at liberty to plead in bar; and the merits shall be determined upon issue or demurrer, as in suits between subject and subject. Thus, if a disseisor of lands, which are holden of the crown, dies seised without any heir, whereby the king is prima facie intitled to the lands, and the possession is cast on him either by inquest of office, or by act of law without any office found; now the disseisee shall have remedy be petition of right, suggesting the title of the crown, and his own superior right before the disseizin made. But where the right of the party, as well as the right of the crown, appears upon record, there the party shall have monstrans de droit, which is putting in a claim of right grounded on facts already acknowledged and established, and praying the judgment of the court, whether upon those facts the king or the subject
hath the right. As if, in the case before supposed, the whole special matter is found by an inquest of office, (as well the disfeifin, as the dying without any heir) the party grieved shall have monstrans de droit at the common law m. But as this seldom happens, and

g Bro. Abr. t. prerog. 2. Fitzh. Abr. t. error. 8.
h Skin. 609.
I Finch. L. 236.
j State Tr. vii. 134.
l Bro. Abr. t. petition. 20. 4 Rep. 58.
m 4 Rep. 55.

the remedy by petition was extremely tedious and expensive, that by monstrans was much enlarged and rendered almost universal by several statutes, particularly 36 Edw. III. c. 13. and 2 & 3 Edw. VI. c. 8. which also allow inquisitions of office to be traversed or denied, wherever the right of a subject is concerned, except in a very few cases n. These proceedings are had in the petty bag office in the court of chancery: and, if upon either of them the right be determined against the crown, the judgment is, quod manus domini regii amoueantur et possessio restituatur petenti, salvo jure domini regis o; which last clause is always added to judgments against the king p, to whom no laches is ever imputed, and whose right is never defeated by any limitation or length of time. And by such judgment the crown is instantly out of possession q; so that there needs not the indecent interposition of his own officers to transfer the seisin from the king to the party aggrieved.

II. THE methods of redressing such injuries as the crown may receive from a subject, are,

1. BY such usual common law actions, as are consistent with the royal prerogative and dignity. As therefore the king, by reason of his legal ubiquity, cannot be disseised or dispossessed of any real property which is once vested in him, he can maintain no action which supposes a dispossession of the plaintiff; such as an assise or an ejectment r: but the may bring a quare impedit s, which always supposes the complainant to be seised or possessed of the advowson: and he may prosecute this writ, as well as every other, as well in the king's bench as the common pleas, or in whatever court he pleases. So too he may bring an action of trespass for
taking away his goods; but not for breaking his close, or any other injury
done upon his soil or possession t. It would be equally tedious and
difficult, to run through every minute

distinction that might be gleaned from our ancient books with regard to
this matter; nor is it in any degree necessary, as much easier and more
effectual remedies are usually obtained by such prerogative modes of
process, as are peculiarly confined to the crown.

2. SUCH is that of inquisition or inquest of office: which is an enquiry
made by the king's officer, his sheriff, coroner, or escheator, virtute officii,
or by writ to them sent for the purpose, or by commissioners specially
appointed, concerning any matter that intitles the king to the possession of
lands or testaments, goods or chattels u. This is done by a jury of no
determinate number; being either twelve, or less, or more. As, to enquire,
whether the king's tenant for life died seised, whereby the reversion
accrues to the king: whether A, who held immediately of the crown, died
without heirs; in which case the lands belong to the king by escheat:
whether B be attained of treason; whereby his estate is forfeited to the
crown: whether C who has purchased lands be an alien; which is another
cause of forfeiture: whether D be an idiot a nativitate; and therefore,
together with his lands, appertains to the custody of the king: and other
questions of like import, concerning both the circumstances of the tenant,
and the value or identity of the lands. These inquests of office were more
frequently in practice than at present, during the continuance of the
military tenures amongst us: when, upon the death of every one of the
king's tenants, an inquest of office was held, called an inquisitio post
mortem, to enquire of what lands he died seised, who was his heir, and of
what age, in order to intitle the king to his marriage, wardship, relief,
primer-feifiein, or other advantages, as the circumstances of the case might
turn out. To superintend and regulate these enquiries the court of wards
and liversies was instituted by statute 32 Hen. VIII. c. 46. which was
abolished at the restoration of king Charles the second, together with the oppressive tenures upon which it was founded.

u Finch. L. 323, 4, 5.

WITH regard to other matters the inquests of office still remain in force, and are taken upon proper occasions; being extended not only to lands but also to goods and chattels personal, as in the case of wreck, treasure-trove, and the like; and especially as to forfeitures for offences. For every jury which tries a man for treason or felony, every coroner's inquest that fits upon a felo de se, or one killed by chancemedley, is, not only with regard to chattels, but also as to real interests, in all respects an inquest of office: and if they find the treason or felony, or even the slight of the party accused (though innocent) the king is thereupon, by virtue of this office found, intitled to have his forfeitures; and also in the case of chancemedley, he or his grantees are entitled to such things, by way of deodand, as have moved to the death of the party.

THESE inquests of office were devised by law, as an authentic means to give the king his right by solemn matter of record; without which he in general can neither take, nor part from, any thing w. For it is a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon or seise any mans' possessions upon bare surmises without the intervention of a jury x. It is however particularly enacted by the statute 33 Hen. VIII. c. 20. that, in case of attainder for high treason, the king shall have the forfeiture instantly, without any inquisition of this sort before office found, therefore by the statute 18 Hen. VI. c. 6. it was enacted, that all letters patent or grants of lands and tenements before office found, or returned into the exchequer, shall be void. And, by the bill of rights at the revolution, 1 W. & M. ft. 2. c. 2. it is declared, that all grants and promises of fines and forfeitures of particular persons before conviction (which is here the inquest of office) are illegal and void; which indeed was the law of the land in the reign of Edward the third y.

w Finch. L. 82.
y 2 Inst. 48.

WITH regard to real property, if an office be found for the king, it puts him in immediate possession, without the trouble of a formal entry, provided a
subject in the like case would have had a right to enter; and the king shall receive all the mesne or intermediate profits from the time that his title accrued. As on the other hand, by the articuli super cartas a, if the king's escheator or sheriff seise lands into the king's hand without cause, upon taking them out of the kings hand again, the party shall have the mesne profits restored to him.

IN order to avoid the possession of the crown, acquired by the finding of such office, the subject may not only have his petition of right, which discloses new facts not found by the office, and his monstrans de droit, which relies on the facts as found; but also he may (for the most part) traverse or deny the matter of fact itself, and put it in a course of trial by the common law process of the court of chancery: yet still, in some special cases, he hath no remedy left but a mere petition of right b. These traverses, as well as the monstrans de droit, were greatly enlarged and regulated for the benefit of the subject, by the statutes before-mentioned, and others c. And in the traverses thus given by statute, which came in the place of the old petition of right, the party traversing is considered as the plaintiff d; and must therefore make out his own title, as well as impeach that of the crown, and then shall have judgment quod manus domini regis amoveantur, &c.

3. WHERE the crown hath unadvisedly granted any thing by letters patent, which ought not to be granted e, or where the patentee hath done an act that amounts to a forfeiture of the

z Finch. L. 325, 326.
a 28 Edw. l. ft. 3. c. 19.
b Finch. L. 324.
e See book II. ch. 21.

grant f, the remedy to repeal the patent is by writ of scire facias in chancery g. This may be brought either on the part of the king, in order to resume the thing granted; or, if the grant be injurious to a subject, the king is bound of right to permit him (upon his petition) to use his royal name for repealing the patent in a scire facias h. And so also, if, upon office untruly found for the king, he grants the land over to another, he who is
grieved thereby, and traverses the office itself, is intitled before issue
joined to a scire facias against the patentee, in order to avoid the grant i.

4. AN information on behalf of the crown, filed in the exchequer by the
king's attorney general, is a method of suit for recovering money or other
chattels, or for obtaining satisfaction in damages for any personal wrong
committed in the lands or other possessions of the crown. It differs from
an information filed in the court of king's bench, of which we shall treat in
the next book; in that this is instituted to redress a private wrong, by which
the property of the crown is affected, that is calculated to punish some
public wrong, or heinous misdemeanour in the defendant. It is grounded on
no writ under seal, but merely on the intimation of the king's officer
the attorney general, who gives the court to understand and be informed of?
the matter in question; upon which the party is put to answer, and trial is
had, as in suits between subject and subject. The most usual informations
are those of intrusion and debt: intrusion, for any trespass committed on
the lands of the crown, as by entering thereon without title, holding over
after a lease is determined, taking the profits, cutting down timber, or the
like; and debt, upon any contract for monies due to the king, or for any
forfeiture due to the crown upon the breach of a penal statute. This is most
commonly used to recover forfeitures occasioned by transgressing those
laws, which are enacted for the establishment and

f Dyer. 198.
g 3 Lev. 220. 4 Inst. 88.
h 2 Ventr. 344.
I Bro. Abr. t. fciro facias. 69. 185.
k Moor. 375.
l Cro. Jac. 212. 1 Leon. 48. Savil. 49.

support of the revenue: others, which regard mere matters of police and
public conveyance, being usually left to be inforced by common informers,
in the qui tam informations or actions, of which we have formerly spoken
m. But after the attorney general has informed upon the breach of a penal
law, no other information can be recei

n. There is also an information
in rem, when any goods are supposed to become the property of the
crown, and no man appears to claim them, or to dispute the title or the
king. As anciently in the case of treasure-trove, wrecks, waifs, and estrays,
seised by the king's officer for his use. Upon such seizure an information
was usually filed in the king's exchequer, and thereupon a proclamation
was made for the owner (if any) to come in the claim the effects; and at the same time there issued a commission of appraisement to value the goods in the officer's hands: after the return of which, and a second proclamation had, if no claimant appeared, the goods were supposed derelict, and condemned to the use of the crown o. And when, in later times' forfeitures of the goods themselves, as well as personal penalties on the parties, were inflicted by act of parliament for transgressions against the laws of the customs and excise, the same process was adopted in order to secure such forfeited goods for the public use, though the offender himself had escaped the reach of justice.

5. A WRIT of quo warranto is in the nature of a writ of right for the king, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right p. It lies also in case of non-user or long neglect of a franchise, or mis-user or abuse of it; being a writ commanding the defendant to shew by what warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. This was originally returnable before the king's justices at Westminster q; but

m See pag. 160.

n Hardr. 201.
p Finch. L. 322. 2 Inst. 282.

afterwards only before the justices in eyre, by virtue of the statutes of quo warranto, 6 Edw. I. c. 1. and 18 Edw. I. st. 2.r but since those justices have given place to the king's temporary commissioners of assise, the judges on the several circuits, this branch of the statutes hath lost its effect s; and writs of quo warranto (if brought at all) must now be prosecuted and determined before the king's justices at Westminster. And in case of judgment for the defendant, he shall have an allowance of his franchise; but in case of judgment for the king, for that the party is intitled to no such franchise, or hath disused or abused it, the franchise is either seised into the king's hands, to be granted out again to whomever he shall please; or, if it be not such a franchise as may subsist in the hands of the crown, there is merely judgment of ouster, to turn out the party who usurped it t.
THE judgment on a writ of quo warranto (being in the nature of a writ of right) is final and conclusive even against the crown u. Which, together with the length its process, probably occasioned that disuse into which it is now fallen, and introduced a more modern method of prosecution, by information filed in the court of king's bench by the attorney general, in the nature of a writ of quo warranto; wherein the process is speedier, and the judgment not quite so decisive. This is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, or seise it for the crown: but hath long been applied to the mere purposes of trying the civil right, seising the franchise, or ousting the wrongful possessor; the fine being nominal only.

DURING the violent proceedings that took place in the latter end of the reign of king Charles the second, it was among other things thought expedient to new-model most of the corporation towns in the kingdom; for which purpose many of those bodies

were persuaded to surrender their charters, and informations in the nature of quo warranto were brought against others, upon a supposed, or frequently a real, forfeiture of their franchises by neglect or abuse of them. And the conveyance was, that the liberties of most of them were seised into the hands of the king, who granted them fresh charters with such alterations as were thought expedient; and during their state of anarchy the crown named all their magistrates. This exertion of power, though perhaps in summo jure it was for the most part strictly legal, gave a great and just alarm; the new-modelling of all corporations being a very large stride towards establishing arbitrary power: and therefore it was thought necessary at the revolution to bridle this branch of the prerogative, at least so far as regarded the metropolis, by statute 2 W. & M. c. 8. which enacts, that the franchises of the city of London shall never be forfeited again for any cause whatsoever.

THIS proceeding is however now applied to the decision of corporation disputes between party and party, without any intervention of the prerogative, by virtue of the statute 9 Ann. c. 20. which permits an
information in nature of quo warranto to be brought with leave of the court, at the relation of any person desiring to prosecute the same, (who is then styled the relator) against any person usurping, intruding into, or unlawfully holding any franchise or office in any city, borough, or town corporate; provides for its speedy determination; and directs that, if the defendant be convicted, judgment of ouster as well as a fine may be given against him, and that the relator shall pay or receive costs according to the event of the suit.

6. THE writ of mandamus w is also made by the same statute 9 Ann. c. 20. a most full and effectual remedy, in the first place for refusal or admission where a person is intitled to an office or place in any such corporation; and, secondly, for wrongful removal, when a person is legally possessed. These are injuries,

w See pag. 110.

for which though redress for the party interested may be had by assise, or other means, yet as the franchises concern the public, and may affect the administration of justice, this prerogative writ also issues from the court of king's bench, commanding, upon good cause shewn to the court, the party complaining to be admitted or restored to his office. And the statute requires, that a return be immediately made to the first writ of mandamus; which return may be pleaded to or traversed by the prosecutor, and his antagonist may reply, take issue, or demur, and the same proceedings may be had as if an action on the case had been brought for making a false return; and, after judgment obtained for the prosecutor, he shall have a peremptory writ of mandamus to compel his admission or restitution; which latter (in case of an action) is effected by a writ of restitution x. So that now the writ of mandamus, in cases within this statute, is in the nature of an action, and a writ of error may be had thereon y.

THIS writ of mandamus may also be issued, in pursuance of the statute 11 Geo. I. c. 4. in case within the regular time no election shall be made of the mayor or other chief officer of any city, borough, or town corporate, or (being made) it shall afterwards become void; to require the electors to proceed to election, and proper courts to be held for admitting and swearing in the magistrates so respectively chosen.
WE have now gone through the whole circle of civil injuries, and the redress which the laws of England have anxiously provided for each. In which the student cannot but observe, that the main difficulty which attends their discussion arises from their great variety, which is apt at our first acquaintance to breed a confusion of ideas, and a kind of distraction in the memory: a difficulty not a little increased by the very immethodical arrangement, too justly complained of in our ancient writers; but which will insensibly wear away when they come to be re-

x 11 Rep. 79.
y 1 P. Wms. 351.

considered, and we are a little familiarized to those terms of art in which the language of our ancestors has obscured them. Terms of art there will unavoidably be in all sciences; the easy conception and thorough comprehension of which must depend upon frequent use: and the more subdivided any branch of science is, the more terms must be used to express the nature of these several subdivisions, and mark out with sufficient precision the ideas they are meant to convey. This difficulty therefore, however great it may appear at first view, will shrink to nothing upon a nearer approach; and be rather advantageous than of any disservice, by imprinting a clear and distinct notion of the nature of these several remedies. And, such as it is, it arises principally from the excellence of our English laws; which adapt their redress exactly to the circumstances of the injury, and do not furnish one and the same action for different wrongs, which are impossible to be brought within one and the same description: whereby every man knows what satisfaction he is entitled to expect from the courts of justice, and as little as possible is left in the breast of the judges, whom the law appoints to administer, and not to prescribe the remedy. And I may venture to affirm, that there is hardly a possible injury, that can be offered either to the person or property of another, for which the party injured may not find a remedial writ, conceived in such terms as are properly adapted to his own particular grievance.

IN the several personal actions which we have cursorily explained, as debt, trespass, detinue, action on the case, and the like, it is easy to observe how plain, perspicuous, and simple the remedy is, as chalked out by the ancient common law. In real actions for the recovery of landed and other permanent property, as the right is more intricate, the feodal or rather
Norman remedy by real actions is somewhat more complex and difficult, and attended with some delays. And since, in order to obviate those difficulties, and retrench those delays, we have permitted the rights of real property to be drawn into question in mixed or personal suits, we are (it must be owned) obliged to have recourse too such arbitrary fictions and expedients, that unless we had developed their principles, and traced out their progress and history, our present system of remedial jurisprudence (in respect of landed property) would appear the most intricate and unnatural, that ever was adopted by a free and enlightened people.

BUT this intricacy of our legal process will be found, when attentively considered, to be one of those troublesome, but not dangerous, evils which have their root in the frame of our constitution, and which therefore can never be cured, without hazarding every thing that is dear to us. In absolute governments, when new arrangements of property and a gradual change of manners have destroyed the original ideas, on which the laws were devised and established, the prince by his edict may promulge a new code, more suited to the present emergencies. But when laws are to be framed by popular assemblies, even of the representative kind, it is too Herculean a task to begin the work of legislation afresh, and extract a new system from the discordant opinions of more than five hundred counsellors. A single legislator or an enterprising sovereign, a Solon or Lycurgus, a Justinian or a Frederick, may at any time form a concise, and perhaps an uniform, plan of justice; and evil betide that presumptuous subject who questions its wisdom or utility. But who, that is acquainted with the difficulty of new-modelling any branch of our statute laws (though relating but to roads or to parish-settlements) will conceive it ever feasible to alter any fundamental point of the common law, with all its appendages and consequents, and set up another rule in its stead. When therefore, by the gradual influence of foreign trade and domestic tranquillity, the spirit of our military tenures began to decay, and at length the whole structure was removed, the judges quickly perceived that the forms and delays of the old feodal actions, (guarded with their several outworks of effoins, vouchers, aid-prayers, and a hundred other formidable intrenchments) were ill suited to that more simple and commercial mode of property which succeeded the former, and required a more speedy decision of right, to facilitate exchange and alienation. Yet they wisely avoided soliciting any great legislative revolution in the old established forms, which might have been productive
of conveyances more numerous and extensive than the most penetrating genius could foresee; but left them as they were, to languish in obscurity and oblivion, and endeavoured by a series of minute contrivances to accommodate such personal actions, as were then in use, to all the most useful purposes of remedial justice: and where, through the dread of innovation, they hesitated at going so far as perhaps their good sense would have prompted them, they left an opening for the more liberal and enterprising judges, who have sate in our courts of equity, to shew them their error by supplying the omissions of the courts of law. And, since the new expedients have been refined by the practice of more than a century, and are sufficiently known and understood, they in general answer the purpose of doing speedy and substantial justice, much better than could now be effected by any great fundamental alterations. The only difficulty that attends them arises from their fictions and circumvities, but, when once we have discovered the proper clew, that labyrinth is easily pervaded. We inherit an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless. The inferior apartments, now converted into rooms of conveyance, are cheerful and commodious, thought their approaches are winding and difficult.

IN this part of our disquisition I however thought it may duty to unfold, as far as intelligibly I could, the nature of these real actions, as well as of personal remedies. And this not only because they are still in force, still the law of the land, though obsolete and disused; and may perhaps, in their turn, be hereafter with some necessary corrections called out again into common use; but also because, as a sensible writer has well observed z,


whoever considers how great a coherence there is between theseveral parts of the law, and how much the reason of onecase opens and depends upon that of another, will I presumebe far from thinking any of the old learning useless, whichwill so much conduce to the perfect understanding of the modern. And besides I should have done great injustice to the founders of our legal constitution, had I led the student to imagine, that the remedial instruments of our law were originally contrived in so complicated a form, as we now present them to his view: had I, for instance, entirely passed over the direct and obvious remedies by assises and writs of entry, and
only laid before him the modern method of prosecuting a writ of ejectment.

CHAPTER THE EIGHTEENTH.
OF THE PURSUIT OF REMEDIES BY ACTION;
AND, FIRST, OF THE ORIGINAL WRIT.

HAVING, under the head of redress by suit in courts, pointed out in the preceding pages, in the first place, the nature and several species of courts of justice, wherein remedies are administered for all sorts of private wrongs; and, in the second place, shewn to which of these courts in particular application must be made for redress, according to the distinction of justice, or, in other words, what wrongs are cognizable by one court, and what by another; I proceeded, under the title of injuries cognizable by the courts of common law, to define and explain the specifical remedies by action, provided for every possible degree of wrong or injury; as well such remedies as are dormant and out of use, as those which are in every day's practice, apprehending that the reason of the one could never be clearly comprehended, without some acquaintance with the other: and, I am now, in the last place, to examine the manner in which these several remedies are pursued and applied, by action in the courts of common law; to which I shall afterwards subjoin a brief account of the proceedings in courts of equity.

IN treating of remedies by action at common law, I shall confine myself to the modern method of practice in our courts of judicature. For, though I thought it necessary to throw out a few observations on the nature of real actions, however at present disused, in order to demonstrate the coherence and uniformity of our legal constitution, and that there was no injury so obstinate and inveterate, but which might in the end be eradicated by some or other of those remedial writs; yet it would be too irksome a task to perplex both my readers and myself with explaining all the rules of proceeding in these obsolete actions; which are frequently mere positive establishments, the forma et figura judicii, and conduce very little to illustrate the reason and fundamental grounds of the law. Wherever I apprehend they may at all conduce to this end, I shall endeavour to hint at them incidentally.
WHAT therefore the student may expect in this and the succeeding chapters, is an account of the method of proceeding in and prosecuting a suit upon any of the personal writs we have before spoken of, in the court of common pleas at Westminster; that being the court originally constituted for the prosecution of all civil actions. It is true that the courts of king's bench and exchequer, in order, without intrenching upon ancient forms, to extend their remedial influence to the necessities of modern times, have now obtained a concurrent jurisdiction and cognizance of civil suits: but, as causes are therein conducted by much the same advocates and attorneys, and the several courts and their judges have an entire communication with each other, the methods and forms of proceeding are in all material respects the same in all of them. So that, in giving an abstract or history a of the progress of a suit through the court of common pleas, we

a In deducing this history the student must not expect authorities to be constantly cited; as practical knowledge is not so much to be learned from any books of law, as from experience and attendance on the courts. the compiler must therefore be frequently obliged to rely upon his own observations; which in general he hath been studious shall at the same time give a general account of the proceedings of the other two courts; taking notice however of any considerable difference in the local practice of each. And the same abstract will moreover afford us some general idea of the conduct of a cause in the inferior courts of common law, those in cities and boroughs, or in the court-baron, or hundred, or county court: all which conform (as near as may be) to the example of the superior tribunals, to which their causes may probably be, in some stage or other, removed.

THE most natural and perspicuous way of considering the subject before us, will be (I apprehend) to pursue it is the order and method wherein the proceedings themselves follow each other; rather than to distract and subdivide it by any more logical analysis. The general therefore and orderly parts of a suit are these; 1. The original writ: 2. The process: 3. The pleadings: 4. The issue or demurrer: 5. The trial: 6. The judgment, and its incidents: 7. The proceedings in nature of appeals: 8. The execution.

FIRST, then, of the original, or original writ; which is the beginning or foundation of the suit. When a person hath received an injury, and thinks
it worth his while to demand a satisfaction for it, he is to consider with himself, or take advice, what redress the law has given for that injury; and thereupon is to

studious to avoid, where those of any other might be had. To accompany and illustrate these remarks, such gentlemen as are designed for the possession will find it necessary to peruse the books of entries, ancient and modern; which are transcripts of proceedings that have been had in some particular actions. A book or two of technical learning will also be found very convenient; from which a man of a liberal education and tolerable understanding may glean pro re nata as much as is sufficient for his purpose. These books of practice, as they are called, are all pretty much on a level, in point of composition and solid instruction; so that that which bears the latest edition is usually the best. But Gilbert's history and practice of the court of common pleas is a book of a very different stamp: and though (like the rest of his posthumous works) it has suffered most grossly by ignorant or careless transcribers, yet it has traced out the reason of many parts of our modern practice, from the feudal institutions and the primitive construction of our courts, in a most clear and ingenious manner.

make application or suit to the crown, the fountain of all justice, for that particular specific remedy which he is determined or advised to pursue. As, for money due on bond, an action of debt; for goods detained without force, an action of detinue or trover; or, if taken with force, an action of trespass vi et armis; or, to try the title of lands, a writ of entry or action of trespass in ejectment; or, for any consequential injury received, a special action on the case. To this end he is to sue out, or purchase by paying the stated fees, an original or original writ, from the court of chancery, which is the officina justitiae, the shop or mint of justice, wherein all the king's writs are framed. It is a mandatory letter from the king in parchment, sealed with his great seal b, and directed to the sheriff of the county wherein the injury is committed or supposed so to be, requiring him to command the wrongdoer or party accused, either to do justice to the complainant, or else to appear in court, and answer the accusation against him. Whatever the sheriff does in pursuance of this writ, he must return or certify to the court of common pleas, together with the writ itself: which is the foundation of the jurisdiction of that court, being the king's warrant for the judges to proceed to the determination of the cause. For it was a maxim introduced by the Normans, that there should be no proceedings in common pleas before the king's justices without his original writ; because
they held it unfit that those justices, being only the substitutes of the crown, should take cognizance of any thing but what was thus expressly referred to their judgment. However, in small actions, below the value of forty shillings, which are brought in the court-baron or county court, no royal writ is necessary: but the foundation of such suits continues to be (as in the times of the Saxons) not by original writ, but by plaint; that is, by a private memorial tendered in open court to the judge, wherein the party injured sets forth his cause of action, and the judge is bound of common right to administer justice therein, without any special mandate from the king. Now indeed even

b Finch. L. 237.
c Flet. l. 2. c. 34.
d Mirr. c. 2. 5.

the royal writs are held to be demandable of common right, on paying the usual fees: for any delay in the granting them, or setting an unusual or exorbitant price upon them, would be a breach of magna carta, c. 29.

ORIGINAL writs are either optional or peremptory; or, in the language of our law, they are either a praecipe, or a si te secerit securum. The praecipe is in the alternative, commanding the defendant to do the thing required, or shew the reason wherefore he hath not done it. The use of this writ is where something certain is demanded by the plaintiff, which is in the power of the defendant himself to perform; as, to restore the possession of land, to pay a certain liquidated debt, to perform a specific covenant, to render an account, and the like: in all which cases the writ is drawn up in the form of a praecipe or command, to do thus or shew cause to the contrary; giving the defendant his choice, to redress the injury or stand the suit. The other species of original writs is called a si secerit te securum, from the words of the writ, which directs the sheriff to cause the defendant to appear in court, without any option given him, provided the plaintiff gives the sheriff security effectually to prosecute his claim. This writ is in use, where nothing is specifically demanded, but only a satisfaction in general; to obtain which and minister complete redress, the intervention of some judicature is necessary. Such are writ of trespass, or on the case, wherein no debt or other specific thing is sued for in certain, but only damages to be assessed by a jury. For this end the defendant is immediately called upon to appear in court, provided the plaintiff gives
good security of prosecuting his claim. Both species of writs are teste'd, or
witnessed, in the king's own name; witness ourself at Westminster, or
wherever the chancery may be held.

e Finch. L. 257.
f Append. No. III. 1.
g Append. No. II. 1.

THE security here spoken of, to be given by the plaintiff for prosecuting
his claim, is common to both writs, though it gives denomination only to
the latter. The whole of it is at present become a mere matter of form; and
John Doe and Richard Roe are always returned as the standing pledges for
this purpose. The ancient use of them was to answer for the plaintiff; who
in case he brought an action without cause, or failed in the prosecution of
it when brought, was liable to an amercement from the crown for raising a
false accusation; and so the form of the judgment still is h. In like manner
as by the Gothic constitutions no person was permitted to lay a complaint
against another nisi subscriptura aut specificatione trium testium, quod
actionem vellet persequi i: and, as by the laws of Sancho I, king of
Portugal, damages were given against a plaintiff who prosecuted a
groundless action k.

THE day, on which the defendant is ordered to appear in court, and on
which the sheriff is to bring in the writ and report how far he has obeyed it,
is called the return of the writ; it being then returned by him to the kings
justices at Westminster. And it is always made returnable at the distance
of at least fifteen days from the date or teste, that the defendant may have
time to come up to Westminster, even from the most remote parts of the
kingdom; and upon some day in one of the four terms, in which the
court sits for the dispatch of business.

THESE terms are supposed by Mr. Selden l to have been instituted by
William the conqueror: but sir Henry Spelman hath clearly and learnedly
shewn, that they were gradually formed from the canonical constitutions
of the church; being indeed no other than those leisure seasons of the year,
which were not occupied by the great festivals or fasts, or which were not
liable to the general avocations of rural business. Throughout all chris-

h Finch. L. 189. 252.
i Stiernh. de jure Gothor. l. 3. c. 7.
tendom, in very early times, the whole year was one continual term for hearing and deciding causes. For the christian magistrates, to distinguish themselves from the heathens, who were extremely superstitious in the observation of their dies faeti et nefasti, went into a contrary extreme, and administered justice upon all days alike. Till at length the church interposed and exempted certain holy seasons from being profaned by the tumult of forensic litigations. As, particularly, the time of advent and christmas, which gave rise to the winter vacation; the time of lent and easter, which created that in the spring; the time of pentecost, which produced the third; and the long vacation, between midsummer and michaelmas, which was allowed for the hay time and harvest. All sundays also, and some peculiar festivals, as the days of the purification, ascension and some others, were included in the same prohibition; which was established by a canon of the church, A. D. 517. and was fortified by an imperial constitution of the younger Theodosius, comprized in the Theodosian code m.

AFTERWARDS, when our own legal constitution came to be settled, the commencement and duration of our law terms were appointed with an eye to those canonical prohibitions; and it was ordered by the laws of king Edward the confessor n, that from advent to the octave of the epiphany, from septuagesima to the octave of easter, from the ascension to the octave of pentecost, and from three in the afternoon of all saturdays till monday morning, the peace of God and of holy church shall be kept throughout all the kingdom. And so extravagant was afterwards the regard that was paid to these holy times, that though the author of the mirror o mentions only one vacation of any considerable length, containing the months of August and September, yet Britton is express p, that in the reign of king Edward the first no secular plea could be held, nor any man sworn on the

m Spelman of the terms.
n c. 3. de temporibus et diebus pacis.
o c. 3. 8.
p c. 53.

q, in the times of advent, lent, pentecost, harvest and vintage, the days of the great litanies, and all solemn festivals. But he adds, that the
Bishops and prelates did nevertheless grant dispensations, (of which many are preserved in Rymer's foedera of the time of king Henry the third) that assises and juries might be taken in some of these holy seasons upon reasonable occasions. And soon afterwards a general dispensation was established in parliament, by statute Westm. 1. 3 Edw. I. c. 51. which declares, that forasmuch as it is great charity to do right unto all men at all times when need shall be, by the assent of all the prelates it was provided, that assises of novel disseifin, mortd' ancestor, and darrein presentment should be taken in advent, septuagesima, and lent, even as well as inquests may be taken; and that at the special request of the king to the bishops. The portions of time that were not included within these prohibited seasons, fell naturally into a fourfold division: and, from some festival or saint's day that immediately preceded their commencement, were denominated the terms of St. Hilary, of Easter, of the holy Trinity, and of St. Michael: which terms have been since regulated and abbreviated by several acts of parliament; particularly trinity term by statute 32 Hen. VIII. c. 2. and michaelmas term by statute 16 Car. I. c. 6. and again by statute 24 Geo. II. c. 48.

There are in each of these terms stated days called days in bank, dies in banco; that is, days of appearance in the court of common pleas, called usually bancum, or commune bancum, to distinguish it from bancum regis or the court of king's bench. They are generally at the distance of about a week from each other, and regulated by some festival of the church. On some one of these days in bank all original writs must be made returnable; and therefore they are generally called the returns of that term; whereof every term has more or less, said by the mirror r to have been originally fixed by king Alfred, but certainly settled as early as the statute of 51 Hen. III. ft. 2. But though many of the return days are fixed upon sundays, yet the court never fits to receive these returns till the monday after s: and therefore no proceedings can be had, or judgment can be given, or supposed to be given, on the sunday t.

The first return in every term is, properly speaking, the first day in that term; as, for instance, the octave of St. Hilary, or the eighth day inclusive after the feast of that saint; which falling on the thirteenth of January, the
octave therefore or first day of Hilary term is the twentieth of January. And thereon the court sits to take essoigns, or excuses for such as do not appear according to the summons of the writ: wherefore this is usually called the essoign day of the term. But the person summoned has three days of grace, beyond the return of the writ, in which to make his appearance; and if he appears on the fourth day inclusive, the quarto die post, it is sufficient. For our sturdy ancestors held it beneath the condition of a freeman to be obliged to appear, or to do any other act, at the precise time appointed or required. The feudal law therefore always allowed three distinct days of citation, before the defendant was adjudged contumacious for not appearing: preserving in this respect the German custom, of which Tacitus thus speaks: illud ex libertatevitium, quod non simul ne suffi convenient; fed et alter et tertiusdies cunctatione coeuntium absumitur. And a similar indulgence prevailed in the Gothic constitution: illud enim nimiae libertatisindicium, conceffa toties impunitas non parenti; nec enim trinis judicii confessibus peonam perditae causae contumax meruit. Therefore at the beginning of each term, the court does not sit for dispatch of business till the fourth day, as in Hilary term on the twenty third of January; and in Trinity term, by statute 32 Hen. VIII. c. 21. not till the sixth day; which is therefore usually called and set down in the almanacs as the first day of the term.

s Regist. 19. Salk. 627. 6 Mod. 250.
u Feud. l. 2. t. 22.
w de mor. Germ. c. 11.
x Stieren. de jure Goth. l. 1. c. 6.

CHAPTER THE NINTEENTH.
OF PROCESS.

THE next step for carrying on the suit, after suing out the original, is called the process; being the means of compelling the defendant to appear in court. This is sometimes called original process, being founded upon the original writ; and also to distinguish it from mesne or intermediate process, which issues, pending the suit, upon some collateral interlocutory matter; as to summon juries, witnesses, and the like. Mesne process is also sometimes put in contradistinction to final process, or process of
execution; and then it signifies all such process as intervenes between the beginning and end of a suit.

BUT process, as we are now to consider it, is the method taken by the law to compel a compliance with the original writ, of which the primary step is by giving the party notice to obey it. This notice is given upon all real praecipes, and also upon all personal writs for injuries in court at the return of the original writ, given to the defendant by two of the sheriff’s messengers called summoners, either in person or left at his house or land: in like manner as in the civil law the first process is by personal citation, in jus vocando. This warning on the land is

a Finch. L. 436.
b Ibid. 344. 352.
c Ff. 2. 4. 1.

given, in real actions, by erecting a white stick or wand on the defendant’s grounds; (which stick or wand among the northern nations is called the baculus munciatorius) and by statute 31 Eliz. c. 3. it must also be proclaimed on some sunday before the door of the parish church.

IF the defendant disobeys this verbal monition, the next process is by writ of attachment, or pone, so called from the words of the writ, *pone per vadium et salvos plegios*, put by gage and safe pledges A. B. the defendant, &c. This is a writ, not issuing out of chancery, but out of the court of common pleas, being grounded on the non-appearance of the defendant at the return of the original writ; and thereby the sheriff is commanded to attach him, b taking gage, that is, certain of his goods, which he shall forfeit if he doth not appear; or by making him find safe pledges or sureties, who shall be amerced in case of his non-appearance. This is also the first and immediate process, without any previous summons, upon actions of trespass *vi et armis*, or for other injuries, which though not forcible are yet trespasses against the peace, as deceit and conspiracy; where the violence of the wrong requires a more speedy remedy, and therefore the original writ commands the defendant to be at once attached, without any precedent warning.

IF, after attachment, the defendant neglects to appear, he not only forfeits this security, but is moreover to be farther compelled by writ of distringas, or distress, infinite; which is a subsequent process issuing from the court
of common pleas, commanding the sheriff to distrein the defendant from
time to time, and continually afterwards, by taking his goods and the
profits of his lands, which he forfeits to the king if he doth not appear m.

\[d\text{ Dalt. of sher. c. 31.}\]
\[e\text{ Stiernh. de jure Sueon. l. 1. c. 6.}\]
\[f\text{ Append. No. III. 2.}\]
\[g\text{ Finch. L. 345.}\]
\[h\text{ Dalt. sher. c. 32.}\]
\[i\text{ Finch. L. 305. 352.}\]
\[j\text{ Append. No. II. 1.}\]
\[k\text{ Append. No. III. 2.}\]
\[l\text{ Finch. L. 352.}\]

IN like manner as by the civil law, if the defendant absconds, so that the
citation is of no effect, mittitur adversarius in possessionem bonorum ejus.

AND here by the common, as well as the civil, law the process ended in
case of injuries without force; the defendant, if he had any substance,
being gradually stripped of it all by repeated distresses, till he rendered
obedience to the king's writ; and, if he had no substance, the law held him
incapable of making satisfaction, and therefore looked upon all farther
process as nugatory. And besides, upon feodal principles, the person of a
feudatory was not liable to be attached for injuries merely civil, lest
thereby his lord should be deprived of his personal services. But, in cases
of injury accompanied with force, the law, to punish the breach of the
peace and prevent its disturbance for the future, provided also a process
against the defendant's person, in case he neglected to appear upon the
former process of attachment, or had no substance whereby to be
attached; subjecting his body to imprisonment by the writ of capias ad
respondendum o. But this immunity of the defendant's person, in case of
peaceable though fraudulent injuries, producing great contempt of the law
in indigent wrongdoers, a capias was also allowed, to arrest the person, in
actions of account, though no breach of the peace be suggested, by the
statutes of Marlbridge, 52 Hen. III. c. 23. and Westm. 2. 13 Edw. I. c. 11. in
actions of debt and detinue, by statute 25 Edw. III. c. 17. and in all actions
on the case, by statute 19 Hen. VII. c. 9. Before which last statute a practice
had been introduced of commencing the suit by bringing an original writ
of trespass quare clausum fregit, for breaking the plaintiff's close, vi et
armis; which by the old common law subjected the defendant's person to
be arrested by writ of capias: and then afterwards, by connivance of the
court, the plaintiff might proceed to prosecute for any other less forcible
injury. This practice (through custom rather than necessity, and for saving
some trouble and expense, in suing out a special original adapted to the

n Ff. 2. 4. 19.
ο 3 Rep. 12.

particular injury) still continues in almost all cases, except in actions of
debt; though now, by virtue of the statutes above cited and others, a capias
might be had upon almost every species of complaint.

IF therefore the defendant being summoned or attached makes default,
and neglects to appear; or if the sheriff returns a nihil, or that the
defendant hath nothing whereby he may be summoned, attached, or
distreined; the capias now usually issues p, being a writ commanding the
sheriff to take the body of the defendant if he may be found in his bailiwick
or county, and him safely to keep, so that he may have him in court on the
day of the return, to answer to the plaintiff of a plea of debt, or trespass,
&c, as the case may be. This writ, and all others subsequent to the original
writ, not issuing out of chancery but from the court into which the original
was returnable, and being grounded on what has passed in that court in
consequence of the sheriff’s return, are called judicial, not original, writs;
they issue under the private seal of that court, and not under the great seal
of England; and are teste’d, not in the king’s name, but in that of the chief
justice only. And these several writs, being grounded on the sheriff’s
return, must respectively bear date the same day on which the writ
immediately preceding was returnable.

THIS is the regular and orderly method of process. But it is now usual in
practice, to sue out the capias in the first instance, upon a supposed return
of the sheriff; especially if it be suspected that the defendant, upon notice
of the action, will abscond: and afterwards a fictitious original is drawn up,
with a proper return thereupon, in order to give the proceedings a colour
of regularity. When this capias is delivered to the sheriff, he by his under-
sheriff grants a warrant to his inferior officers, or bailiffs, to execute it on
the defendant. And, if the sheriff of Oxfordshire (in which county the
injury is supposed to be committed and the action is laid) cannot find the
defendant in his jurisdiction, he
returns that he is not found, noon est inventus, in his bailiwick: whereupon another writ issues, called a testatum capias, directed to the sheriff of the county where the defendant is supposed to reside, as of Berkshire, reciting the former writ, and that it is testified, testatum est, that the defendant lurks or wanders in his bailiwick, wherefore he is commanded to take him, as in the former capias. But here also, when the action is brought in one county and the defendant lives in another, it is usual, for saving trouble, time, and expense, to make out a testatum capias at the first; supposing not only an original, but also a former capias, to have been granted, which in fact never was. And this fiction, being beneficial to all parties, is readily acquiesced in and is now become the settled practice; being one among many instances to illustrate that maxim of law, that in fictione juris consistit aequitas.

BUT where a defendant absconds, and the plaintiff would proceed to an outlawry against him, an original writ must then be sued out regularly, and after that a capias. And if the sheriff cannot find the defendant upon the first writ of capias, and returns a non est inventus, there issues out an alias writ, and after that a pluries, to the same effect as the former: only after these words we command you, this clause is inserted, as we have formerly, or, as we have often commanded you; sicut alias, or, sicut pluries praecepimus. And, if a non est inventus is returned upon all of them, then a writ of exigent or exigi facias may be sued out, which requires the sheriff to cause the defendant to be proclaimed, required, or exacted, in five county courts successively, to render himself; and, if he does, then to take him, as in a capias: but if he does not appear, and is returned quinto exactus, he shall then be outlawed by the coroners of the county. Also by statutes 6 Hen. VIII. c. 4. and 31 Eliz. c. 3. whether the defendant dwells within the same or another county than that wherein the exigent is sued out, a writ of proclamation shall issue out at the same time with the exigent, commanding the sheriff of the county wherein the defendant dwells to
make three proclamations thereof in places the most notorious, and most likely to come to his knowledge, a month before the outlawry shall take place. Such outlawry is putting a man out of the protection of the law, so that he is incapable to bring any action for redress of injuries; and it is also attended with a forfeiture of all one's goods and chattels to the king. And therefore, till some time after the conquest, no man could be outlawed but for felony; but in Bracton's time, and somewhat earlier, process of outlawry was ordained to lie in all actions for trespasses vi et armis u. And since, by a variety of statutes (the same which allow the writ of capias before-mentioned) process of outlawry doth lie in divers actions that are merely civil; provided they be commenced by original and not by bill w. If after outlawry the defendant appears publicly, he may be arrested by a writ of capias utlagatum x, and committed till the outlawry be reversed. Which reversal may be had by the defendant's appearing personally in court (and in the king's bench without any personal appearance, so that he appears by attorney, according to statute 4 & 5 W. & M. c. 18.) and any plausible cause, however slight, will in general be sufficient to reverse it, it being considered only as a process to compel an appearance. But then the defendant must pay full costs, and put the plaintiff in the same condition, as if he had appeared before the writ of exigi facias was awarded.

SUCH is the first process in the court of common pleas. In the king's bench they may also (and frequently do) proceed in certain causes, particularly in actions of ejectment and trespass, by original writ, with attachment and capias thereon y; returnable, not as Westminster, where the common pleas are now fixed in consequence of magna carta, butubicunque suerimus in Anglia?

\[ t \text{ Append. No. III. 2.} \]
\[ u \text{ Co. Litt. 128.} \]
\[ w \text{ 1 Sid. 159.} \]
\[ x \text{ Append. No. III. 2.} \]
\[ y \text{ Ibid. No. II. 1.} \]

wheresoever the king shall then be in England; the king's bench being removeable into any part of England at the pleasure and discretion of the crown. But the more usual method of proceeding therein is without any original, but by a peculiar species of process entitled a bill of Middlesex; and therefore so entitled, because the court now sits in that county; for if it sate in Kent, it would then be a bill of Kent. For though, as the justices of
this court have, by its fundamental constitution, power to determine all
offences and trespasses, by the common law and custom of the realm z, it
needed no original writ from the crown to give it cognizance of any
misdemesnor in the county wherein it resides; yet as, by this court's
coming into any county, it immediately superseded the ordinary
administration of justice by the general commissions of eyre and of oyer
and terminer a, a process of its own became necessary, within the county
where it sate, to bring in such persons as were accused of committing any
forcible injury. The bill of Middlesex b 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 of a plea of trespass. For this accusation of trespass
it is, that gives the court of king's bench jurisdiction in other civil causes,
as was formerly observed; since, when once the defendant is taken into
custody of the marshall, or prison-keeper of this court, may here be
prosecuted for any other species of injury. Yet, in order to found this
jurisdiction, it is not necessary that the defendant be actually the
marshall's prisoner; for, as soon as he appears, or puts in bail, to the
process, he is deemed by so doing to be in such custody of the marshall, as
will give the court a jurisdiction to proceed c. And, upon these accounts, in
the bill or process a complaint of tre
spass is always suggested, whatever
else may be the real cause of action. This bill of Middlesex must be served
on the defendant by the sheriff, if he finds him in that county: but, if he

z Bro. Abr. t. cyer & determiner. 8.
a Bro. Abr. t. jurisdiction, 66. 3. Inst. 27.
b Append. No. III. 3.
c 4 Inst. 72.

returnsnon est inventus,? then there issues out a writ of latitat d, to the
sheriff of another county, as Berks; which is similar to the testatum capias
in the common pleas, and recites the bill of Middlesex and the proceedings
thereon, and that it is testified that the defendantlatitat et discurririt? lurks
and wanders about in Berks; and therefore commands the sheriff to take
him, and have his body in court on the day of the return. But, as in the
common pleas the testatum capias may be sued out upon only a supposed,
and not an actual, preceding capias; so in the king's bench a latitat is
usually sued out upon only a supposed, and not an actual, bill of
Middlesex. So that, in fact, a latitat may be called the first process in the
court of king's bench, as the testatum capias is in the common pleas. Yet,
as in the common pleas, if the defendant lives in the county wherein the action is laid, a common capias suffices; so in the king's bench likewise, if he lives in Middlesex, the process must still be by bill of Middlesex only.

IN the exchequer the first process is by writ of quo minus, in order to give the court a jurisdiction over pleas between party and party. In which writ e the plaintiff is alleged to be the king's farmer, or debtor, and that the defendant hath done him the injury complained of, quo minus sufficiens existit, by which he is the less able, to pay the king his rent, or debt. And upon this the defendant may be arrested as upon a capias from the common pleas.

THUS differently do the three courts set out at first, in the commencement of a suit; for which the reason is obvious: since by this means the two courts of king's bench and exchequer entitle themselves to hold plea in subjects causes, which by the original constitution of Westminster-hall they were not empowered to do. Afterwards, when the cause is once drawn into the respective courts, the method of pursuing it is pretty much the same in all of them.

d Append. No. III.  3.
e Ibid.  4.

IF the sheriff has found the defendant upon any of the former writs, the capias, latitat, &c, he was anciently obliged to take him into custody, in order to produce him in court upon the return, however small and minute the cause of action might be. For, not having obeyed the original summons, he had shewn a contempt of the court, and was no longer to be trusted at large. But when the summons fell into disuse, and the capias became in fact the first process, it was thought hard to imprison a man for a contempt which was only supposed: and therefore in common cases by the gradual indulgence of the courts (at length authorized by statute 12 Geo. I. c. 29. which was amended by statute 5 Geo. II. c. 27. and made perpetual by statute 21 Geo. II. c. 3.) the sheriff or his officer can now only personally 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 this action; which in effect reduces it to a mere summons. And if the defendant thinks proper to appear upon this notice, his appearance is recorded, and he puts in sureties for his future attendance and obedience; which sureties are called common bail, being the same two imaginary persons that were
pledges for the plaintiff's prosecution, John Doe and Richard Roe. Or, if
the defendant does not appear upon the return of the writ, or within four
(or, in some cases, eight) days after, the plaintiff may enter an appearance
for him, as if he had really appeared; and may file common bail in the
defendant's name, and proceed thereupon as if the defendant had done it
himself.

BUT if the plaintiff will make affidavit, or assert upon oath, that the cause
of action amounts to ten pounds or upwards, then in order to arrest the
defendant, and make him put in substantial sureties for his appearance,
called special bail, it is required by statute 13 Car. II. ft. 2. c. 2. that the
true cause of action should be expressed in the body of the writ or process.
This statute (without any such intention in the makers) had like to have
ousted the king's bench of all its jurisdiction over civil injuries
without force: for, as the bill of Middlesex was framed only for actions of
trespass, a defendant could not be arrested and held to bail thereupon for
breaches of civil contracts. But to remedy this inconvenience, the officers
of the king's bench devised a method of adding what is called a clause of ac
etiam to the usual complaint of trespass; the bill of Middlesex
commanding the defendant to be brought in to answer the plaintiff of a
plea of trespass, and also to a bill of debt f: the complaint of trespass giving
cognizance to the court, and that of debt authorizing the arrest. In return
for which, lord chief justice North a few years afterwards, in order to save
the suitors of his court the trouble and expense of suing out special
originals, directed that in the common pleas, besides the usual complaint
of breaking the plaintiff's close, a clause of ac etiam might be also added to
the writ of capias, containing the true cause of action; as,that the said
Charlesthed defendant may answer to the plaintiff of a plea of trespass
breaking his close: and also, ac etiam, may answer him, according to the
custom of the court, in a certain plea of trespassupon the case, upon
promises, to the value of twenty pounds, &c g. The sum sworn to by the
plaintiff is marked upon the back of the writ; and the sheriff, or his officer
the bailiff, is then obliged actually to arrest or take into custody the body of
the defendant, and, having so done, to return the writ with a cepi corpus
endorsed thereon.

AN arrest must be by corporal seising or touching the defendant's body;
after which the bailiff may justify breaking open the house in which he is,
to take him: otherwise he has no such power; but must watch his
opportunity to arrest him. For every man's house is looked upon by the
law to be his castle of defence and asylum, wherein he should suffer no
violence. Which principle is carried so far in the civil law, that for the most
part not so much as a common citation or summons, much less an arrest,
can be executed upon a man within his own walls h. Peers of

f Append. No. III. 3.
h Ff. 2. 4. 18?21.

the realm, members of parliament, and corporations, are privileged from
arrests; and of course from outlawries i. And against them the process to
inforce an appearance must be by summons and distress infinite, instead
of a capias. Also clerks, attorneys, and all other persons attending the
courts of justice (for attorneys, being officers of the court, are always
supposed to be there attending) are not liable to be arrested by the
ordinary process of the court, but must be sued by bill (called usually a bill
of privilege) as being personally present in court k. Clergymen performing
divine service, and not merely staying in the church with a fraudulent
design, are for the time privileged from arrests, by statute 50 Edw. III. c. 5.
and 1 Ric. II. c. 16. as likewise members of convocation actually attending
thereon, by statute 8 Hen. VI. c. 1. Suitors, witnesses, and other persons,
necessarily attending any courts of record upon business, are not to be
arrested during their actual attendance, which includes their necessary
coming and returning. And no arrest can be made in the king’s presence,
nor within the verge of his royal palace, nor in any place where the king’s
justices are actually sitting. The king hath moreover a special prerogative,
(which indeed is very seldom exerted l) that he may by his writ of
protection privilege a defendant from all personal, and many real, suits for
one year at a time, and no longer; in respect of his being engaged in his
service out of the realm m. And the king also by the common law might
take his creditor into his protection, so that no one might sue or arrest him
till the king’s debt were paid n: but by the statute 25 Edw. III. st. 5. c. 19.
notwithstanding such protection, another creditor may proceed to
judgment against him, with a

I Whitelock of parl. 206, 207.
k Bro. Abr. t. bille. 29. 12 Mod. 163.
l Sir. Edward Coke informs us, (1 Inst. 131.) that hereinhe could say
nothing of his own experience; for albeit queen Elizabeth maintained many
wars, yet she granted few or no protections: and her reason was, that he was
no fit subject to be employed in her service, that was subject to other mens actins; lest she might be thought to delay justice. But king William, in 1692, granted one to lord Cutts, to protect him from being outlawed by his taylor: (3 Lev. 332.) which is the last that appears upon our books. m Finch. L. 454. 3 Lev. 332.


stay of execution, till the king's debt be paid; unless such creditor will undertake for the king's debt, and then he shall have execution for both. And, lastly, by statute 29 Car. II. c. 7. no arrest can be made, nor process served upon a sunday, except for treason, felony, or breach of the peace. When the defendant is regularly arrested, he must either go to prison, for safe custody; or put in special bail to the sheriff. For, the intent of the arrest being only to compel an appearance in court at the return of the writ, that purpose is equally answered, whether the sheriff detains his person, or takes sufficient security for his appearance, called bail (from the French word, bailer, to deliver) because the defendant is bailed, or delivered, to his sureties, upon their giving security for his appearance; and is supposed to continue in their friendly custody instead of going to gaol. The method of putting in bail to the sheriff is by entering into a bond or obligation, with one or more sureties (not fictitious persons, as in the former case of common bail, but real, substantial, responsible bondsmen) to insure the defendant's appearance at the return of the writ; which obligation is called the bail bond. The sheriff, if he pleases, may let the defendant go without any sureties; but that is at his own peril: for, after once taking him, the sheriff is bound to keep him safely, so as to be forthcoming in court; otherwise an action lies against him for an escape. But, on the other hand, he is obliged, by statute 23 Hen. VI. C. 10. to take (if it be tendered) a sufficient bailbond: and, by statute 12 Geo. I. C. 29. the sheriff shall take bail for no other sum than such as is sworn to by the plaintiff, and endorsed on the back of the writ. Upon the return of the writ, or within four days after, the defendant must appear according to the exigency of the writ. This appearance is effected by putting in and justifying bail to the action; which is commonly called putting in bail above. If this be not done, and the bail that were taken by the sheriff

o Append. No. III. 5.
below are responsible persons, the plaintiff may take an assignment from
the sheriff of the bail-bond (under the statute 4 & 5 Ann. c. 16.) and bring
an action thereupon against the sheriff’s bail. But if the bail, so accepted by
the sheriff, be insolvent persons, the plaintiff may proceed against the
sheriff himself, by calling upon him, first, to return the writ (if not already
done) and afterwards to bring in the body of the defendant. And, if the
sheriff does not then cause sufficient bail to be put in above, he will
himself be responsible to the plaintiff.
The bail above, or bail to the action, must be put in either in open court, or
before one of the judges thereof; or else, in the country, before a
commissioner appointed for that purpose by virtue of the statute 3 W. &
M. c. 4. which must be transmitted to the court. These bail, who must at
least be two in number, must enter into a recognizance in court or before
the judge or commissioner, whereby they do jointly and severally
undertake, that if the defendant be condemned in the action he shall pay
the costs and condemnation, or render himself a prisoner, or that they will
pay it for him: which recognizance is transmitted to the court in a slip of
parchment intitled a bail piece q. And, if required, the bail must justify
themselves in court, or before the commissioner in the country, by
swearing themselves house-keepers, and each of them to be worth double
the sum for which they are bail, after payment of all their debts. This
answers in some measure to the stipulatio or satisdatio of the Roman laws
r, which is mutually given by each litigant party to the other: by the
plaintiff, that he will prosecute his suit, and pay the costs if he loses his
cause; in like manner as our law still requires nominal pledges of
prosecution from the plaintiff: by the defendant, that he shall continue in
court, and abide the sentence of the judge, much like our special bail; but
with this difference, that the sidejussores were there absolutely bound
judicatum solvere, to see the costs and condemna-

p Append. No. III. 5.
q Ibid.
r Inst. L. 4. t. 11. Ff. l. 2. t. 8

tion paid at all events: whereas our special bail may be discharged, by
surrendering the defendant into custody, within the time allowed by law;
for which purpose they are at all times intitled to a warrant to apprehend
him s.
Special bail is required (as of course) only upon actions of debt, or actions
on the case in trover or for money due, where the plaintiff can swear that
the cause of action amounts to ten pounds: but in actions where the
damages are precarious, being to be assessed ad libitum by a jury, as in
actions for words, ejectment, or trespass, it is very seldom possible for a
plaintiff to swear to the amount of his cause of action; and therefore no
special bail is taken thereon, unless by a judge's order or the particular
directions of the court, in some peculiar species of injuries, as in cases of
mayhem or atrocious battery; or upon such special circumstances, as
make it absolutely necessary that the defendant should be kept within the
reach of justice. Also in actions against heirs, executors, and
administrators, for debts of the deceased, special bail is not demandable:
for the action is not so properly against them in person, as against the
effects of the deceased in their possession. But special bail is required even
of them, in actions for a devastavit, or wasting the goods of the deceased;
that wrong being of their own committing.
Thus much for process; which is only meant to bring the defendant into
court, in order to contest the suit, and abide the determination of the law.
When he appears either in person as a prisoner, or out upon bail, then
follow the pleadings between the parties, which we shall consider at large
in the next chapter.

CHAPTER THE TWENTIETH.
Of PLEADING.

PLEADINGS are the mutual altercations between the plaintiff and
defendant; which at present are set down and delivered into the proper
office in writing, though formerly they were usually put in by their counsel
ore tenus, or viva voce, in court, and then minuted down by the chief
clerks, or prothonotaries; whence in our old law French the pleadings are
frequently denominated the parol.
The first of these is the declaration, narratio, or count, anciently called the
tale a; in which the plaintiff sets forth his cause of complain at length:
being indeed only an amplification or exposition of the original writ upon
which his action is founded, with the additional circumstances of time and
place, when and where the injury was committed. But we may remember b
that, in the king's bench, when the defendant is brought into court by bill
of Middlesex, upon a supposed trespass, in order to give the court a
jurisdiction, the plaintiff may declare in whatever action, or charge him
with whatever injury, he thinks proper; unless he has held him to bail by a
special actum, which the plaintiff is then bound to pursue. And so also, in order to have the benefit of a capias to secure the defendant's person, it was the ancient practice and is therefore still warrantable in the com-

b See pag. 285. 288.

mon pleas, to sue out a writ of trespass quare clausum fregit, for breaking the plaintiff's close; and plaintiff declares in whatever action the nature of his actual injury may require; as an action of covenant, or on the case for breach of contract, or other less forcible transgression; unless by holding the defendant to bail on a special actum, he has bound himself to declare accordingly.

In local actions, where possession of land is to be recovered, or damages for an actual trespass, or for waste, &c, affecting land, the plaintiff must lay his declaration or declare his injury to have happened in the very county and place that it really did happen; but in transitory actions, for injuries that might have happened anywhere, as debt, detinue, slander, and the like, the plaintiff may declare in what county he pleases, and then the trial must be in that county in which the declaration is laid. Though if the defendant will make affidavit, that the cause of action, if any, arose not in that but in another county, the court will direct a change of the venue, or visne, (that is, the vicinia or neighbourhood in which the injury is declared to be done) and will oblige the plaintiff to declare in the proper county. For the statute 6 Ric. II. c. 2. having ordered all writs to be laid in their proper counties, this, as the judges conceived, empowered them to change the venue, if required, and not to insist rigidly on abating the writ: which practice began in the reign of James the first; And this power is discretionally exercised, so as not to cause but prevent a defect of justice. Therefore the court will not change the venue to any of the four northern counties, previous to the spring circuit; because there the assises are holden only once a year, at the time of the summer circuit. And it will sometimes remove the venue from the proper jurisdiction, (especially of the narrow and limited kind) upon a suggestion, duly supported, that a fair and impartial trial cannot be had therein.

c 2 Ventr. 259.
d 2 Salk. 670.
It is generally usual in actions upon the case to set forth several cases, by different counts in the same declaration; so that if the plaintiff fails in the proof of one, he may succeed in another. As, in an action on the case upon an assumpsit for goods sold and delivered, the plaintiff usually counts or declares, first, upon a settled and agreed price between him and the defendant; as that they bargained for twenty pounds: and lest he should fail in the proof of this, he counts likewise upon a quantum valebant; that the defendant bought other goods, and agreed to pay him so much as they were reasonably worth; and then avers that they were worth other twenty pounds: and so on in three or four different shapes; and at last concludes with declaring that the defendant had refused to fulfil any of these agreements, whereby he is endamaged to such a value. And if he proves the case laid in any one of his counts, though he fails in the rest, he shall recover proportionable damages. This declaration always concludes with these words, and thereupon he brings suit, & c; in producit fectam, & c. By which word, suit or fecta, (a sequendo) were anciently understood the witnesses or followers of the plaintiff. For in former times the law would not put the defendant to the trouble of answering the charge, till the plaintiff had made out at least a probable case. But the actual production of the suit, the fecta, or followers, is now antiquated; and hath been totally disused, at least ever since the reign of Edward the third, though the form of it still continues.

At the end of the declaration are added also the plaintiff's common pledges of prosecution, John Doe and Richard Roe, which, as we before observed, are now mere names of form; though formerly they were of use to answer to the king for the amercements of the plaintiff, in case he were nonsuited, barred of his action, or had a verdict and judgment against him. For, if the plaintiff neglects to deliver a declaration for two terms after the defendant appears, or is guilty of other delays or defaults against the rules of law in any subsequent stage of the action, he is adjudged not to follow or pursue his remedy as he ought to do, and thereupon a nonsuit, or non prossequitur, is entered; and he is said to be nonpros.' d. And for thus deserting his complaint, after making a false claim or complain (pro falso clamore suo) he shall not only pay costs to the defendant, but is liable to be
ameerced to the king. A retraxit differs from a nonsuit, in that the one is
negative, and the other positive : the nonsuit is a default and neglect of the
plaintiff, and therefore he is allowed to begin his suit again, upon payment
of costs ; but a retraxit is an open and voluntary renunciation of his suit, in
court, and by this he for ever loses his action. A dis-continuance is some
what similar to a nonsuit : for when a plaintiff leaves a chasm in the
proceedings of his cause, as by not continuing the process regularly from
day to day, and time to time, as he ought to do, the suit is dis-continued,
and the defendant is no longer bound to attend ; but the plaintiff must
begin again, by suing out a new original, usually paying costs to his
antagonist. Anciently, by the demise of the king, all suits depending in his
courts were at once discontinued, and the plaintiff was obliged to renew
the process, by suing out a fresh writ from the successor ; the virtue of the
former writ being totally gone, and the defendant no longer bound to
attend in consequence thereof : but, to prevent the expense as well as delay
attending this rule of law, the statute 1 Edw. VI. C. 7. enacts, that by the
death of the king no action shall be discontinued ; but all proceedings shall
stand good as if the same king had been living.
When the plaintiff hath stated his case in the declaration, it is incumbent
on the defendant within a reasonable time to make his defence and to put
in a plea ; or else the plaintiff will at once recover judgment by def-
ault, or nihil dicit of the defendant.
Defence, in its true legal sense, signifies not a justification, protection, or
guard, which is now its popular signification ; but
merely an opposing or denial (from the French verb defender) of the truth
or validity of the complaint. It is the contestatio litis of the civilians : a
general assertion that the plaintiff hath no ground of action, which
assertion is afterwards extended and maintained in his plea. For it would
be ridiculous to supposed that the defendant comes and defends (or, in the
vulgar acceptation justifies) the force and injury, in one line, and pleads
that he is not guilty of the trespass complained of, in the next. And
therefore in actions of dower, where the demandant does not count of any
injury done, but merely demands her endowment k, and in assises of land,
where also there is no injury alleged, but merely a question of right stated
for the determination of the recognitors or jury, the tenant makes no such
defence l. In writs of entry m, where no injury is stated in the count, but
merely the right of the demandant and the defective title of the tenant, the
tenant comes and defends or denies his right, jus suum, that is (as I
understand it, though with a small grammatical inaccuracy) the right of
the demandant, the only one expressly mentioned in the pleadings : or else
denies his own right to be such, as is suggested by the count of the demandant. And in writs of right the tenant always comes and defends the right of the demandant and his seisin, jus praedicti S. et seisinam ipsius o, (or else the seisin of his ancestor, upon which he counts, as the case may be) and the demandant may reply, that the tenant unjustly defends his, the demandant's right, and the seisin on which he counts p. All which is extremely clear, if we understand by defence an opposition or denial, but is otherwise inexplicably difficult q.

The courts were formerly very nice and curious with respect to the nature of the defence, so that if no defence was made, though a sufficient plea was pleaded, the plaintiff should recover

k Raftal. Entr. 234.
l Booth of real actions. 118.
m Vol.II. append. No. V. 2.
n Append. No. I. 5.
o Co. Entr. 182.
q The true reason of this, says Booth, (on real actions. 94. 112.) I could never yet find.

judgmentr: and therefore the book, entitled novae narrationes or the new talyss, at the end of almost every count, narratio, or tale, subjoins such defence as is proper for the defendant to make. For a general defence or denial was not prudent in every situation, since thereby the propriety of the writ, the competency of the plaintiff, and the cognizance of the court, were allowed. By defending the force and injury the defendant waved all pleas of misnomert; by defending the damages, all exceptions to the person of the plaintiff; and by defending either one or the other when and where it should behave him, he acknowledged the jurisdiction of the courtu. But of late years these niceties have been very deservedly discountenancedw; though they still seem to be law, if insisted onx.

AFTER defence made, the defendant must put in his plea. But, before he pleads, he is intitled to demand one imparlancey, or licentia loquendi, and may have more granted by consent of the plaintiff; to see if he can end the matter amicably without farther suit, by talking with the plaintiff: a practice, which is supposed to have arisen from a principle of religion, in obedience to that precept of the gospel, agree with thine adversary quickly whilst thou art in the way with hima. And it may be observed that this

r Entr. 212, edit. 1534.
s 247, 248, edit. 1534.
t 231, edit. 1534.
u 201, edit. 1534.
w 56, edit. 1534.
x 110, edit. 1534.
gospel precept has plain reference to the Roman law of the twelve tables, which expressly directed the plaintiff and defendant to make up the matter, while they were in the way, or going to the praetor; --- in via, rem uti pacunt orato. There are also many other previous steps which may be taken by a defendant before he puts in his plea. He may, in real actions, demand a view

r Co. Litt. 127.
s edit. 1534.
u En la defence sont iiij choses entendantz: per tant quil defende tort et force, bome doyt entendre quil fe excuse de tort a luy furmys per eounte, et fait fe partie al ple; et per tant quil defende les damages, il affirme le partie able deftre refpondu; et per tant quil defende ou et quant il devera, il accepte la poiar de courte de conufrtrs ou trier lour ple. (Mod. tenend. cur. 408. edit 1534.) See also Co. Litt. 127.
w Salk. 217. Lord Raym. 282.
x Carth. 230. Lord Raym. 117.
a Matth. V. 25.

of the thing in question, in order to ascertain its identity and other circumstances. He may crave oyerb of the writ, or of the bond, or other specialty upon which the action is brought; that is to hear it read to him; the generality of defendants in the times of ancient simplicity being supposed incapable to read it themselves: whereupon the whole is entered verbatim upon the record, and the defendant may take advantage of any condition or other part of it, not stated in the plaintiff's declaration. In real actions also the tenant may pray in aid, or call for assistance of another, to help him to plead, because of the feebleness and imbecility of his own estate. Thus a tenant for life may pray in aid of him that hath the inheritance in remainder or reversion; and an incumbent may pray in aid of the patron and ordinary: that is, that they shall be joined in the action and help to defend the title. Voucher also is the calling in of some person to answer the action, that hath warranted the title to the tenant or defendant. This we still make use of in the form of common recoveriesc, which are grounded on a writ of entry; a species of action that we may remember relies chiefly on the weakness of the tenant's title, who therefore vouches another person to warrant it. If the vouchee appears, he
is made defendant instead of the vouchor: but, if he afterwards makes
default, recovery shall be had against the original defendant; and he shall
recover over an equivalent in value, against the deficient vouchee. In
assises indeed, where the principal question is whether the demandant or
his ancestors were or were not in possession till the ouster happened, and
the title of the tenant is little (if at all) discussed, there no voucher is
allowed; but the tenant may bring a writ of warrantia chartae against the
warrantor, to compel him to assist him with a good plea or defence, or else
to render damages and the value of the land, if recovered against the
tenant. In many real actions alsoe, brought by or against an infant under
the age of twenty one years, and also in actions of debt bought against him,
as heir to any deceased ancestor, either party may suggest the nonage of
the in-b Append. No. III. 6.
c Vol. II. append. No. V. 2.
d F. N. B. 135.
e Dyer. 137.

fant, and pray that the proceedings may be deferred till his full age, or in
our legal phrase that the infant may have his age, and that the parol may
demur, that is that the pleadings may be stayed; and then they shall not
proceed till his full age, unless it be apparent that he cannot be prejudiced
thereby. But, by the statutes of Whftm. I. 3 Edw. I. c. 46. and of Glocester
6 Edw. I. c. 2. in writs of entry fur disfeifin in some particular cases, and in
actions auncestrel brought by an infant, the parol shall not demur:
otherwise he might be deforced of his whole property, and even want a
maintenance, till he came of age. So likewise in a writ of dower the heir
shall not have his age; for it is
necessary that the widow's claim be
immediately determined, else she may want a present subsistence. Nor
shall an infant patron have it in a quare impedeth, since the law holds it
necessary and expedient, that the church be immediately filled. It is in this
stage also of the cause, if at all, that cognizance of the suit must be claimed
or demanded; when any person or body corporate hath the franchise, not
only of bolding pleas within a particular limited jurisdiction, but also of
the cognizance of pleas: and that, either without any words exclusive of
other courts, which entitles the lord of the franchise, whenever any suit
that belongs to his jurisdiction is commenced in the courts at
Westminster, to demand the cognizance thereof; or with such exclusive
words, which also entitle the defendant to plead to the jurisdiction of the
court. Upon this claim of cognizance, if allowed, all proceedings shall cease in the superior court, and the plaintiff is left at liberty to pursue his remedy in the special jurisdiction. As when a scholar or other privileged person of the universities of Oxford or Cambridge is impleaded in the courts at Westminster for any cause of action whatsoever, unless upon a question of freehold. In these cases, by the charter of those learned bodies, confirmed by act of parliament, the chancellor or vice-chancellor may put in a claim of cognizance; which,

f Finch. L. 360.
g I Roll. Abr. 137.
h Ibid. 138.
i 2 Lord Raym. 836. 10 Mod. 126.
k See pag. 83.

if made in due time and with due proof of the facts alleged, is regularly allowed by the courts. It must be demanded before any imparlance, for that is a submission to the jurisdiction of the superior court: and it will not be allowed if it occasions a failure of justice, or if an action be brought against the person himself who claims the franchise, unless he hath also a power in such case of making another judge.

WHEN these proceedings are over, the defendant must then put in his excuse or plea. Pleas are of two sorts; dilatory pleas, and pleas to the action. Dilatory pleas are such as tend merely to delay or put off the suit, by questioning the propriety of the remedy, rather than by denying the injury: pleas to the action are such as dispute the very cause of suit. The former cannot be pleaded after a general imparlance, which is an acknowledgement of the propriety of the action.

I. DILATORY pleas are, I. To the jurisdiction of the court: alleging, that it ought not to hold plea of this injury, it arising in Wales or beyond sea; or because the land in question is of ancient demesne, and ought only to be demanded in the lord's court, &c. 2. To the disability of the plaintiff, by reason whereof he is incapable to commence or continue the suit; as, that he is an alien enemy, outlawed, excommunicated, attainted of treason or felony, under a praemunire, not in rerum natura (being only a fictitious person) an infant, a feme-covert, or a monk professed. 3. In abatement: which abatement is either of the
m 2 Ventr. 363.

n Hob. 87. Yearbook, M. 8 Hen. VI. 20. In this latter case the chancellor of Oxford claimed cognizance of an action of trespass brought against himself; which was disallowed, because he should not be judge in his own cause. The argument used by serjeant Rolfe, on behalf of the cognizance, is curious and worth transcribing. En aucun temps suit un pape, et avoit fait un grand offence, et le cardinals vindrent a luy et difoyent a luy, peccasti: et il dit, judica me: et ils difyent, non possumus, quia caput es ecclesiae; jusica teipsum: ed l apostos dit, judico me cremair; et suit combustus; et apres suit un fainct. Et in ceo cas il suit son juge demene, et iffint m' eft pas inconvenient que un bome soit juge demene.

writ, or the count, for some defect in one of them; as by misnaming the defendant, which is called a misnomer; giving him a wrong addition, as esquire instead of knight; or other want of form in any material respect. Or, it may be, that the plaintiff is dead; for the death of either party is at once an abatement of the suit. And in actions merely personal, arising ex delicto, for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is that action personalis moritur cum personae; and it never shall 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 have 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 against or by the executors: being indeed rather actions against the property than the person, in which the executors have now the same interest that their testator had before. These pleas to the jurisdiction, to the disability, or in abatement, were formerly very often used as mere dilatory pleas, without any foundation of truth, and calculated only for delay; but now by statute 4 & 5 Ann. c. 16. no dilatory plea is to be admitted, without affidavit made of the truth thereof, or some probable matter shewn to the court to induce them to believe it true. And with respect to the pleas themselves, it is a rule, that no exception shall be admitted against a declaration or writ, unless the defendant will in the same plea give the plaintiff a better; that is, shew
him how it might be amended, that there may not be two objections upon the same account.

o 4 Inst. 315.
q Brownl. 139.

ALL pleas to the jurisdiction conclude to the cognizance of the court; praying judgment, whether the court will have farther cognizance of the suit: pleas to the disability conclude to the person; by praying judgment, if the said A the plaintiff ought to be answered: and pleas in abatement (when the suit is by original ) conclude to the writ or declaration; by praying judgment of the writ, or declaration, and that the same may be quashed, caffetur, made void, or abated: but, if the action be by bill, the plea must pray judgment of the bill, and not of the declaration; the bill being here the original, and the declaration only a copy of the bill.

WHEN these dilatory pleas are allowed, the cause is either dismissed from that jurisdiction; or the plaintiff is stayed till his disability be removed; or he is obliged to sue out a new writ, by leave obtained from the court, or to amend and new-frame his declaration. But when on the other hand they are overruled as frivolous, the defendant has judgment of respondeat ouster, or to answer over in some better manner. It if then incumbent on him to plead

2. A PLEA to the action; that is, to answer to the merits of the complaint. This is done by confessing or denying it.

A CONFESSION of the whole complaint is not very usual, for then the defendant would probably end the matter sooner; or not plead at all, but suffer judgment to go by default. Yet sometimes, after tender and refusal of a debt, if the creditor harasses his debtor with an action, it then becomes necessary for the defendant to acknowledge the debt, and plead the tender; adding that he has always been ready, tout temps prist, and still is ready, uncore prist, to discharge it: for a tender by the debtor and refusal by the creditor will in all cases discharge the costss, but not the debt itself; though in some particular cases the creditor will

r Co. Entr. 271.
s I Vent. 21.
totally lose his moneyt. But frequently the defendant confesses one part of
the complaint (by a cognovit actionem in respect thereof ) and traverses or
denies the rest: in order to avoid the expense of carrying that part to a
formal trial, which he has no ground to litigate. A species of this fort of
confession is the payment of money into court: which is for the most part
necessary upon pleading a tender, and is itself a kind of tender to the
plaintiff; by paying into the hands of the proper officer of the court as
much as the defendant acknowledges to be due, together with the costs
hitherto incurred, in order to prevent the expense of any farther
proceedings. This may be done upon what is called a motion; which is an
occasional application to the court by the parties or their counsel, in order
to obtain some rule or order of court, which becomes necessary in the
progress of a cause; and it is usually grounded upon an affidavit, (the
perfect tense of the verb affido) being a voluntary oath before some judge
or officer of the court, to evince the truth of certain facts, upon which the
motion is grounded: though no such affidavit is necessary for payment of
money into court. If, after the money paid in, the plaintiff proceeds in his
suit, it is at his own peril: for, if he does not prove more due than is so paid
into court, he shall be nonsuited and pay the defendant costs; but he shall
still have the money so paid in, for that the defendant has acknowledged to
be his due. In the French law the rule of practice is grounded upon
principles somewhat similar to this; for there, if a person be sued for more
than he owes, yet he loses his cause if he does not tender so much as he
really does owev. To this head may also be referred the practice of what is
called a set-off: whereby the defendant acknowledges the justice of the
plaintiff's demand on the one hand; but, on the other, sets up a demand of
his own, to counterbalance that of the plaintiff, either in the whole or in
part: as, if the plaintiff sues for ten pounds due on a note of hand, the
defendant may set off nine pounds due to himself for merchandize sold to
the plaintiff, and, in case he pleads such set-off, must pay the remaining
balance into court. This an-
y Sp. L. b. 6. c. 4.

swers very nearly to the compensatio, or stoppage, of the civil lawu, and
depends on the statutes 2 Geo. II. c. 22. and 8 Geo. II. c. 24. which enact,
that, where are mutual debts between the plaintiff and defendant, one debt
may be sent against the other, and either pleaded in bar, or given in
evidence upon the general issue at the trial; which shall operate as payment, and extinguish so much of the plaintiff's demand.

PLEAS, that totally deny the cause of complaint are either the general issue, or a special plea, in bar.

I. THE general issue, or general plea, is what traverses, thwarts, and denies at once the whole declaration; without offering any special matter whereby to evade it. As in trespass either vi et armis, or on the case, non culpabilis, not guilty; in debt upon contract, nil debet, he owes nothing; in debt on bond, non est factum, it is not his deed; on an assumpsit, non assumpsit, he made no such promise. Or in real actions, nul tort, no wrong done; nul disfeifin, no disfeifin; and in a writ of right, that the tenant has more right to hold than the demandant has to demand. These pleas are called the general issue, because, by importing an absolute and general denial of what is alleged in the declaration, they amount at once to an issue; by which we mean a fact affirmed on one side and denied on the other.

FORMERLY the general issue was seldom pleaded, except when the party meant wholly to deny the charge alleged against him. But when he meant to distinguish away or palliate the charge, it was always usual to set forth the particular facts in what is called a special plea; which was originally intended to apprize the court and the adverse party of the nature and circumstances of the defence, and to keep the law and the fact distinct. And it is an invariable rule, that every defence, which cannot be thus specially pleaded, may be given in evidence, upon the general issue at the trial. But, the science of special plead-

| u Ff. 16. 2. I. |
| w Append. No. II. 4. |

ing having been frequently perverted to the purposes of chicane and delay, the courts have of late in some instances, and the legislature in many more, permitted the general issue to be pleaded, which leaves every thing open, the fact, the law, and the equity of the case; and have allowed special matter to be given in evidence at the trial. And, though it should seem as if much confusion and uncertainty would follow from so great a relaxation of the strictness anciently observed, yet experience has shewn it to be
otherwise; especially with the aid of a new trial, in case either party be unfairly surprized by the other.

2. SPECIAL pleas, in bar of the plaintiff's demand, are very various, according to the circumstances of the defendant's case. As, in real actions a general release or a fine, both of which may destroy and bar the plaintiff's title. Or, in personal actions, an accord, arbitration, conditions performed, nonage of the defendant, or some other fact which precludes the plaintiff from his action. A justification is likewise a special plea in bar; as in actions of assault and battery, son assault demesne, that it was the plaintiff's own original assault; in trespass, that the defendant did the thing complained of in right of some office which warranted him so to do; or, in an action of slander, that the plaintiff is really as bad a man as the defendant said he was.

ALSO a man may plead the statutes of limitations in bar; or the time limited by certain acts of parliament, beyond which no plaintiff can lay his cause of action. This, by the statute of 32 Hen. VIII. c. 2. in a writ of right is sixty years: in assises, writs of entry, or other possessory actions real, of the seisin of one's ancestors, in lands; and either of their seisin, or one's own, in rents, suits, and services; fifty years: and in actions real for lands grounded upon one's own seisin or possession, such possession must have been within thirty years. By statute I Mar. ft. 2. c. 5. this limitation does not extend to any suit for advowsons, upon reasons given in a former chapter. But by the statute

x Append. No. III. 6.

y See pag. 250.

21 Jac. I. c. 2. a time of limitation was extended to the case of the king; so that possession for sixty years precedent to 19 Febr. 1623, is a bar even against the prerogative, in derogation of the ancient maxim nullum tempus occurrit regi. By another statute. 21 Jac. I. c. 16. twenty years is the time of limitation in any writ of formedon: and, by a consequence, twenty years is also the limitation in every action of ejectment; for no ejectment can be brought, unless where the lessor of the plaintiff is intitled to enter on the landsa, and by the statute 21 Jac. I. c. 16. no entry can be made by any man, unless within twenty years after his right shall accrue. As to all personal actions, they are limited by the statute late mentioned to six years after the cause of action commenced; except actions of assault, battery,
mayhem, and imprisonment, which must be brought within four years, and actions for words, which must be brought within two years, after the injury committed. And by the statute 31 Eliz. c. 5. all suits, indictments, and informations, upon any penal statutes, where any forfeiture is to the crown, shall be sued within two years, and where the forfeiture is to a subject, within one year, after the offence committed; unless where any other time is specially limited by the statute. Lastly, by statute 10 W. III. c. 14. no writ of error, or scire facias, shall be brought to reverse any judgment, fine, or recovery, for error, unless it be prosecuted within twenty years. The use of these statutes of limitation is to preserve the peace of the kingdom, and to prevent those unnumerable perjuries which might ensue, if a man were allowed to bring an action for any injury committed at any distance of time. Upon both these accounts the law therefore holds, that interest reipublicae ut fit finis litium: and upon the same principle the Athenian laws in general prohibited all actions, where the injury was committed five years before the complaint was made. If therefore in any suit, the injury, or cause so action, happened earlier than the period expressly limited by law, the defendant may plead the statutes of limitations in bar: as upon an assumpt-

z 3 Inst. 189.
a See pag. 206.

sit, or promise to pay money to the plaintiff, the defendant may plead non assumpsit infra sex annos; he made no such promise within six years; which is an effectual bar to the complaint.

AN estoppel is likewise a special plea in bar: which happens where a man hath done some act, or executed some deed, which estops or precludes him from averring any thing to the contrary. As if tenant for years (who hath no freehold) levies a fine to another person. Though this is void as to strangers, yet it shall work as an estoppel to the cognizor; for, if he afterwards brings an action to recover these lands, and his fine is pleaded against him, he shall thereby be estopped from saying, that he had no freehold at the time, and therefore was incapable of levying it.

THE conditions and qualities of a plea (which, as well as the doctrine of estoppels, will also hold equally, mutatis mutandis, with regard to other parts of pleading) are, I. That it be single and containing only one matter;
for duplicity begets confusion. But by statute 4 & 5 Ann. c. 16. a man with leave of the court may plead two or more distinct matters or single pleas; as in an action of assault and battery, these three, not guilty, son assault demesne, and the statute of limitations. 2. That it be direct and positive, and not argumentative. 3. That it have convenient certainty of time, place, and persons. 4. That it answer the plaintiff's allegations in every material point. 5. That it be so pleaded as to be capable of tried.

SPECIAL pleas are usually in the affirmative, sometimes in the negative, but they always advance some new fact not mentioned in the declaration; and then they must be averred to be true in the common form: ---and this he is ready to verify. --- This is not necessary in pleas of the general issue; those always containing a total denial of the facts before advanced by the other party, and therefore putting him upon the proof of them.

IT is a rule in pleading, that no man be allowed to plead specially such a plea as amounts only to the general issue, or a total denial of the charge; but in such case he shall be driven to plead the general issue in terms, whereby the whole question is referred to a jury. But if the defendant, in an assise or action of trespass, be desirous to refer the validity of his title to the court rather than the jury, he may state his title specially, and at the same time give colour to the plaintiff, or suppose him to have an appearance or colour of title, bad indeed in point of law, but of which the jury are not competent judges. As if his own true title be, that he claims by feoffment with livery from A, by force of which he entered on the lands in question, he cannot plead this by itself, as it amounts to no more than the general issue, nul tort, nul disfeifin, in assise, or not guilty in an action of trespass. But he may allege this specially, provided he goes farther and says, that the plaintiff claiming by colour of a prior deed of feoffment, without livery, entered; upon whom he entered; and may then refer himself to the judgment of the court which of these two titles is the best in point of lawc.

WHEN the plea of the defendant is thus put in, if it does not amount to an issue or total contradiction of the declaration but only evades it, the plaintiff may plead again, and reply to the defendant's plea: either traversing it, that is, totally denying it; as if on an action of debt upon bond the defendant pleads solvit ad diem, that he paid the money when due, here the plaintiff in his replication may totally traverse this plea, by denying that the defendant paid it: or he may allege new matter in
contradiction to the defendant's plea; as when the defendant pleads no award made, the plaintiff may reply, and set forth an actual award, and assign a breach: or the replication may confess and avoid the plea, by some new matter or distinction, consistent with the plaintiff's former declaration; as, in an action for the trespassing upon land whereof the plaintiff is seised, if the defendant shews a

c Dr & St. d. 2. c. 53.

title to the land by descent, and that therefore he had a right to enter, and gives colour to the plaintiff, the plaintiff may either traverse and totally deny the fact of the descent; or he may confess and avoid it, by replying, that true it is that such descent happened, but that since the descent the defendant himself demised the lands to the plaintiff for term of life. To the replication the defendant may rejoin, or put in an answer called a rejoinder. The plaintiff may answer the rejoinder by a fur-rejoinder; upon which the defendant may rebut; and the plaintiff answer him by a fur-rebutter. Which pleas, replications, rejoinders, fur-rejoinders, rebutters, and fur-rebutters answer to the exceptio, replicatio, duplicatio, triplicatio, and quadruplicatio of the Roman lawse.

THE whole of this process is denominated the pleading; in the several stages of which it must be carefully observed, not to depart or vary from the title or defence, which the party has once insisted on. For this (which is called a departure in pleading) might occasion endless altercation. Therefore the replication must support the declaration, and the rejoinder must support the plea, without departing out of it. As in the case of pleading no award made, in consequence of a bond of arbitration, to which the plaintiff replies, setting forth an actual award; now the defendant cannot rejoin that he hath performed this award, for such rejoinder would be an entire departure from his original plea, which alleged that no such award was made: therefore he has now no other choice, but to traverse the fact of the replication, or else to demur upon the law of it.

YET in many actions the plaintiff, who has alleged in his declaration a general wrong, may in his replication, after an evasive plea by the defendant, reduce that general wrong to a more particular certainty, by assigning the injury afresh with all its specific circumstances in such
manner as clearly to ascertain and identify it, consistently with his general complaint; which is

e Inst. 4. 14. Bract. l. 5. tr. 5. c. I.

called a new or novel assignment. As, if the plaintiff in trespass declares on a breach of his close in D; and the defendant pleads that the place where the injury is said to have happened is a certain close of pasture in D, which descended to him from B his father, and so is his own freehold; the plaintiff may reply and assign another close in D, specifying the abuttals and boundaries as the real place of the injury.

IT hath previously been observed that duplicity in pleading must be avoided. Every plea must be simple, entire, connected, and confined to one single point: it must never be entangled with a variety of distinct independent answers to the same matter; which must require as many different replies, and introduce a multitude of issues upon one and the same dispute. For this would often embarrass the jury, and sometimes the court itself, and at all events would greatly enhance the expense of the parties. Yet it frequently is expedient to plead in such a manner, as to avoid any implied admission of a fact, which cannot with propriety or safety be positively affirmed or denied. And this may be done by what is called a protestation; whereby the party interposes an oblique allegation or denial of some fact, protesting (by the gerund, protestando) that such a matter does or does not exist; and at the same time avoiding a direct affirmation or denial. Sir Edward Coke hath defined a protestation (in the pithy dialect of that age) to be an exclusion of a conclusion. For the use of it is, to save the party from being concluded with respect to some fact or circumstance, which cannot be directly affirmed or denied without falling into duplicity pleading; and which yet, if he did not thus enter his protest, he might be deemed to have tacitly waived or admitted. Thus, while tenure in villenage subsisted, if a villein had brought an action against his lord, and the lord was inclined to try the merits of the demand, and the lord was inclined to try the merits of the demand, and at the same time to prevent any conclusion against himself that he had waived his signiory; he could not in this

f Bro. Abr. t. trespass. 205. 284. 
g pag. 308. 
h I Inst. 124.
case both plead affirmatively that the plaintiff was his villein, and also take
issue upon the demand; for then his plea would have been double, as the
former alone would have been a good bar to the action: but he might have
alleged the villenage of the plaintiff, by way of protestation, and then have
denied the demand. By this means the future vassalage of the plaintiff was
saved to the defendant, in case the issue was found in his (the defendant’s
) favouri: for the protestation prevented that conclusion, which would
otherwise have resulted from the rest of his defence, that he had
enfranchised the plaintiffk; since no villein could maintain a civil action
against his old. So also if a defendant, by way of inducement to the point of
his defence, alleges (among other matters) a particular mode of seizin or
tenure, which the plaintiff is unwilling to admit, and yet desires to take
issue on the principal point of the defence, he must deny the seizin or
tenure by way of protestation, and then traverse the defensive matter. So,
lastly, if an award be set forth by the plaintiff, and he can assign a breach
in one part of it (viz. the non-payment of a sum of money) and yet is afraid
to admit the performance of the rest of the award, or to aver in general a
non-performance of any part of it, lest something should appear to have
been performed; he may save to himself any advantage he might hereafter
make of the general non-performance, by alleging that by protestation;
and plead only the non-payment of the moneyl.

IN any stage of the pleadings, when either side advances or affirms any
new matter, he usually (as was said) avers it to be true; and this he is ready
to verify. On the other hand, when either side traverses or denies the facts
pleaded by his antagonist, he usually tenders an issue, as it is called; the
language of which is different according to the party by whom the issue is
tendered: for if the traverse or denial comes from the defendant
and of this he puts

i Co. Litt. 126.
k See book II. ch. 6. pag. 94.

himself upon the county,? thereby submitting himself to the judgment of
his peersm: but if the traverse lies upon the plaintiff, he tenders the issue
or prays the judgment of the peers against the defendant in another form;
thus, and this he prays may be enquired of by the country.
BUT if either side (as, for instance, the defendant) pleads a special negative plea, not traversing or denying any thing that was before alleged, but disclosing some new negative matter; as where the suit is on a bond, conditioned to perform an award, and the defendant pleads, negatively, that no award was made, he tenders no issue upon this plea; because it does not yet appear whether the fact will be disputed, the plaintiff not having yet asserted the existence of any award; but when the plaintiff replies, and sets forth an actual specific award, if then the defendant traverses the replication, and denies the making of any such award, he then and not before tenders an issue to the plaintiff. For when in the course of pleading they come to a point which is affirmed on one side, and denied on the other, they are then said to be at issue; all their debates being at last contracted into a single point, which must now be determined either in favour of the plaintiff or of the defendant.

m Append. No. II. 4.

CHAPTER THE TWENTY FIRST.
OF ISSUE AND DEMURRER.

ISSUE, exitus, being the end of all the pleadings, is the fourth part or stage of an action, and is either upon matter of law, or matter of fact.

AN issue upon matter of law is called a demurrer: and it confesses the facts to be true, as stated by the opposite party; but denies that, by the law arising upon those facts, any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse; according to the party which first demurs, demoratur, rests or abides upon the point in question. As, if the matter of the plaintiff’s complaint or declaration be insufficient in law, as by not assigning any sufficient trespass, then the defendant demurs to the declaration: if, on the other hand, the defendant’s excuse or plea be invalid, as if he pleads that he committed the trespass by authority from a stranger, without setting out the stranger’s right; here the plaintiff may demur in law to the plea: and so on in every other part of the proceedings, where either side perceives any material objection in point of law, upon which he may rest his case.

THE form of such demurrer is by averring the declaration or plea, the replication or rejoinder, to be insufficient in law to
maintain the action or the defence; and therefore praying judgment for want of sufficient matter allegeda. Sometimes demurrers are merely for want of sufficient form in the writ or declaration. But in case of exceptions to the form, or manner of pleading, the party demurring must by statute 27 Eliz. c. 5. and 4 & 5 Ann. c. 16. set forth the causes of his demurrer, or wherein he apprehends the deficiency to consist. And upon either a general, or such a special demurrer, the opposite party avers it to be sufficient, which is called a joinder in demurrerb, and then the parties are at issue in point of law. Which issue in law, or demurrer, the judges of the court before which the action is brought must determine.

AN issue of fact is where the fact only, and not the law, is disputed. And when he that denies or traverses the fact pleaded by his antagonist has tendered the issue, thus, and this he prays may be enquired of by the country,? or and of this he puts himself upon the country,? it may immediately be subjoined by the other party, and the said A. B. doth the like. Which done, the issue is said to be joined, both parties having agreed to rest the state of the cause upon the truth of the fact in questionc. And this issue, of fact, must generally speaking be determined, not by the judges of the court, but by some other method; the principal of which methods is that by the country, per pais, (in Latin, per patriam) that is, by jury. Which establishment, of different tribunals for determining these different issues, is in some measure agreeable to the course of justice in the Roman republic, where the judices or dinarii determined only questions of fact, but questions of law were referred to the decisions of the centumvirid.

BUT here it will be proper to observe, that during the whole of these proceedings, from the time of the defendant's appearance in obedience to the king's writ, it is necessary that both the

a Append. No. III. 6.
b Ibid.
c Append. No. II. 4.
d Cic. de Ocator. l. I. c. 38.

parties be kept or continued in court from day to day, till the final determination of the suit. For the court can determine nothing, unless in the presence of both the parties, in person or by their attorneys, or upon default of one of them, after his original appearance and a time prefixed
for his appearance in court again. Therefore in the course of pleading, if either party neglects to put in his declaration, plea, replication, rejoinder, and the like, within the times allotted by the standing rules of the court, the plaintiff, if the omission be his, is said to be nonsuit, or not to follow and pursue his complaint, and shall lose the benefit of his writ: or, if the negligence be on the side of the defendant, judgment may be had against him, for such his default. And, after issue or demurrer joined, as well as in some of the previous stages of proceeding, a day is continually given and entered upon the record, for the parties to appear on from time to time, as the exigence of the case may require. The giving of this day is called the continuance, because thereby the proceedings are continued without interruption from one adjournment to another. If these continuances are omitted the cause is thereby discontinued, and the defendant is discharged fine die, without a day, for this turn: for by his appearance in court he has obeyed the command of the king’s writ; and, unless he be adjourned over to a day certain, he is no longer bound to attend upon that summons; but he must be warned afresh, and the whole must begin de novo.

NOW it may sometimes happen, that after the defendant has pleaded, nay, even after issue or demurrer joined, there may have arisen some new matter, which it is proper for the defendant to plead; as, that the plaintiff, being a feme-sole, is since married, or that the plaintiff, being a feme-sole, is since married, or that she has given the defendant a release, and the like: here, if the defendant takes advantage of this new matter, as early as he possibly can, viz. at the day given for his next appearance, he is permitted to plead it in what is called a plea puis darrein continuance, or since the last adjournment. For it would be unjust to exclude him from the benefit of this new defence, which it was not in his power to make when he pleaded the former. But it is dangerous to rely on such a plea, without due consideration; for it confesses the matter which was before in dispute between the partie ses. And it is not allowed to be put in, if any continuance has intervened between the arising of this fresh matter and the pleading of it: for then the defendant is guilty of neglect, or laches, and is supposed to rely on the merits of his former plea. Also it is not allowed after a demurrer is determined, or verdict given; because then relief may be had in another way, namely, by writ of audita querela, of which hereafter. And these pleas puis darrein continuance, when brought to a demurrer in law or issue of fact, shall be determined in like manner as other pleas.
WE have said, that demurrers, or questions concerning the sufficiency of
the matters alleged in the pleadings, are to be determined by the judges of
the court, upon solemn argument by counsel on both sides; and to that
end a demurrer book is made up, containing all the proceedings at length,
which are afterwards entered on record; and copies thereof, called paper-
books, are delivered to the judges to peruse. The recordf is a history of the
most material proceedings in the cause, entered on a parchment roll, and
continued down to the present time; in which must be stated the original
writ and summons, all the pleadings, the declaration, view or oyer prayed,
the imparlances, plea, replication, rejoinder, continuances, and whatever
further proceedings have been had; all entered verbatim on the roll, and
also the issue or demurrer, and joinder therein.

THESE were formerly all written, as indeed all public proceedings were, in
Norman or law French, and even the arguments of the counsel and
decisions of the court were in the same barbarous dialect. An evident and
shameful badge, it must be owned, of tyranny and foreign servitude; being
introduced un-

e Cro. Eliz. 49.
der the auspices of William the Norman, and his sons: whereby the
observation of the Roman satyrist was once more verified, thatGallia
caufidicos docuit facunda Britannosg. This continued till the reign of
Edward III; who, having employed his arms successfully in subduing the
crown of France, thought it unbeseeming the dignity of the victors to use
any longer the language of a vanquished county. By a statute therefore,
passed in the thirty sixth year of his reignh, it was enacted, that for the
future all pleas should be pleaded, shewn, defended, answered, debated,
and judged in the English tongue; but be entered and enrolled in Latin. In
like manner as don Alonso X, king of Castyle (the great-grandfather of our
Edward III) obliged his subjects to use the Castilian tongue in all legal
proceedingsi; and as, in 1286, the German language was established in the
courts of the empirek. And perhaps if our legislature had then directed
that the writs the
ms themselves, which are mandates from the king to his
subjects to perform certain acts or to appear at certain places, should have
been framed in the English language, according to the rule of our ancient
lawl, it had not been very improper. But the record or enrollment of those
writs and the proceedings thereon, which was calculated for the benefit of
posterity, was more serviceable (because more durable) in a dead and immutable language than in any flux or living one. The practisers however, being used to the Norman language, and therefore imagining they could express their thoughts more aptly and more concisely in that than in any other, still continued to take their notes in law French; and of course when those notes came to be published, under the denomination of reports, they were printed in that barbarous dialect; which, joined to the additional terrors of a Gothic black letter, has occasioned many a student to throw away his Plowden and Littleton, without venturing to attack a page of them. And yet in reality, upon a nearer acquaintance, they would have found nothing very formidable in the language; which differs

in its grammar and orthography as much from the modern French, as the diction of Chaucer and Gower does from that of Addison and Pope. Besides, as the English and Norman languages were concurrently used by our ancestors for several centuries together, the two idioms have naturally assimilated, and mutually borrowed from each other: for which reason the grammatical construction of each is so very much the same, that I apprehend an Englishman (with a week's preparation) would understand the laws of Normandy, collected in their grand coustumire, as well if not better than a Frenchman bred within the walls of Paris.

THE Latin, which succeeded the French for the entry and enrollment of pleas, and which continued in use for four centuries, answers of nearly to the English (oftentimes word for word) that it is not at all surprizing it should generally be imagined to be totally fabricated at home, with little more art or trouble than by adding Roman terminations to English words. Whereas in reality it is a very universal dialect, spread throughout all Europe at the eruption of the northern nations, and particularly accommodated and moulded to answer all the purposes of the lawyers with a peculiar exactness and precision. This is principally owing to the simplicity or (if the reader pleases) the poverty and baldness of its texture, calculated to express the ideas of mankind just as they arise in the human mind, without any rhetorical flourishes, or perplexed ornaments of style:
for it may be observed, that those laws and ordinances, of public as well as
private communities, are generally the most easily understood, where
strength and perspicuity, nor harmony or elegance of expression, have
been principally consulted in compiling them. These northern nations, or
rather their legislators, though they resolved to make use of the Latin
tongue in promulgating their laws, as being more durable and more
generally known to their conquered subjects than their own Teutonic
dialects, yet either through choice or necessity have frequently intermixed
therein some words of a Gothic original; which is, more or less the
case in every country of Europe, and therefore not to be imputed as any
peculiar blemish in our English legal latinity. The truth is, what is
generally denominated law-latin is in reality a mere technical language,
calculated for eternal duration, and easy to be apprehended both in
present and future times; and on those accounts best suited to preserve
those memorials which are intended for perpetual rules of action. The
rude pyramids of Egypt have endured from the earliest ages, while the
more modern and more elegant structures of Attica, Rome, and Palmyra
have sunk beneath the stroke of time.

AS to the objection of locking up the law in a strange and unknown tongue,
this is of little weight with regard to records, which few have occasion to
read but such as do, or ought to, understand the rudiments of Latin. And
besides it may be observed of the law-latin, as the very ingenious sir John
Daviesn observes of the law-french, that it is so very easy to be learned,
that the meanest wit that ever came to the study of the law doth come to
understand it almost perfectly in ten days without a reader.

IT is true indeed that the many terms of art, with which the law abounds,
are sufficiently harsh when latinized (yet not more so than those of other
sciences) and may, as Mr Selden observeso, give offenceto some
grammarians of squeamish stomachs, who would rather choose to live in
ignorance of things the most useful and important, than to have their
delicate ears wounded by the use of a word, unknown to Cicero, Salust, or
the other writers of the Augustan age. Yet this is no more than must
unavoidably happen when things of modern use, of which the Romans had
no idea, and consequently no phrases to express

m The following sentence, si quis ad battalia curte sua exierit, if any one
goes out of his own court to fight, &c. may raise a smile in the student as a
flaming modern anglicism: but he may meet with it, among others of the
same stamp, in the laws of the Burgundians on the continent, before the end of the fifth century. (Add. I. c. 5. 2.)

o Pref. ad Eadmer.

them, come to be delivered in the Latin tongue. It would puzzle the most classical scholar to find an appellation, in his pure latinity, for a constable, a record, or a deed of feoffment: it is therefore to be imputed as much to necessity, as ignorance, that they were styled in our forensic dialect constabularius, recordum, and feofsamentum. Thus again, another uncouth word of our ancient laws (for I defend not the ridiculous barbarisms foretimes introduced by the ignorance of modern practisers) the substantive murdrum, or the verb murdrare, however harsh and unclassical it may seem, was necessarily framed to express a particular offence; since no other word in being, occidere, interficere, necare, or the like, was sufficient to express the intention of the criminal, or quo animo the act was perpetrated; and therefore by no means came up to the notion of murder at present entertained by our law; viz. a killing with malice aforethought.

A SIMILAR necessity to this produced a similar effect at Byzantium, when the Roman laws were turned into Greek for the use of the oriental empire: for, without any regard to Attic elegance, the lawyers of the imperial courts made no scruple to translate sidei-commissarios, /p cubiculum, /q filium-familias,/r repudium, /s compromissum, /t reverentia et obsequium, /u and the like. They studied more the exact and precise import of the words, than the neatness and delicacy of their cadence. And my academical readers will excuse me for suggesting, that the terms of the law are not more numerous, more uncouth, or more numerous, more uncouth, or more difficult to be explained by a teacher, than those of logic, physics, and the whole circle of Aristotle's philosophy, nay even of the politer arts of architecture and its kindred studies, or the science of rhetoric itself. Sir Thomas More's famous legal question /w contains in it nothing more difficult, than the definition

/p Nov. I. c. I.
/q Nov. 8. edict. Constantinop.
/r Nov. 117. c. I.
/s Ibid. c. 8.
/t Nov. 82. c. II.
which in his time the philosophers currently gave of their materia prima, the groundwork of all natural knowledge; that it isneque quid, neque quantum, neque u quale, neque aliquid eorum quibus ens determinatur;? or its subsequent explanation by Adrian Heereboord, who assures usx that materia prima non est corpus, neque per formam corporis, neque per simplicem essentiam: est tamen ens, et quid inter substantia, licet incompleta; habetque actum ex se entitativum, et simul est potentia subjectiva? The law therefore, with regard to its technical phrases, stands upon the same footing with other studies, and requests only the same indulgence.

THIS technical Latin continued in use from the time of its first introduction, till the subversion of our ancient constitution under Cromwell; when, among many other innovations in the law, some for the better and some for the worse, the language of our records was altered and turned into English. But, at the restoration of king Charles, this novelty was no longer countenanced; the practisers finding it very difficult to express themselves so concisely or significantly in any other language but the Latin. And thus it continued without any sensible inconvenience till about the year 1730, when it was again thought proper that the proceedings at law should be done into English, and it was accordingly so ordered by statute 4 Geo. II. c. 26. This was done, in order that the common people might have knowledge and understanding of what was alleged or done for and against them in the process and pleadings, the judgment and entries in a cause. Which purpose I know not how well it has answered; but am apt to suspect that the people are now, after many years experience, altogether as ignorant in matters of law as before. On the other hand, these inconveniences have already arisen from the alteration; that now many clerks and attorneys are hardly able to read, much less to understand, a record even of so modern a date as the reign of George the first. And it has much enhanced the expense of all legal proceedings: for since

x Philofob. natural. c. I. 28, &c.

the practisers are confined (for the sake of the stamp duties, which are thereby considerably encreased) to write only a stated number of words in
a sheet; and as the English language, through the multitude of its particles, is much more verbose than the Latin; it follows that the number of sheets must be very much augmented by the changey. The translation also of technical phrases, and the names of writs and other process, were found to be so very ridiculous (a writ of nisi prius, quare impedit, fieri facias, habeas corpus, and the rest, not being capable of an English dress with any degree of seriousness) that in two years time a new act was obliged to be made, 6 Geo. II. c. 14; which allows all technical words to continue in the usual language, and has thereby almost defeated every beneficial purpose of the former statute.

WHAT is said of the alteration of language by the statute 4 Geo. II. c. 26. will hold equally strong with respect to the prohibition of using the ancient immutable court hand in writing the records or other legal proceedings; whereby the reading of any record that is forty years old is now become the object of science, and calls for the help of an antiquarian. But that branch of it, which forbids the use of abbreviations, seems to be of more solid advantage, in delivering such proceedings from obscurity: according to the precept of Justinianz; ne per scripturam aliqua fiat in posterum dubitatio, jubemus non per siglorum captiones et compendiosa aenigmata ejusdem codicis textum conscribi, fed per literarum consequentiam explanari concedimus. But, to return to our demurrer.

WHEN the substance of the record is completed, and copies are delivered to the judges, the matter of law, upon which the demurrer is grounded, is upon solemn argument determined by the court, and not by any trial by jury; and judgment is there-

y For instance, these words, secundum formam statuti,? are now converted into seven, according to the form of the statute.

z de concept. digest. 13.

upon accordingly given. As, in an action of trespass, if the defendant in his plea confesses the fact, but justifies it causa venationis, for that he was hunting; and to this the plaintiff demurs, that is, he admits the truth of the plea, but denies the justification to be legal: now, on arguing this demurrer, if the court be of opinion, that a man may not justify trespass in hunting, they will give judgment for the plaintiff; if they think that he may then judgment is given for the defendant. Thus is an issue in law, or demurrer, disposed of.
AN issue of fact takes up more form and preparation to settle it; for here the truth of the matters alleged must be solemnly examined in the channel prescribed by law. To which examination, of facts, the name of trial is usually confined, which will be treated of at large in the two succeeding chapters.

CHAPTER THE TWENTY SECOND.
OF THE SEVERAL SPECIES OF TRIAL.

THE uncertainty of legal proceedings is a notion so generally adopted, and has so long been the standing theme of wit and good humour, that he who should attempt to refute it would be looked upon as a man, who was either incapable of discernment himself, or else meant to impose upon others. Yet it may not be amiss, before we enter upon the several modes whereby certainty is meant to be obtained in our courts of justice, to inquire a little wherein this uncertainty, so frequently complained of, consists; and to what causes it owes its original.

IT hath sometimes been said to owe its original to the number of our municipal constitutions, and the multitude of our judicial decisions; which occasion, it is alleged, abundance of rules that militate and thwart with each other, as the sentiments or caprice of successive legislatures and judges have happened to vary. The fact, of multiplicity, is allowed; and that thereby the researches of the student are rendered more difficult and laborious: but that, with proper industry, the result of those enquiries will be doubt and indecision, is a consequence that cannot be admitted. People are apt to be angry at the want of simplicity in our laws: they mistake variety for confusion, and complicated cases for contradictory. They bring us the examples of

a See the preface to sir John Davies's reports: Wherein many of the following topics are discussed more at large.

arbitrary governments, of Denmark, Muscovy, and Prussia; of wild and uncultivated nations, the savages of Africa and America; or of narrow domestic republics, in ancient Greece and modern Switzerland; and unreasonably require the same paucity of laws, the same conciseness of
practice, in a nation of freemen, a polite and commercial people, and a populous extent of territory.

IN an arbitrary, despotic, government, where the lands are at the disposal of the prince, the rules of succession, or the mode of enjoyment, must depend upon his will and pleasure. Hence there can be but few legal determinations relating to the property, the descent, or the conveyance of real estates; and the same holds in a stronger degree with regard to goods and chattels, and the contracts relating thereto. Under a tyrannical sway trade must be continually in jeopardy, and of consequence can never be extensive: this therefore puts an end to the necessity of an infinite number of rules, which the English merchant daily recurs to for adjusting commercial differences. Marriages are there usually contracted with slaves; or at least women are treated as such: no laws can be therefore expected to regulate the rights of dower, jointures, and marriage settlements. Few also are the persons who can claim the privileges of any laws; the bulk of those nations, viz. the commonalty, boors or peasants, being merely villeins and bondmen. Those are therefore left to the private coercion of their lords, are esteemed (in the contemplation of these boasted legislators) incapable of either right or injury, and of consequence are entitled to no redress. We may fee, in these arbitrary states, how large a field of legal contests is already rooted up and destroyed.

AGAIN; were we a poor and naked people, as the savages of America are, strangers to science, to commerce, and the arts as well of convenience as of luxury, we might perhaps be content, as some of them are said to be, to refer all disputes to the next man we met upon the road, and so put a short end to every controversy. For in a state of nature there is no room for municipal laws; and the nearer any nation approaches to that state, the fewer they will have occasion for. When the people of Rome were little better than sturdy shepherds or herdsmen, all their laws were contained in ten or twelve tables: but as luxury, politeness, and dominion increased, the civil law increased in the same proportion, and swelled to that amazing bulk which it now occupies, though successively pruned and retrenched by the emperors Theodosius and Justinian.

In like manner we may lastly observe, that, in petty states and narrow territories, much fewer laws will suffice than in large ones, because there are fewer objects upon which the laws can operate. The regulations of a
private family are short and well-known; those of a prince's household are necessarily more various and diffuse.

The causes therefore of the multiplicity of the English laws are, the extent of the country which they govern; the commerce and refinement of its inhabitants; but, above all, the liberty and property of the subject. These will naturally produce an infinite fund of disputes, which must be terminated in a judicial way: and it is essential to a free people, that these determinations be published and adhered to; that their property may be as certain and fixed as the very constitution of their state. For though in many other countries every thing is left in the breast of the judge to determine, yet with us he is only to declare and pronounce, not to make or new-model, the law. Hence a multitude of decisions, or cases adjudged, will arise; for seldom will it happen that any one rule will exactly suit with many cases. And in proportion as the decisions of courts of judicature are multiplied, the law will be loaded with decrees, that may sometimes (though rarely) interfere with each other: either because succeeding judges may not be apprized of the prior adjudication; or because they may think differently from their predecessors; or because the same arguments did not occur formerly as at present; or, in fine, because of the natural imbecility and imperfection that attends all human proceedings. But, wherever this happens to be the case in any material points, the legislature is ready, and from time to time both may, and frequently does, intervene to remove the doubt; and, upon due deliberation had, determines by a declaratory statute how the law shall be held for the future.

WHATEVER instances therefore of contradiction or uncertainty may have been gleaned from our records, or reports, must be imputed to the defects of human laws in general, and are not owing to any particular ill construction of the English system. Indeed the reverse is most strictly true. The English law is less embarrassed with inconsistent resolutions and doubtful questions, than any other known system of the same extent and the same duration. I may instance in the civil law: the text whereof, as collected by Justinian and his agents, is extremely voluminous and diffuse; but the idle comments, obscure glosses, and jarring interpretations grafted thereupon by the learned jurists, are literally without number. And these glosses, which are mere private opinions of scholastic doctors (and not, like our books of reports, judicial determinations of the court) are all of authority sufficient to be vouched and relied on; which must needs breed
great distraction and confusion in their tribunals. The same may be said of
the canon law; though the text thereof is not of half the antiquity with the
common law of England; and though the more ancient any system of laws
is, the more it is liable to be perplexed with the multitude of judicial
decrees. When therefore a body of laws, of so high antiquity as the English,
is in general so clear and perspicuous, it argues deep wisdom and foresight
in such as laid the foundations, and great care and circumspection, in such
as have built the superstructure.

BUT is not (it will be asked) the multitude of lawsuits, which we daily see
and experience, an argument against the clearness and certainty of the law
itself By no means: for among the
various disputes and controversies, which are daily to be met with in the
course of legal proceedings, it is obvious to observe how very few arise
from obscurity in the rules or maxims of law. An action shall seldom be
heard of, to determine a question of inheritance, unless the fact of the
descent be controverted. But the dubious points, which are usually
agitated in our courts, arise chiefly from the difficulty there is of
ascertaining the intentions of individuals, in their solemn dispositions of
property; in their contracts, conveyances, and testaments. It is an object
indeed of the utmost importance in this free and commercial country, to
lay as few restraints as possible upon the transfer of possessions from
hand to hand, or their various designations marked out by the prudence,
convenience, or necessities, or even by the caprice, of their owners: yet to
investigate the intention of the owner is frequently matter of difficulty,
among heaps of entangled conveyances or wills of a various obscurity. The
law rarely hesitates in declaring its own meaning; but the judges are
frequently puzzled to find out the meaning of others. Thus the powers, the
interest, the privileges, and properties of a tenant for life, and a tenant in
tail, are clearly distinguished and precisely settled by law: but, what words
in a will shall constitute this or that estate, has occasionally been disputed
for more than two centuries past; and will continue to be disputed as long
as the carelessness, the ignorance, or singularity of testators shall continue
to cloth their intentions in dark or new-fangled expressions.

BUT, notwithstanding so vast an accession of legal controversies, arising
from so fertile a fund as the ignorance and wilfulness of individuals, these
will bear no comparison in point of number to those which are founded
upon the dishonesty, and disingenuity of the parties: by either their
suggesting complaints that are false in fact, and thereupon bringing
groundless actions; or by their denying such facts as are true, in setting up unwarrantable defences. Ex facto oritur jus: if therefore the fact be perverted or mis-represented, the law which arise from thence will unavoidably be unjust or partial. And, in order to prevent this, it is necessary to set right the fact, and establish the truth contended for, by appealing to some mode of probation or trial, which the law of the country has ordained for a criterion of truth and falsehood.

THESE modes of probation or trial form in every civilized country the great object of judicial decisions. And experience will abundantly shew, that above a hundred of our lawsuits arise from disputed facts, for one where the law is doubted of. About twenty days in the year are sufficient, in Westminster-hall, to settle (upon solemn argument) every demurrer or other special point of law that arises throughout the nation: but two months are annually spent in deciding the truth of facts, before six distinct tribunals, in the several circuits of England; exclusive of Middlesex and London, which afford a supply of causes much more than equivalent to any two of the largest circuits.

TRIAL then is the examination of the matter of fact in issue; of which there are many different species, according to the difference of the subject, or thing to be tried: of all which we will take a cursory view in this and the subsequent chapter. For the law of England so industriously endeavours to investigate truth at any rat, that it will not confine itself to one, or to a few, manners of trial; but varies its examination of facts according to the nature of the facts themselves: this being the one invariable principle pursued, that as well the best method of trial, as the best evidence upon that trial, which the nature of the case affords, and no other, shall be admitted in the English courts of justice.

THE species of trials in civil cases are seven. By record; by inspection, or examination; by certificate; by witnesses; by wager of battle; by wager of law; and by jury.

I. FIRST then of the trial by record. This is only used in one particular instance: and that is where a matter of record is pleaded in any action, as a fine, a judgment, or the like; and the opposite party pleads null tile record,? that there is no such matter of record existing: upon this, issue is tendered and joined in the following form, and this he prays may be enquired of by the record, and the other doth the
like;? and hereupon the party pleading the record has a day given him to bring it in, and proclamation is made in court for him to bring forth his record or he shall be condemned;? and, on his failure, his antagonist shall have judgment to recover. The trial therefore of this issue is merely by the record; for, as sir Edward Cokeb observes, a record or enrollment is a monument of so high a nature, and importeth in itself such absolute verity, that if it be pleaded that there is no such record, it shall not receive any trial by witness, jury, or otherwise, but only by itself. Thus titles of nobility, as whether earl or no earl, baron or no baron, shall be tried by the king's writ or patent only, which is matter of recordc. Also in case of an alien, whether alien friend or enemy, shall be tried by the league or treaty between his sovereign and ours; for every league or treaty is of recordd. And also, whether a manor be held in ancient demesne or not, shall be tried by the record of domesday in the king's exchequer.

II. TRIAL by inspection, or examination, is when for the greater expedition of a cause, in some point or issue being either the principal question, or arising collaterally out of it, but being evidently the object of sense, the judges of the court, upon the testimony of their own senses, shall decide the point in dispute. For, where the affirmative or negative of a question is matter of such obvious determination, it is not thought necessary to summon a jury to decide it; who are properly called in to inform the conscience of the court in respect of dubious facts: and therefore when the fact, from its nature, must be evident to the court either from ocular demonstration or other irrefragable proof, there the law departs from its usual resort, the verdict of twelve men, and relies on the judgment of the court alone. As in case of a suit to reverse a fine for non-age of the cognizor, or to set aside a statute or recognizance entered into by an infant; here, and in other cases of the like sort, a writ shall issue to the sheriffe, commanding him that he constrain the said party to appear, that it may be ascertained by the view of his body by the king's justices, whether he be of full age or not;ut per aspectum corporis sui confitare poterit justiciariis nostris, si praedictus A fit plenae aetatis, necnef. If however the court has, upon inspection, any doubt of the age of the party, (as may frequently be the case) it may proceed to take
proofs of the fact; and, particularly, may examine the infant himself upon an oath of voir dire, veritatem dicere, that is, to make true answer to such questions as the court shall demand of him: or the court may examine his mother, his god-father, or the like.

IN like manner if a defendant pleads in abatement of the suit that the plaintiff is dead, and one appears and calls himself the plaintiff, which the defendant denies; in this case the judges shall determine by inspection and examination, whether he be the plaintiff or noth. Also if a man be found by a jury an idiot a nativitate, he may come in person into the chancery before the chancellor, or be brought there by his friends, to be inspected and examined, whether idiot or not: and if, upon such view and enquiry, it appears he is not so, the verdict of the jury, and all the proceedings thereon, are utterly void and instantly of no effecti.

ANOTHER instance in which the trial by inspection may be used, is when upon an appeal of mayhem, the issue joined is whether it be mayhem or no mayhem, this shall be decided by the court upon inspection, for which purpose they may call in

e 9 Rep. 31.
f This question of non-age was formerly, according to Glanvil, (l. 13. c. 15.) tried by a jury of eight men; though now it is tried by inspection.
g 2 Roll. Abr. 573.
h 9 Rep. 30.
i Ibid. 31.

the assistance of surgeonsj. And, by analogy to this, in an action of trespass for mayhem, the court, (upon view of such mayhem as the plaintiff has laid in his declaration, or which is certified by the judges who tried the cause to be the same as was given in evidence to the jury) may encrease the damages at their own discretionk; as may also be the case upon view of an atrocious batteryl. But then the battery must likewise be alleged so certainly in the declaration, that it may appear to be the same with the battery inspected.

ALSO, to ascertain any circumstances relative to a particular day past, it hath been tried by an inspection of the almanac by the court. Thus, upon a writ of error from an inferior court, that of Lynn, the error assigned was that the judgment was given on a sunday, it appearing to be on 26
February, 26 Eliz. and upon inspection of the almanacs of that year it was found that the 26th of February in that year actually fell upon a sunday: this was held to be a sufficient trial, and that a trial by a jury was not necessary, although it was an error in fact; and so the judgment was reversed. But, in all these cases, the judges, if they conceive a doubt, may order it to be tried by jury.

III. THE trial by certificate is allowed in such cases, where the evidence of the person certifying is the only proper criterion of the point in dispute. For, when the fact in question lies out of the cognizance of the court, the judges must rely on the solemn averment or information of persons in such a station, as affords them the most clear and competent knowledge of the truth. As therefore such evidence (if given to a jury) must have been conclusive, the law, to save trouble and circuity, permits the fact to be determined upon such certificate merely. Thus, I. If the issue be whether A was absent with the king in his army out of the realm in time of war, this shall be triend by

the certificate of the mareschall of the king's host in writing under his seal, which shall be sent to the justices. 2. If, in order to avoid an outlawry, or the like, it was alleged that the defendant was in prison, ultra mare, at Bourdeaux, or in the service of the mayor of Bourdeaux, this should have been tried by the certificate of the mayor; and the like of the captain of Claaiso. But, when this was lawp, those towns were under the dominion of the crown of England. And therefore, by a parity of reason, it should now hold that in similar cases, arising at Jamaica or Minorca, the trial should now hold that should be by certificate from the governor of those islands. We also findq that the certificate of the queen's messenger, sent to summon home a peeress of the realm, was formerly held a sufficient trial of the contempt in refusing to obey such summons. 3. For matters within the realm; the customs of the city of London shall be tried by the certificate of the mayor and aldermen, certified by the mouth of their recorderr; upon a surmise from the party alleging it, that the custom ought to be thus tried: else it must be tried by the countrys. As, the custom of distributing the
effects of freemen deceased; of enrolling apprentices; or that he who is free of one trade may use another; if any of these, or other similar, points come in issue. But this rule admits of an exception, where the corporation of London is party, or interested, in the suit; as in an action brought for a penalty inflicted by the custom: for there the reason of the law will not endure so partial a trial; but this custom shall be determined by a jury, and not by the mayor and aldermen, certifying by the mouth of their recordert.

4. In some cases, the sheriff of London's certificate shall be the final trial: as if the issue be, whether the defendant be a citizen of London or a foreigner, in case of privilege pleaded to be sued only in the city courts. Of a nature somewhat similar to which is the trial of the privilege of the university, when the chancellor claims cognizance of the cause, be-

cause one of the parties is a privileged person. In this case, the charters, confirmed by act of parliament, direct the trial of the question, whether a privileged person or no, to be determined by the certificate and notification of the chancellor under seal; to which it hath also been usual to add an affidavit of the fact: but if the parties be at issue between themselves, whether A is a member of the university or no, on a plea of privilege, the trial shall be then by jury, and not by the chancellor's certificate; because the charters direct only that the privilege be allowed on the chancellor's certificate, when the claim of cognizance is made by him, and not where the defendant himself pleads his privilege: so that this must be left to the ordinary course of determination. 5. In matters of ecclesiastical jurisdiction, as marriage, and of course general bastardy, and also excommunication, and orders, these, and other like matters, shall be tried by the bishop's certificate. As if it be pleaded in abatement, that the plaintiff is excommuni ed, and issue is joined thereon; or if a man claims an estate by descent, and the tenant alleges the demandant to be a bastard; or if on a writ of dower the heir pleads no marriage; or if the issue in a quare impedit be, whether or no the church be full by institution; all these being matters of mere ecclesiastical cognizance, shall be tried by
certificate from the ordinary. But in an action on the case for calling a man bastard, the defendant having pleaded in justification that the plaintiff was really so, this was directed to be tried by a jury: because, whether the plaintiff be found either a general or special bastard, the justification will be good; and no question of special bastardy shall be tried by the bishop's certificate, but by a jury. For a special bastard is one born, before marriage, of parents who afterwards intermarry: which is bastardy by our law, though not by the ecclesiastical. It would therefore be improper to refer the trial of that question to the bishop; who, whether the child be born before or after marriage, will be sure to return or certify him legitimate. Ability of a clerk presented, admission, institution, and deprivation of a clerk, shall also be tried by certificate from the ordinary or metropolitan, because of these he is the most competent judge: but induction shall be tried by a jury, because it is a matter of public notoriety, and is likewise the corporal investiture of the temporal profits. Resignation of a benefice may be tried in either way; but it seems most properly to fall within the bishop's cognizance. 6. The trial or all customs and practice of the courts shall be by certificate from the proper officers of those courts respectively; and, what return was made on a writ by the sheriff or under-sheriff, shall be only tried by his own certificate. And thus much for those several issues, or matters of fact, which are proper to be tried by certificate.

IV. A FOURTH species of trial is that by witnesses, per testes, without the intervention of a jury. This is the only method of trial known to the civil law; in which the judge is left to form in his own breast his sentence upon the credit of the witnesses examined: but it is very rarely used in our law, which prefers the trial by jury before it in almost every instance. Save only, that when a widow brings a writ of dower, and the tenant pleads that the husband is not dead; this, being looked upon as a dilatory plea, is, in favour of the widow and for greater expedition, allowed to be tried by witnesses examined before the judges: and so, saith Finch, shall no other case in our law. But sir Edward Coke mentions some others: as, to try whether the tenant in a real action was duly summoned, or the validity of a
challenge to a juror: so that Finch's observation must be confined to the trial of direct and not collateral issues. And in every case sir Edward Coke lays it down, that the affirmative must be proved by two witnesses at the least.

z See introd. to the great charter. edit. Oxon. fub anno 1253.
a See book I. Ch. II.
c Dyer. 229.
d 2 Roll. Abr. 583.
e 9 Rep. 31.
f L. 423.
g I Inst. 6.

V. THE next species of trial is of great antiquity, but much disused; though still in force if the parties choose to abide by it: I mean the trial by wager of battle. This seems to have owed its original to the military spirit of our ancestors, joined to a superstitious frame of mind; it being in the nature of an appeal to providence, under an apprehension and hope (however presumptuous and unwarrantable) that heaven would give the victory to him who had the right. The decision of suits, by this appeal to the God of battles, is by some said to have been invented by the Burgundi, one of the northern or German clans that planted themselves in Gaul. And it is true, that the first written injunction of judiciary combats that we meet with, is in the laws of Gundebald, A. D. 501, which are preserved in the Burgundian code. Yet it does not seem to have been merely a local custom of this or that particular tribe, but to have been the common usage of all those warlike people from the earliest timesh. And it may also seem from a passage in Velleius paterculusj, that the Germans, when first they became known to the Romans, were wont to decide all contests of right by the sword: for when Quintilius Varus endeavoured to introduce among them the Roman laws and method of trial, it was looked upon (says the historian) as anovitas incognitae, ut folita armis decerni, jure terminarentur. And among the ancient Goths in Sweden we find the practice of judiciary duels established upon much the same footing as they formerly were in our own countryi.

THIS trial was introduced into England among other Norman customs by William the conqueror; but was only used in three cases, one military, one criminal, and the third civil. The first in the court-martial, or court of
chivalry and honour: the second in appeals of felony, of which we shall speak in the next book: and the third upon issue joined in a writ of right, the last and

h Seld. of duels. c. 5.
i 1. 2. c. 118.
j Stierh. de jure Sueon. l. I. c. 7.
k Co. Litt. 261.
l 2 Hawk. P. C. 45.

most solemn decision of real property. For in writs of right the jus proprietatis, which is frequently a matter of difficulty, is in question; but other real actions being merely questions of the jus possessionis, which are usually more plain and obvious, our ancestors did not in them appeal to the decision of providence. Another pretext for allowing it, upon these final writs of right, was also for the sake of such claimants as might have the true right, but yet by the death of witnesses or other defect of evidence be unable to prove it to a jury. But the most curious reason of all is given in the mirrorn, that it is allowable upon warrant of the combat between David for the people of Israel of the one party, and Goliah for the Philistines of the other party: a reason, which pope Nicholas I very seriously decides to be inconclusiven. Of battle therefore on a writ of righto we are now to speak; and although the writ of right itself, and of course this trial thereof, be at present disused; yet, as it is law at this day, it may be matter of curiosity, at least, to enquire into the forms of this proceeding, as we may gather them from ancient authorsp.

THE last trial by battle that was joined in a civil suit (though there was afterwards one in the court of chivalry in the reign of Charles the firstq; and another tendered, but not joined, in a writ of right upon the northern circuit in 1638) was in the thirteenth year of queen Elizabeth, as reported by sir James Dyerr, and was held in Tothill fields Westminster,non fine magna juris consutorum perturbatione,? faith sir Henry Spelmans, who was himself a witness of the ceremony. The form, as appears from the authors before cited, is as follows.

WHEN the tenant in a writ of right pleads the general issue, viz. that he hath more right to hold, than the demandant hath

m c. 3.  23.
to recover; and offers to prove it by the body of his champion, which
tender is accepted by the demandant; the tenant in the first place must
produce his champion, who, by throwing down his glove as a gage or
pledge, thus wages or stipulates battle with the champion of the
demandant; who, by taking up the gage or glove, stipulates on his part to
accept the challenge. The reason why it is waged by champions, and not by
the parties themselves, in civil actions, is because, if any party to the suit
dies, the suit must abate and be at an end for the present; and therefore no
judgment could be given for the lands in question, if either of the parties
were slain in battlet: and also that no person might claim an exemption
from this trial, as was allowed in criminal cases, where the battle was
waged in person.

A PICEE of ground is then in due time set out, of sixty feet square,
enclosed with lists, and on one side a court erected for the judges of the
court of common pleas, who attend there in their scarlet robes; and also a
bar is prepared for the learned serjeants at law. When the court sits, which
ought to be by sunrising, proclamation is made for the parities, and their
champions; who are introduced by two knights, and are dressed in a suit of
armour, with red sandals, barelegged from the knee downwards,
bareheaded, and with bare arms to the elbows. The weapons allowed them
are only batons, or staves, of an ell long, and a four-cornered leather
target; so that death very seldom ensued this civil combat. In the court
military indeed they fought with sword and lance, according to Spelman
and Rushworth; as likewise in France only villeins fought with the buckler
and baton, gentlemen armed at all points. And upon this, and other
circumstances, the president Montesquieu hath with great ingenuity not
only deduced the impious custom of private duels upon imaginary points
of honour, but hath also traced the heroic madness of knight errantry,
from the same original of judicial combats. But to proceed.
WHEN the champions, thus armed with batons, arrive within the lists or place of combat, the champion of the tenant then takes his adversary by the hand, and makes oath that the tenements in dispute are not the right of the demandant; and the champion of the demandant, then taking the other by the hand, swears in the same manner that they are; so that each champion is, or ought to be, thoroughly persuaded of the truth of the cause he fights for. Next an oath against sorcery and enchantment is to be taken by both the champions, in this or a similar form; hear this, ye justices, that I have this day neither eat, drank, nor have upon me, neither bone, stone, ne grass; nor any enchantment, sorcery, or witchcraft, whereby the law of God may be abased, or the law of the devil exalted. So help me God and his saints.

THE battle is thus begun, and the combatants are bound to fight till the stars appear in the evening: and, if the champion of the tenant can defend himself till the stars appear, the tenant shall prevail in his cause; for it is sufficient for him to maintain his ground, and make it a drawn battle, he being already in possession: but, if victory declares itself for either party, for him is judgment finally given. This victory may arise, from the death of either of the champions: which indeed hath rarely happened; the whole ceremony, to say the truth, bearing a near resemblance to certain rural athletic diversions, which are probably derived from this original. Or victory is obtained, if either champion proves recreant, that is, yields, and pronounces the horrible word of craven; a word of disgrace and obloquy, rather than of any determinate meaning. But a horrible word it indeed is to the vanquished champion: since as a punishment to him for forfeiting the land of his principal by pronouncing that shameful word, he is condemned, as a recreant, amittere liberam legem, that is, to become infamous and not be accounted liber et legalis bomo; being supposed by the event to be proved forsworn, and therefore never to be put upon a jury or admitted as a witness in any cause.

THIS is the form of a trial by battle; a trial which the tenant, or defendant in a writ of right, has it in his election at this day to demand; and which was the only decision of such writ of right after the conquest, till Henry the second by consent of parliament introduced the grand assisew, a peculiar
species of trial by jury, in concurrence therewith; giving the tenant his choice of either the one or the other. Which example, of discountenancing these judicial combats, was imitated about a century afterwards in France, by an edict of Louis the pious, A. D. 1260, and soon after by the rest of Europe. The establishment of this alternative, Glanvil, chief justice to Henry the second, and probably his adviser herein, considers as a most noble improvement, as in fact it was, of the law.

VI. A SIXTH species of trial is by wager of law, vadiatio legis, as the foregoing is called wager of battle, vadiatio duelli: because, as in the former case the defendant gave a pledge, gage, or vadium, to try by battle; so here he was to put in sureties or vadios, that at such a day he will make his law, that is, take the benefit which the law has allowed him. For our ancestors considered, that there were many cases where an innocent man, of good credit, might be overborne by a multitude of false witnesses; and therefore established this species of trial, by the oath of the defendant himself: for if he will absolutely swear himself not chargeable, and appears to be a person of re-
no man seeing it; then shall an oath of the Lord between them both, that he hath not put his hand unto his neighbour's goods; and the owner of it shall accept thereof, and he shall not make it good. We shall likewise be able to discern a manifest resemblance, between this species of trial, and the canonical purgation of the popish clergy, when accused of any capital crime. The defendant or person accused was in both cases to make oath of his own innocence, and to produce a certain number of compurgators, who swore they believed his oath. Somewhat similar also to this is the sacramentum decisionis, or the voluntary and decisive oath of the civil law; where one of the parties to the suit, not being able to prove his charge, offers to refer the decision of the cause to the oath of his adversary: which the adversary was bound to accept, or tender the same proposal back again; otherwise the whole was taken as confessed by him. But, though a custom somewhat similar to this prevailed formerly in the city of London, yet in general the English law does not thus, like the civil, reduce the defendant, in case he is in the wrong, to the dilemma of either confession or perjury: but is indeed so tender of permitting the oath to be taken, even upon the defendant's own request, that it allows it only in a very few cases; and in those it has also devised other collateral remedies for the party injured, in which the defendant is excluded from his wager of law.

a Exod. xxii. 10.
b Cod. 4. I. 12.
c Bro. Abr. t. ley gager. 77.

THE manner of waging and making law is this. He that has waged, or given security, to make his law, brings with him into court eleven of his neighbours: a custom, which we find particularly described so early as in the league between Alfred and Guthrun the Daned; for by the old Saxon constitution every man's credit in courts of law depended upon the opinion which his neighbours had of his veracity. The defendant then, standing at the end of the bar, is admonished by the judges of the nature and danger of a false oath: and if he still persists, he is to repeat this or the like oath: hear this, ye justices, that I do not own unto Richard Jones the sum of ten pounds, nor any penny thereof, in manner and form as the said Richard hath declared against me. So help me God. And thereupon his eleven neighbours or compurgators shall avow upon their oaths, that
they believe in their consciences that he faith the truth; so that himself
must be sworn de sideditate, and the eleven de credulitatef. It is held
indeed by later authoritiesg that fewer than eleven compurgators will do:
butsir Edward Coke is positive that there must be this number; and his
opinion not only seems founded upon better authority, but also upon
better reason: for, as wager of law is equivalent to a verdict in the
defendant's favour, it ought to be established by the same or equal
testimony, namely by the oath of twelve men. And so indeed Glanvil
expresses ith,jurabit duodecima manu:? and in 9 Hen. III. when a
defendant in an action of debt waged his law, it was adjudged by the
courtquod defendat se duodecima manu. Thus too, in an author of the age
of Edward the firstk, we read,adjudicabitur reus ad legem suam
duodecima manu. And the ancient treatise, entitled dyversite des courts,
expressly confirms sir Edward Coke's opinionl.

d cap. 3. Wilk. LL. Angl. Sax.
e Salk. 682.
f Co. Litt. 295.
g 2 Ventr. 171.
h l. I. c. 9.
i Fitzh. Abr. t. ley. 78.
k Hengbem magna. c. 5.
l Il covient aver' orc lay xi maynz de juror aue luy, fc. Que ilz. Entende en
lour conveiens que il difoyt voier. (fol. 306.)

IT must be however observed, that so long as the custom continued of
producing the fecta, the suit, or witnesses to give probability to the
plaintiff's demand, (of which we spoke in a former chapter) the defendant
was not put to wage his law, unless the fecta was first produced, and their
testimony was found consistent. To this purpose speaks magna carta, c.
28.nullus ballivus de caetero ponat aliquem ad legem manifestam,? (that
is, wager of battle)nec ad juramentum,? (that is, wager of law)simplici
loquela sua,? (that is, merely by his count or declaration)sine testibus
sidedibus ad hoc inductis. Which Fleta thus explains:si petens fectam
produixerit, et concordes inveniantur, tunc reus poiterit vadiare legem
suam contra petentem et contra fectam suam prolatam; fed si fecta
variabilis inveniatur, extunc non tenebitur legem vadiare contra fectam
illum. It is true indeed, that Fleta expressly limits the number of
compurgators to be only double to that of the fecta produced;ut si duos vel
tres testes produixerit ad probandum, oportet quod defensio fiat per
quatuor vel per sex; ita quod pro quolibet teste duos producat juratores, usque ad duodecim: so that according to this doctrine the eleven compurgators were only to be produced, but not all of them sworn, unless the fecta consisted of six. But, though this might possibly be the rule till the production of the fecta was generally disused, since that time the duodecima manus seems to have been generally required.

IN the old Swedish or Gothic constitution, wager of law was not only permitted, as it still is in criminal cases, unless the fact be extremely clear against the prisoner; but was also absolutely required, in many civil cases: which an author of their ownp very justly charges as being the source of frequent perjury. This, he tells us, was owing to the popish ecclesiastics, who introduced this method of purgation from their canon law; and, having sown a plentiful crop of oaths in all judicial proceedings, reaped

m l. 2. c. 63.
 n Bro. Abr. t. ley gager. 9.
o Mod. Un. Hist. xxxii. 22.
p Stiernhock de jure Sueonum. L. I. c. 9.

afterwards an ample harvest of perjuries: for perjuries were punished in part by pecuniary fines, payable to the coffers of the church. But with us in England wager of law is never required; and is then only admitted, where an action is brought upon such matters as may be supposed to be privately transacted between the parties, and wherein the defendant may be presumed to have made satisfaction without being able to prove it. Therefore it is only in actions of debt upon simple contract, or for an amercement in actions of detinue, and of account, where the debt may have been paid, the goods restored, or the account balanced, without any evidence of either; it is only in these actions, I say, that the defendant is admitted to wage his lawq: so that wager of law lieth not, when there is any specialty, as a bond or deed, to charge the defendant, for that would be cancelled if satisfied; but when the debt groweth by word only. Nor doth it lie in an action of debt, for arrears of an account, settled by auditors in a former action. And by such wager of law (when admitted) the plaintiff is perpetually barred; for the law, in the simplicity of the ancient times, presumed that no one would forswear himself, for any worldly things. Wager of law however lieth in a real action, where the tenant alleges he
was not legally summoned to appear, as well as in mere personal contractst.

A MAN outlawed, attainted for false verdict, or for conspiracy or perjury, or otherwise become infamous, as by pronouncing the horrible word in a trial by battle, shall not be permitted to wage his law. Neither shall an infant under the age of twenty one, for he cannot be admitted to his oath; and therefore on the other hand, the course of justice shall flow equally, and the defendant, where an infant is plaintiff, shall not wage his law. But a feme-covert, when joined with her husband, may be admitted to wage her law: and an alien shall do it in his own languageu.

q Co. Litt. 295.
r 10 Rep. 103.
s Co. Litt. 295.
t Finch. L. 423.
u Co. Litt. 295.

IT is moreover a rule, that where a man is compellable by law to do any thing, whereby he becomes creditor to another, the defendant in that case shall not be admitted to wage his law: for then it would be in the power of any bad man to run in debt first, against the inclinations of his creditor, and afterwards to swear it away. But where the plaintiff hath given voluntary credit to the defendant, there he may wage his law; for by giving him such credit, the plaintiff has himself borne testimony that he is one whose character may be trusted. Upon this principle it is, that in an action of debt against a prisoner by a gaoler for his victuals, the defendant shall not wage his law: for the gaoler cannot refuse the prisoner, and ought not to suffer him to perish for want of sustenance. But otherwise it is for the board or diet of a man at liberty. In an action of debt brought by an attorney for his fees, the defendant cannot wage his law, because the plaintiff is compellable to be his attorney. And so, if a servant be retained according to the statute of labourers, 5 Eliz. c. 4. which obliges all single persons of a certain age, and not having other visible means of livelyhood, to go out to service; in an action of debt for the wages of such a servant, the master shall not wage his law, because the plaintiff was compellable to serve. But it had been otherwise, had the hiring been by special contract, and not according to the statutew.
IN no case where a contempt, trespass, deceit, or any injury with force is alleged against the defendant, is he permitted to wage his law: for it is impossible to presume he has satisfied the plaintiff his demand in such cases, where damages are uncertain and left to be assessed by a jury. Nor will the law trust the defendant with an oath to discharge himself, where the private injury is coupled as it were with a public crime, that of force and violence; which would be equivalent to the purgation oath of the civil law, which ours has so justly rejected.

w Co. Litt. 295.
x Ibid. Raym. 286.

EXECUTORS and administrators, when charged for the debt of the deceased, shall not be admitted to wage their law: for no man can with a safe conscience wage law of another man's contract; that is, swear that he never entered into it, or at least that he privately discharged it. The king also has his prerogative; for, as all wager of law imports a reflection on the plaintiff for dishonesty, therefore there shall be no such wager on actions brought by himz. And this prerogative extends and is communicated to his debtor and accomptant; for, on a writ of quo minus in the exchequer for a debt on simple contract, the defendant is not allowed to wage his law.

THUS the wager of law never permitted, but where the defendant bore a fair and unreproachable character; and it also was confined to such cases where a debt might be supposed to be discharged, or satisfaction made in private, without any witnesses to attest it: and many other prudential restrictions accompanied this indulgence. But at length it was considered, that (even under all its restrictions) it threw too great a temptation in the way of indigent or profligate men: and therefore by degrees new remedies were devised, and new forms of action were introduced, wherein no defendant is at liberty to wage his law. So that now no plaintiff need at all apprehend any danger from the hardness of his debtor's conscience, unless he voluntarily chooses to rely on his adversary's veracity, by bringing an obsolete, instead of a modern, action. Therefore one shall hardly hear at present of an action of debt brought upon a simple contract; that being supplied by an action of trespass on the case for the breach of a promise or assumpsit; wherein, though the specific debt cannot be recovered, yet damages may, equivalent to the specific debt. And, this being an action of trespass, no law can be waged therein. So, instead of an
action of detinue to recover the very thing detained, an action of trespass on the case in trover and

y Finch. L. 424.
z Ibid. 425.
a Co. Litt. 295.

conversion is usually brought; wherein, though the horse or other specific chattel cannot be had, yet the defendant shall pay damages for the conversion, equal to the value of the chattel; and for this trespass also no wager of law is allowed. In the room of actions of account a bill in equity is usually filed: wherein, though the defendant answers upon his oath, yet such oath is not conclusive to the plaintiff; but he may prove every article by other evidence, in contradiction to what the defendant has sworn. So that wager of law is quite out of use, being avoided by the mode of bringing the action; but still it is not out of force. And therefore, when a new statute inflicts a penalty, and gives an action of debt for recovering it, it is usual to add, in which no wager of law shall be allowed: otherwise an hardy delinquent might escape any penalty of the law, by swearing he had never incurred, or else had discharged it.

THESE six species of trials, that we have considered in the present chapter, are only had in certain special and eccentrical cases; where the trial by the country, per pais, or by jury, would not be so proper or effectual. In the next chapter we shall consider at large the nature of that principal criterion of truth in the law of England.

CHAPTER THE TWENTY THIRD.
OF THE TRIAL BY JURY.

THE subject of our next enquiries will be the nature and method of the trial by jury; called also the trial per pais, or by the country. A trial that hath been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof. Some authors have endeavoured to trace the original of juries up as high as the Britons themselves, the first inhabitants of our island; but certain it is, that they were in use among the earliest Saxon colonies, their institution being ascribed by bishop Nicolfona to Woden himself, their great legislator and captain. Hence it is, that we may find traces of juries in the laws of all
those nations which adopted the feodal system, as in Germany, France, and Italy; who had all of them a tribunal composed of twelve good men and true, boni homines, usually the vasals or tenants of the lord, being the equals or peers of the parties litigant: and, as the lord's vasals judged each other in the lord's courts, so the king's vasals, or the lords themselves, judged each other in the king's court. In England we find actual mention of them so early as the laws of king Ethelred, and that not as a new invention. Stiernhoek

a de jure Saxonum, p. 12.
c Wilk LL. Angl. Sax. 117.
d de jure Sueonum. l. I. c. 4.

ascribes the invention of the jury, which in the Teutonic languages is denominated nembda, to Regner, king of Sweden and Denmark, who was co-temporary with our king Egbert. Just as we are apt to impute the invention of this, and some other pieces of juridical polity, to the superior genius of Alfred the great; to whom, on account of his having done much, it is usual to attribute every thing: and as the tradition of ancient Greece placed to the account of their one Hercules whatever achievement was performed superior to the ordinary prowess of mankind. Whereas the truth seems to be, that this tribunal was universally established among all the northern nations, and so interwoven in their very constitution, that the earliest accounts of the one give us also some traces of the other. Its establishment however and use, in this island, of what date soever it be, though for a time greatly impaire and shaken by the introduction of the Norman trial by battle, was always of highly esteemed and valued by the people that no conquest, no change of government, could ever prevail to abolish it. In magna carta it is more than once insisted on as the principal bulwark of our liberties; but especially by chap. 29. that no freeman shall be hurt in either his person or property, nisi per legale judicium parium fuorum vel per legem terrae. A privilege which is couched in almost the same words with that of the emperor Conrad, two hundred years beforee: nemo beneficium fuum perdat, nisi fecundum consuetudinem antecessorum nostrorum et per judicium parium fuorum. And it was ever esteemed, in all countries, a privilege of the highest and most beneficial nature.
BUT I will not mispend the reader's time in fruitless encomiums on this method of trial: but shall proceed to the dissiction and examination of it in all its parts, from whence indeed its highest encomium will arise; since, the more it is searched into and understood, the more it is sure to be valued. And this is a species of knowledge most absolutely necessary for every gentleman in the kingdom: as well because he may be frequently called upon to determine in this capacity the rights of others, his fellow-subjects; as because his own property, his liberty, and his life, depend upon maintaining, in its legal force, the constitutional trial by jury.

TRIALS by jury in civil causes are of two kinds; extraordinary, and ordinary. The extraordinary I shall only briefly hint at, and confine the main of my observations to that which is more usual and ordinary.

THE first species of extraordinary trial by jury is that of the grand assise, which was instituted by king Henry the second in parliament, as was mentioned in the preceding chapter, by way of alternative offered to the choice of the tenant or defendant in a writ of right, instead of the barbarous and unchristian custom of duelling. For this purpose a writ de magna assisa eligenda is directed to the sherifff, to return four knights, who are to elect and choose twelve others to be joined with them, in the manner mentioned by Glanvilg; who, having probably advised the measure itself, in the measure itself, is more than usually copious in describing it: and these, all together, form the grand assise, or great jury, which is to try the matter of right, and must consist of sixteen jurorsh.

ANOTHER species of extraordinary juries, is the jury to try an attaint; which is a process commenced against a former jury, for bringing in a false verdict; of which we shall speak more largely in a subsequent chapter. At present I shall only observe, that this jury is to consist of twenty four of the best men in the county, who are called the grand jury in the attaint, to distinguish them from the first or petit jury; and these are to hear and try the goodness of the former verdict.
WITH regard to the ordinary trial by jury in civil cases, I shall pursue the same method in considering it, that I set out with in explaining the nature of prosecuting actions in general, viz. by following the order and course of the proceedings themselves, as the most clear and perspicuous way of treating it.

WHEN therefore an issue is joined, by these words, and this the said A prays may be enquired of by the country, or, and of this he puts himself upon the country, and the said B does the like; the court awards a writ of venire facias upon the roll or record, commanding the sheriff that he cause to come here on such a day, twelve free and lawful men, liberos et legales homines, of the body of his county, by whom the truth of the matter may be better known, and who are neither of kin to the aforesaid A, nor the aforesaid B, to recognize the truth of the issue between the said partiei. And such writ is accordingly issued to the sheriff.

THUS the cause stands ready for a trial at the bar of the court itself: for all trials were there anciently had, in actions which were there first commenced; which never happened but in matters of weight and consequence, all trifling suits being ended in the court-baron, hundred, or county courts: and all causes of great importance or difficulty are still usually retained upon motion, to be tried at the bar in the superior courts. But when the usage began, to bring actions of any trifling value in the courts of Westminster-hall, it was found to be an intolerable burden to compel the parties, witnesses, and jurors, to come from Westmorland perhaps or Cornwall, to try an action of assault at Westminster. Therefore the legislature took into consideration, that the kin's justices came usually twice in the year into the several counties, ad capiendas assisas, to take or try writs of assise, of mort d' ancestor, novel disfeifin, nuisance, and the like. The form of which writs we may remember was stated to be,

i Append. No. II. 4.

that they commanded the sheriff to summon an assise or jury, and go to view the land in question; and then to have the said jury ready at the next coming of the justices of the assise (together with the parties) to recognize and determine the disfeifin, or other injury complained of. As therefore these judges were ready in the country to administer justice in real actions of assise, the legislature thought proper to refer other matters in issue to
be also determined before them, whether of a mixed or personal kind. And therefore it was enacted by statute Westm. 2. 13. Edw. I. c. 30. that a clause of nisi prius should be inserted in all the aforesaid writs of venire facias; that is, that the sheriff should cause the jurors to come to Westminster (or wherever the king's courtsshould be held) on such a day in easter and michaelmas terms; nisi prius, unless before that day the justices assigned to take assises shall come into his said county. By virtue of which the sheriff returned his jurors to the court of the justices of assise, which was sure to be held in the vacation before easter and michaelmas terms; and there the trial was had.

AN inconvenience attended this remedy: principally becuase, as the sheriff made no return of the jury to the court at Westminster, the parties were ignorant who they were till they came upon the trial, and therefore were not ready with their challenges or exceptions. For this reason by the statute 42 Edw. III. c. 11. the method of trials by nisi prius was altered; and it was enacted that no inquests (except of assise and gaol-delivery) should be taken by writ of nisi pruis, till after the sheriff had returned the names of the jurors to the court above. So that now the caluse of nisi prius is left out of the writ of venire facias, which is the sheriff's warrant to warn the jury; and is inserted in another part of the proceedings, as we shall see presently.

FOR now the course is, to make the sheriff's venire returnable on the last return of the same term wherein issue is joined, viz. hilary or trinity terms, which from the making up of the issues therein are usually called issuable terms. And he returns the names of the jurors in a panel (a little pane, or oblong piece of parchment) annexed to the writ. This jury is not summoned, and therefore, not appearing at the day, must unavoidably make default. For which reason a compulsive process is now awarded against the jurors, called in the common pleas a writ of habeas corpora juratorum, and in the king's bench a distringas, commanding the sheriff to have their bodies, or to distrein them by their lands and goods, that they may appear upon the day appointed. The entry therefore on the roll or record is k, that the jury is respited, through defect of the jurors, till the first day of the next term, then to appear at Westminster; unless before that time, viz. on wednesday the fourth of March, the justices of our lord the king, appointed to take assises in that county, shall have come to Oxford, that is, to the place assigned for holding the assises. Therefore the sheriff is commanded to
have their bodies at Westminster on the said first day of next term, or
before the said justices of assise, if before that time they come to Oxford;
 viz. on the fourth of March aforesaid. And, as the judges are sure to come
and open the circuit commissions on the day mentioned in the writ, the
sheriff returns and summons this jury to appear at the assises, and there
the trial is had before the justices of assise and nisi prius: among whom (as
hath been said) are usually two of the judges of the courts at
Westminster, the whole kingdom being divided into six circuits for this
purpose. And thus we may observe that the trial of common issues, at nisi
prius, was in its original only a collateral incident to the original business
of the justices of assise; though now, by the various revolutions of practice,
it is become their principal employment: hardly any thing remaining in
use of the real assises, but the name.

IF the sheriff be not an indifferent person; as if he be a party in the suit, or
be related by either blood or affinity to either of the parties, he is not then
trusted to return the jury; but the venire shall be directed to the coroners,
who in this, as in many

k Append. No. II.  4.
l See pag. 58.

other instances, are the substitutes of the sheriff, to execute process when
he is deemed an improper person. If any exception lies to the coroners, the
venire shall be directed to two clerks of the court, or two persons of the
county named by the court, and sworn m. And these two, who are called
elisors, or electors, shall indifferently name the jury, and their return is
final.

LET us now pause awhile, and observe (with sir Matthew Hale n) in these
first preparatory stages of the trial, how admirably this constitution is
adapted and framed for the investigation of truth, beyond any other
method of trial in the world. For, first the person returning the jurors is a
man of some fortune and consequence; t
that so he may be not only the less
tempted to commit willful errors, but likewise be responsible for the faults
of either himself or his officers: and he is also bound by the obligation of
an oath faithfully to execute his duty. Next, as to the time of their return:
The panel is returned to the court upon the original venire, and the jurors
are to be summoned and brought in may weeks afterwards to the trial,
whereby the parties may have notice of the jurors, and of their sufficiency
or insufficiency, characters, connections, and relations, that so they may be challenged upon just cause: while at the same time by means of the compulsory process (of distringas or habeas corpora) the cause is not like to be retarded through defect of jurors. Thirdly, as to the place of their appearance: which in causes of weight and consequence is at the bar of the court; but in ordinary cases at the assises, held in the county where the cause of action arises, and the witnesses and jurors live: a provision most excellently calculated for the saving of expense to the parties. For, though the preparation of the causes in point of uniformity of proceeding is preserved throughout the kingdom, and multiplicity of forms is prevented; yet this is no great charge or trouble, on attorney being able to transact the business of forty clients. But the troublesome and most expensive attendance is that of jurors and

m Fortefc. de Laud. LL. c. 25.
n Hist. C. L. c. 12.

witnesses at the trial; which therefore is brought home to them, in the country where most of them inhabit. Fourthly, the persons before whom they are to appear, and before whom the trial is to be held, are the judges of the superior court, if it be a trial at bar; or the judges of assise, delegated from the courts at Westminster by the king, if the trial be held in the country: persons, whose learning and dignity secure their jurisdiction from contempt, and the novelty and very parade of whose appearance have no shall influence upon the multitude. The very point of their being strangers in the county is of infinite service, in preventing those factions and parties, which would intrude in every cause of moment, were it tried only before persons resident on the spot, as justices of the peace, and the like. And, the better to remove all suspicion of partiality, it was wisely provided by the statutes 4 Edw. III. c. 2. 8 Ric. II. c. 2. and 33 Hen. VIII. c. 24. that no judge of assise should hold pleas in any county wherein he was born or inhabits. And, as this constitution prevents party and faction from intermingling in the trial of right, so it keeps both the rule and the administration of the laws uniform. These justices, though thus varied and shHisted at every assises, are all sworn to the same laws, have had the same education, have pursued the same studies, converse and consult together, communicate their decisions and resolutions, and preside in those courts which are mutually connected and their judgments blended together, as they are interchangeably courts of appeal or advice to each other. And hence their administration of justice, and conduct of trials, are consonant
and uniform; whereby that confusion and contrariety are avoided, which would naturally arise from a variety of uncommunicating judges, or from any provincial establishment. But let us now return to the assises.

WHEN the general day of trial is fixed, the plaintiff or his attorney must bring down the record to the assises, and enter it with the proper officer, in order to its being called on in course. If it be not so entered, it cannot be tried; therefore it is in the plaintiff's breast to delay any trial by not carrying down the record: unless the defendant, being fearful of such neglect in the plaintiff, and willing to discharge himself from the action, will himself undertake to bring on the trial, giving proper notice to the plaintiff. Which proceeding is called the trial by proviso; by reason of the clause then inserted in the sheriff's venire, viz.proviso, provided that if two writs come to your hands, (that is one from the plaintiff and another from the defendant) you shall execute only one of them. But this practice begins to be disused, since the statute 14 Geo. II. c. 17. which enacts, that if, after issue joined, the cause is not carried down to be tried according to the course of the court, the plaintiff shall be esteemed to be nonsuited, and judgment shall be given for the defendant as in case of a nonsuit. In case the plaintiff intends to try the cause, he is bound to give the defendant (if he lives within forty miles of London) eight days notice of trial; and, if he lives at a greater distance, then fourteen days notice, in order to prevent surprize: and if the plaintiff then charges his mind, and does not countermand the notice six days before the trial, he shall be liable to pay costs to be defendant for not proceeding to trial, by the same last mentioned statute. The defendant however, or plaintiff, may, upon good cause shewn to the court above, as upon absence or sickness of a material witness, obtain leave upon motion to defer the trial of the cause till the next assises.

BUT we will now suppose all previous steps to be regularly settled, and the cause to be called on in court. The record is then handed to the judge, to peruse and observe the pleadings, and what issues the parties are to maintain and prove, while the jury is called and sworn. To this end the sheriff returns his compulsive process, the writ of habeas corpora, or distringas, with the panel of jurors annexed, to the judge's officer in court. The jurors contained in the panel are either special or common jurors. Special juries were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary
freeholders; or where the sheriff was suspected of partiality, though not upon such apparent cause, as to warrant an exception to him. He is in such cases, upon motion in court and a rule granted thereupon, to attend the prothonotary or other proper officer with his freeholder's book; and the officer is to take indifferently forty eight of the principal freeholders in the presence of the attorneys on both sides; who are each of them to strike off twelve, and the remaining twenty four are returned upon the panel. By the statute 3 Geo. II. c. 25. either party is intitled upon motion to have a special jury struck upon the trial of any issue, as well at the assises as at bar; he paying the extraordinary expense, unless the judge will certify (in pursuance of the statute 24 Geo. II. c. 18.) that the cause required such special jury.

A COMMON jury is one returned by the sheriff according to the directions of the statute 3 Geo. II. c. 25. which appoints, that the sheriff shall not return a separate panel for every separate cause, as formerly; but one and the same panel for every cause to be tried at the same assizes, containing not less than forty eight, nor more than seventy two, jurors: and that their names, being written of tickets, shall be put into a box or glass; and when each cause is called, twelve of these persons, whose names shall be first drawn out of the box, shall be sworn upon the jury, unless absent, challenged, or excused; and unless a previous view of the lands, or tenements, or other matters in question, shall have been though necessary by the court: in which case six or more of the jurors returned, to be agreed on by the parties, or named by a judge or other proper officer of the court, shall be appointed to take such view; and then such of the jury as have appeared upon the view (if any o) shall be sworn on the inquest previous to any other jurors. These acts are well calculated to restrain any suspicion of partiality in the sheriff, or any tampering with the jurors when returned.

0 4 Burr. 252.

AS the jurors appear, when called, they shall be sworn, unless challenged by either party. Challenges are of two sorts; challenges to the array, and challenges to the polls.

CHALLENGES to the array are at once an exception to the whole panel, in which the jury are arrayed or set in order by the sheriff in his return; and they may be made upon account of partiality or some default in the sheriff, or his under-officer who arrayed the panel. And, generally speaking, the
same reasons that before the awarding the venire were sufficient to have directed it to the coroners or clisors, will be also sufficient to quash the array, when made by a person or officer of whose partiality there is any tolerable ground of suspicion. Also, though there be no personal objection against the sheriff, yet if he arrays the panel at the nomination, or under the direction of either party, this is good cause of challenge to the array. Formerly, if a lord of parliament had a cause to be tried, and no knight was returned upon the jury, it was a cause of challenge to the array: but an unexpected use having been made of this dormant privilege by a spiritual lord p, (though his title to such privilege was very doubtful q) it was abolished by statute 24 Geo. II. c. 18. Also, by the policy of the ancient law, the jury was to come de vicineto, from the neighbourhood of the vill or place where the cause of action was laid in the declaration; and therefore some of the jury were obliged to be returned from the hundred in which such vill lay; and, if none were returned, the array might be challenged for defect of hundredors. Thus the Gothic jury, or nemenda, was also collected out of every quarter of the country; binos, trinos, vel etiam senos, ex singulis territorii quadrantibus r. For, living in the neighbourhood, they were properly the very country, or pais, to which both parties had appealed; and were supposed to know before-hand the characters of the parties and witnesses, and therefore the better knew what credit to give to the

q 2 Whitclocke of parl. 211.
r Stiernhook de jure Goth. l. 1. c. 4.

facts alleged in evidence. But this convenience was overbalanced by another very natural and almost unavoidable inconvenience; that jurors, coming out of the immediate neighbourhood, would be apt to intermix their prejudices and partialities in the trial of right. And this our law was so sensible of, that it for a long time has been gradually relinquishing this practice; the number of necessary hundredors in the whole panel, which in the reign of Edward III were constantly six s, being in the time of Fortescue t reduced to four. Afterwards indeed the statute 35 Hen. VIII. c. 6. restored the ancient number of six, but that clause was soon virtually repealed by statute 27 Eliz. c. 6. which required only two. And sir Edward Coke also u gives us such a variety of circumstances, whereby the courts permitted this necessary number to be evaded, that it appears they were
heartily tired of it. At length, by statute 4 & 5 Ann. c. 16. it was entirely abolished upon all civil actions, except upon penal statutes; and upon those also by the 24 Geo. II. c. 18. the jury being now only to come de corpore comitatus, from the body of the county at large, and not de vicineto, or from the particular neighbourhood. The array by the ancient law may also be challenged, if an alien by party to the suit, and, upon a rule obtained by his motion to the court for a jury de medietate linguæ, such a one be not returned by the sheriff, pursuant to the statute 28 Edw. III. c. 18. which enacts, that where either party is an alien born, the jury shall be one half aliens and the other denizens, if required, for the more impartial trial. A privilege indulged to strangers in no other country in the world; but which is as ancient with us as the time of king Ethelred, in whose statute de monticolis Walliae (then aliens to the crown of England) cap. 3. it is ordained, that duodeni legales homines, quorum sex Walli et sex Angli erunt, Anglis et Wallis jus dicunto. But where both parties are aliens, no partiality is to be presumed to one more than another; and therefore the statute 21 Hen. VI. c. 4. the whole jury are then directed to be denizens. And it may be questioned, whether the

t d Laud. LL. c. 25.
u 1 Inst. 157.

statute 3 Geo. II. c. 25. (before referred to) hath not in civil causes undesignedly abridged this privilege of foreigners, by the positive directions therein given concerning the manner of impaneling jurors, and the persons to be returned in such panel. So that the court might probably hesitate, especially in the case of special juries, how far it has now a power to direct a panel to be returned de medietate linguæ, and to alter the method prescribed for striking a special jury, or balloting for common jurymen.

CHALLENGES to the polls in capita, are exceptions to particular jurors; and seem to answer the recusatio judicis in the civil and canon laws: by the constitutions of which a judge might be refused upon any suspicion of partiality w. By the laws of England also, in the times of Bracton/xand Fleta y, a judge might be refused for good cause; but now the law is otherwise, and it is held that judges or justices cannot be challenged z. For the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly
depends upon that presumption and idea. And should the fact at any time prove flagrantly such, as the delicacy of the law will not presume beforehand, there is no doubt but that such misbehaviour would draw down a heavy censure from those, to whom the judge is accountable for his conduct.

BUT challenges to the polls of the jury (who are judges of fact) are reduced to four heads by sir Edward Coke a: propter honoris respectum; propter defectum; propter affectum; and propter delictum.

1. Propter honoris respectum; as if a lord of parliament be impanelled on a jury, he may be challenged by either party, or he may challenge himself.

w Cod. 3. 1. 16. Decretal. i. 2. t. 28. c. 36.
x l. 5. c. 15.
y l. 6. c. 37.
z Co. Litt. 294.
a 1 Inst. 156.

2. Propter defectum; as if a juryman be an alien born, this is defect of birth; if he be a slave or bondman, this is defect of liberty, and he cannot be liver et legalis homo. Under the word homo also, though a name common to both sexes, the female is however excluded, propter defectum sexus: except when a widow feigns herself with child, in order to exclude the next heir, and a suppositious birth is suspected to be intended; then upon the writ de ventre inspiciendo, a jury of women is to be impaneled to try the question, whether with child, or not b. But the principal deficiency is defect of estate, sufficient to qualify him to be a juror. This depends upon a variety of statutes. And, first, by the statute Westm. 2. 13 Edw. I. c. 38. none dispand 20 s. by the year at the least; which is increased to 40 s. by the statute 21 Edw. I. ft. 1. and 2 Hen. V. Ft. 2. c. 3. This was doubled by the statute 27 Eliz. c. 6. which requires in every such case the jurors to have estate of freehold to the yearly value of 4 l. at the least. But, the value of money at that time decreasing very considerably, this qualification was raised by the statute 16 & 17 Car. II. c. 3. to 20 l. per annum, which being only a temporary act, for three years, was suffered to expire without renewal, to the great debasement of juries. However by the statute 4 & 5 W. & M. c. 24. it was again raised to 10 l. per annum in England and 6 l. in Wales, of freehold lands or copyhold; which is the first time that copyholders (as such) were admitted to serve upon juries in any of the
king’s courts, though they had before been admitted to serve in some of the sheriff’s courts, by statutes 1 Ric. III. c. 4. and 9 Hen. VII. c. 13. And, lastly, by statute 3 Geo. II. c. 25. any leaseholder for the term of five hundred years absolute, or for any term determinable upon life or lives, of the clear yearly value of 20 l. per annum over and above the rent reserved, is qualified to serve upon juries. When the jury is de medietate linguae, that is, one moiety of the English tongue or nation, and the other of any foreign one, no want

b Cro. Eliz 566.

of lands shall be cause of challenge to the alien; for, as he is incapable to hold any, this would totally defeat the privilege.

3. JURORS may be challenged propter affectum, for suspicion of bias or partiality. This may either a principal challenge, or to the favour. A principal challenge is such, where the cause assigned carries with it prima facie evident marks of suspicion, either of malice or favour: as, that a juror is of kin to either party within the ninth degree c; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party’s master, servant, counsellor, steward or attorney, or of the same society or corporation with him: all these are principal causes of challenge; which, if true, cannot be overruled, for jurors must be omni exceptione majores. Challenges to the favour, are where the party hath no principal challenge; but object only some probably circumstances of suspicion, as acquaintance, and the like d; the validity of which must be left to the determination of triors, whose office it is to decide whether the juror be favourable or unfavourable. The triors, in case the first man called be challenged, are two indifferent persons named by the court; and, if they try one man and find him indifferent, he shall be sworn; and then he and two triors shall try the next; and when another is found indifferent and sworn, the two triors shall be superseded, and the two first sworn on the jury shall try the rest e.

4. CHALLENGES propter delictum are for some crime or misdemeanour, that affects the juror’s credit and renders him infamous. As for a conviction of treason, felony, perjury, or con-
c Finch. L. 401.
d In the nembda, or jury, or the ancient Goths, three challenges only were allowed to the favour, but the principal challenges were indefinite. Licebat palam excipere, et semper ex probabili causa tres repudiart; etiant plures ex causa praegnanti et manifesta. (Stiernhook l. 1. c. 4.)
e Co. Litt. 158.

spiracy; or if he hath received judgment of the pillory, tumbrel, or the like; or to be branded, whipt, or stigmatized; or if he be outlawed or excommunicated, or hath been attainted of false verdict, praemunire, or forgery; or lastly, if he hath proved recreant when champion in the trial by battle, and thereby hath lost his liberam legem. A juror may himself be examined on oath of voir dire, veritatem dicere, with regard to the three former of these causes of challenge, which are not to his dishonour; but not with regard to this head of challenge, propter delictum, which would be to make him either forswear or accuse himself, if guilty.

BESIDES these challenges, which are exceptions against the fitness of jurors, and whereby they may be excluded from serving; there are also other causes to be made use of by the jurors themselves, which are matter of exemption; whereby their service is excused, and not excluded. As by statute Westm. C. 13. Edw. I. c. 38. sick and decrepit persons, persons not commorant in the county, and men above seventy years old; and by the statute of 7 & 8 W. III. c. 32. infants under twenty one. This exemption is also extended by divers statutes, customs, and charters, to physicians and other medical persons, counsel, attorneys, officers of the courts, and the like; all of whom, if impaneled, must shew their special exemption. Clergymen are also usually excused, out of favour and respect to their function: but, if they are seised of lands and tenements, they are in strictness liable to be impaneled in respect of their lay fees, unless they be in the service of the king or of some bishop; in obsequio domini regis, vel alicujus episcopi f.

IF by means of challenges, or other cause, a sufficient number of unexceptionable jurors doth not appear at the trial, either party may pray a tales. A takes is a supply of such men, as are summoned upon the first panel, in order to make up the deficiency. For this purpose a writ of decem tales, ofct tales, and

the like, was used to be issued to the sheriff at common law, and must be
still so done at a trial at bar, if the jurors make default. But at the assises or
nisi prius, by virtue of the statute 35 Hen. VIII. c. 6. and other subsequent
statutes, the judge is impowered at the prayer of either party to award a
tales de circumstantibus, of persons present in court, to be joined to the
other jurors to try the cause; who are liable however to the same
challenges as the principal jurors. This is usually done, till the legal
number of twelve be completed; in which patriarchal and apostolical
number sir Edward Coke hath discovered abundance of mystery.

WHEN a sufficient number of persons impaneled, or talesmen, appear,
they are then separately sworn, well and truly to try the issue between the
parties, and a true verdict to give according to the evidence; and hence
they are denominated the jury, jurata, and jurors, &c. Juratores.

WE may here again observe, and observing we cannot but admire, how
how scrupulously delicate and how impartially just the law of England
approves itself, in the constitution and frame of a tribunal, thus excellently
contrived for the test and investigation of truth; which appears most
remarkably, 1. In the avoiding of frauds and secret management, by
electing the twelve jurors out of the whole panel by lot. 2. In its caution
against all partiality and bias, by quashing the whole panel or array, if the
officer returning is suspected to be other than indifferent; and repelling
particular jurors, if probably cause be shewn of malice.

g Append. No II.  4.
h 1 Inst. 155.
i Paufanias relates, that at the trial of Mars, for murder, in the court
denominated areopagus from that incident, he was acquitted by a jury
composed of twelve pagan deities. And Dr Hickes, who attributes the
introduction of this number to the Normans, (though he allows the
institution of juries in general to be of much higher antiquity in England)
tells us that among the inhabitants of Norway, from whom the Normans as
well as the Danes were descended, a great veneration was paid to the
number twelve; nihil sanctius, nihil antiquius suit; perinde ac si in ipso hoc
numero feereta quaedam esset religio. (Differt. epistolar. 4.)

or favour to either party. The prodigious multitude of exceptions or
challenges allowed to jurors, who are the judges of fact, amounts nearly to
the same thing as was practised in the Roman republic, before the lost her liberty: that the select judges should be appointed by the praetor with the mutual consent of the parties. Or, as Tully j expresses it: neminem voluerunt maiores nostri, non modo de existimatione cujusquam, fed ne pecuniaria quidem de re minima, esse judicem; nisi qui inter adver farios convenisset.

INDEED these selecti judices bore in many respects a remarkable resemblance to our juries: for they were first returned by the praetor; de decuria senatoria conscribuntur: then their names were drawn by lot, till a certain number was completed; in urnam sortito mittuntur, ut de pluribus necessarius numerus consici posset: then the parties were allowed their challenges; post urnam permittitur accusatori, ac reo, ut ex illo numero rejiciant quos putaverint fibi aut inimicos aut ex aliqua re incommodes fore: next they struck what we call a tales; rejectione celebrata, in eorum locum qui rejecti suerunt, subsortiebatur praetor alios, quibus ille judicum legitimus numerus completeretur: lastly, the judges, like our jury, were sworn; his perfectis, jurabant in leges judices, ut obstricti religione judicarent k.

THE jury are now ready to hear the merits; and, to fix their attention the closer to the facts which they are impaneled and sworn to try, the pleading are opened to them by counsel on that side which holds the affirmative of the question in issue. For the issue is said to lie, and proof is always first required, upon that side which affirms the matter in question: in which our law agrees with the civil l; ei incumbit probation, qui dicit, non qui negat: cum per rerum naturam factum-negantis probatio nulla sit. The opening counsel briefly informs them what has been transacted in the court above; the parties, the nature of the action, the declaration, the plea, replication, and other proceedings, and lastly upon what point the issue is joined, which is there sent down to be determined. Instead of which formerly m the whole record and process of the pleadings was read to them in English by the court, and the matter in issue clearly explained to their capacities. The nature of the case, and the evidence intended to be produced, are next laid before them by counsel

j pro Cluentio. 43.
k Afcon. in Cic. Verr. 1. 6.
l Ff. 22. 3. 2. Cod. 4. 19. 23.
also on the same side; and, when their evidence is gone through, the advocate on the other side opens the adverse case, and supports it by evidence; and then the party which began is heard by way of reply.

THE nature of my present design will not permit me to enter into the numberless niceties and distinctions of what is, or is not, legal evidence to a jury n. I shall only therefore select a few of the general heads and leading maxims, relative to this point, together with some observations on the manner of giving evidence.

AND, first, evidence signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other; and no evidence ought to be admitted to any other point. Therefore upon an action of debt, when the defendant denies his bond by the plea of non est factum, and the issue is, whether it be the defendant’s deed or no; he cannot give a release of this bond in evidence: for that does not destroy the bond, and therefore does not prove the issue which he has chosen to rely upon, viz. that the bond has no existence.

m Fortesc. c. 26.

n This is admirably well performed in lord chief baron Gilbert’s excellent treatise of evidence; a work which it is impossible to abstract or abridge, without losing some beauty and destroying the chain of the whole; and which hath lately been engrafted into that learned and useful work, the introduction to the law of nisi prius. 4to. 1767.

AGAIN; evidence in the trial by jury is of two kinds, either that which is given in proof, or that which the jury may receive by their own private knowledge. The former, or proofs, (to which in common speech the name of evidence is usually confined) are either written, or parol, that is, by word of mouth. Written proofs, or evidence, are, 1. Records, and 2. Ancient deeds of thirty years standing, which prove themselves; but 3. Modern deeds, and 4. Other writings, must be attested and verified by parol evidence of witnesses. And the one general rule that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but, if not possible, then the best evidence that can be had shall be allowed. For if it be found that there is any better evidence existing than is produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed. Thus, in order to prove a lease for years,
nothing else shall be admitted but the very deed of lease itself, if in being; but if that be positively proved to be burnt or destroyed (not relying on any loose negative, as that it cannot be found, or the like) then an attested copy may be produced; or parol evidence be given of its contents. So, no evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases (as in proof of any general customs, or matters of common tradition or repute) the courts admit of hearsay evidence, or an account of what persons deceased have declared in their life-time: but such evidence will not be received of any particular facts. So too, books of account, or shop-books, are not allowed of themselves to be given in evidence for the owner; but a servant who made the entry may have recourse to them to refresh his memory: and, if such servant (who was accustomed to make those entries) be dead, and his hand be proved, the book may be read in evidence o: for, as tradesmen are often under a necessity of giving credit without any note or writing, this is therefore, when accompanied

o Law of nisi prius. 266.

with such other collateral proofs of fairness and regularity p, the best evidence that can then be produced. However this dangerous species of evidence is not carried for far in England as abroad q; where a man’s own books of accounts, by a distortion of the civil law (which seems to have meant the same thing as is practised with us r) with the suppletory oath of the merchant, amount at all times to full proof. But as this kind of evidence, even thus regulated, would be much too hard upon the buyer at any long distance of time, the statute 7 Jac. I. c. 12. (the penners of which seem to have imagined that the books of themselves were evidence at common law) confines this species of proof to such transactions as have happened within one year before the action brought; unless between merchant and merchant in the usual intercourse of trade. For accounts of so recent a date, if erroneous, may more easily be unraveled and adjusted.

WITH regard to parol evidence, or witnesses; it must first be remembered, that there is a process to bring them in by writ of subpoena ad testificandum: which commands them, laying aside all pretences and excuses, to appear at the trial on pain of 100 l. to be forfeited to the king; to which the statute 5 Eliz. c. 9. has added a penalty of 10 l. to the party aggrieved, and damages equivalent to the loss sustained by want of his evidence. But no witness, unless his reasonable expenses be tendered him,
is bound to appear at all; nor, if he appears, is he bound to given evidence till such charges are actually paid him: except he resides within the bills of mortality, and is summoned to give evidence within the same. This compulsory process, to bring in unwilling witnesses, and the additional terrors of an attachment in case of disobedience, are of excellent use in the through investigation of truth: and, upon the same principle, in the Athe-
p Salk. 285.
q Gail. observat. 2. 20. 23.
r Instrumenta domestica, fen adnotatio, si non aliis quoque adminiculis adjuventur, ad probationem fola non sufficiunt. (Cod. 4. 19. 5.) Nam exemplo perniciosum est, ut ei scripturae creditur, quod unumquidque sibi adnotatione propria debitor em constituit. (Ibid. l. 7.)
nain courts, the witnesses who were summoned to attend the trial had their choice of three things; either to swear to the truth of the fact in question, to deny or adjure it, or else to pay a fine of a thousand drachmas.

ALL witnesses, that have the use of their reason, are to be received and examined, except such as are infamous, or such as are interested in the event of the cause. All others are competent witnesses; though the jury from other circumstances will judge of their credibility. Infamous persons are such as may be challenged as jurors, propter delictum; and therefore never shall be admitted to give evidence to inform that jury, with whom they were too scandalous to associate. Interested witnesses may be examined upon a voir dire, if suspected to be secretly concerned in the event; or their interest may be proved in court. Which last is the only method of supporting an objection to the former classes; for no man is to be examined to prove his own infamy. And no counsel, attorney, or other person, intrusted with the secrets of the cause by the party himself, shall be compelled, or perhaps allowed, to give evidence of such conversation or matters of privacy, as came to his knowledge by virtue of such trust and confidence: but he may be examined as to mere matters of fact, as the execution of a deed or the like, which might have come to his knowledge without being intrusted in the cause.

ONE witness (if credible) is sufficient evidence to a jury of any single fact; though undoubtedly the concurrence of two or more corroborates the proof. Yet our law considers that there are many transactions to which
only one person is privy; and therefore does not always demand the testimony of two, as the civil law universally requires. Unius responsio testis omnino non audiatur. To extricate itself out of which absurdity, the modern practice of the civil law courts has plunged itself into another. For, as they do not allow a less number than two witnesses to

s Pott. Antiq. b. 1. c. 21.
s Law of nisi prius, 267.
v Cod. 4. 20. 9.

be plena probation, they call the testimony of one, though never so clear and positive, semi-plena probatio only, on which no sentence can be founded. To make up therefore the necessary complement of witnesses, when they have one only to any single fact, they admit the party himself (plaintiff or defendant) to be examined in his own behalf; and administer to him what is called the suppletory oath: and, if his evidence happens to be is his own favour, this immediately converts the half proof into a whole one. by this ingenious device satisfying at once the forms of the Roman law, and acknowledging the superior reasonableness of the law of England: which permits one witness to be sufficient where no more are to be had; and, to avoid all temptations of perjury, lays it down as an invariable rule, that nemo testis esse debet in propria causa.

POSITIVE proof is always required, where from the nature of the case it appears it might possibly have been had. But, next to positive proof, circumstantial evidence or the doctrine of presumptions must take place: for when the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact is the proof of such circumstances which either necessarily, or usually, attend such facts; and these are called presumptions, which are only to be relied upon till contrary be actually proved. Stabitur praesumptioni donec probetur in contrarium u. Violent presumption is many times equal to full proof w; for there those circumstances appear, which necessarily attend the fact. As 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 time, in full of all demands, this is a violent presumption of his having paid the former rent, and is equivalent 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 payment: and it therefore induces so forcible a presumption, that no proof shall be admitted
to the contrary. Probable presumption, arising from such circumstances as usually attend the fact, hath also its due weight: as if, in a suit for rent due 1754, the tenant proves the payment of the rent due in 1755, this will prevail to exonerate the tenant, unless it be clearly shewn that the rent of 1754 was retained for some special reason, or that there was some fraud or mistake; for otherwise it will be presumed to have been paid before that in 1755, as it is most usual to receive first the rents of longest standing. Light, or rash, presumptions have no weight or validity at all.

THE oath administered to the witness is not only that what be deposes shall be true, but that he shall also depose the whole truth: so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not. And all this evidence is to be given in open court, in the presence of the parties, their attorneys, the counsel, and all by-standers; and before the judge and jury: each party having liberty to except to its competency, which exceptions are publicly stated, and by the judge are openly and publicly allowed or disallowed, in the face of the country; which must curb any secret biass or partiality, that might arise in his own breast. And if, either is his directions or decisions, he mis-states the law by ignorance, inadvertence, or design, the counsel on either side may require him publicly to seal a bill of exceptions; stating the point wherein he is supposed to err: and this he is obliged to seal by statute Westm. 2. 13 Edw. I. c. 31. or, if he refuses so to do, the party may have a compulsory writ against him, commanding him to seal it, if the fact alleged be truly stated: and if he returns, that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return. This bill of exceptions is in the nature of an appeal; examinable, not in the court out of which the record issues for the trial at nisi prius, but in the next immediate superior court, upon a writ of error, after

judgment given in the court below. But a demurrer to evidence shall be determined by the court, out of which the record is sent. This happens,
where a record or other matter is produced in evidence, concerning the legal consequences of which there arises a doubt in law: in which case the adverse party may if he pleases demur to the whole evidence; which admits the trust of every fact that has been alleged, but denies the sufficiency of them all in point of law to maintain or overthrow the issue a: which draws the question of law from the cognizance of the jury, to be decided (as it ought) by the court. But neither these demurrers to evidence, nor the bills of exceptions, are at present so much in use as formerly; since the more frequent extension of the discretionary powers of the court in granting a new trial, which is now very commonly had for the disdirection of the judge at nisi prius.

THIS open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth b, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose that in private, which he will he ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken. Besides the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. Nor is the presence of the judge, during the examination, a matter of small importance; for besides the

a Co. Litt. 72. 5 Rep. 104.
b Hale's Hist. C. L. 254, 5, 6.

respect and awe, with which his presence will naturally inspire the witness, he is able by use and experience to keep the evidence from wandering from the point in issue. In short by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness; in which points all persons must appear alike, when their depositions are reduced to writing, and read to the judge, in the
absence of those who made them: and yet as much may be frequently collected from the matter of it. These are a few of the advantages attending this, the English, way of giving testimony, oretenuis. Which was also indeed familiar among the ancient Romans, as may be collected from Quinctilian c; who lays down very good instructions for examining and cross-examining witnesses viva voce. And this, or somewhat like it, was continued as low as the time of Hadrian d: but the civil law, as it is now modelled, rejects all public examination of witnesses.

AS to such evidence as the jury may have in their own consciences, by their private knowledge of facts, it was an ancient doctrine, that this had as much right to sway their judgment as the written or parol evidence which is delivered in court. And therefore it hath been often held e, that though no proofs be produced on either side, yet the jury might bring in a verdict. For the oath of the jurors, to find according to their evidence, was construed f to be, to do it according to the best of their own knowledge. Which construction was probably made out of tenderness to juries; that they might escape the heavy penalties of an attaint, in case they could shew by any additional proof, that

c Instit. orat. l. 5. c. 7.
d See his epistle to Varus, the legate or judge of Cilicia: tu magis scire potes, quanta sides fit habenda testibus; qui, et cujus dignitatis, et cujus aestimationis sint; et, qui simpliciter vist sint dicere; utrum unum eundemque meditatum sermonem attulerint, an ad ea quae interrogaveras extempore verisimilia responderint. (Ffl. 22. 5. 3.)
e Year book, 14 Hen. VII. 29. Hob. 227. 1 Lev. 87.
f Vaugh. 148, 149.

g their verdict was agreeable to the truth, though not according to the evidence produced: with which additional proof the law presumed they were privately acquainted, though it did not appear in court. But this doctrine was gradually exploded, when attaints began to be disused, and new trials introduced in their stead. For it is quite incompatible with the grounds, upon which such new trials are every day awarded, viz. that the verdict was given without, or contrary to, evidence. And therefore, together with new trials, the practice seems to have been first introduced, which now universally obtains, that if a juror knows any thing of the matter in issue, he may be sworn as a witness, and give his evidence publicly in court.
WHEN the evidence is gone through on both sides, the judge in the presence of the parties, the counsel, and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support is, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence.

THE jury, after the proofs are summed up, unless the case be very clear, withdraw from the bar to consider of their verdict: and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed. A method of accelerating unanimity not wholly unknown in other constitutions of Europe, and in matters of greater concern. For by the golden bulle of the empire h, if, after the congress is opened, the electors delay the election of a king of the Romans for thirty days, they shall be fed only with bread and water, till the same is accomplished. But if our juries eat or drink at all, or have any eatables about them, without consent of the court, and before verdict, it is fineable; and if they do so at his charge for whom they afterwards find, it will set aside the verdict. Also if they speak with either of the parties or their agents, after they are gone from the bar; or if they receive any fresh evidence in private; or if to prevent disputes they cast lots for whom they shall find; any of these circumstances will entirely vitiate the verdict. And it has been held, that if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned i, the judges are not bound to town in a cart k. This necessity of a total unanimity seems to be peculiar to our own constitution l; or, at least, in the nembda or jury of the ancient Goths, there was required (even in criminal cases) only the consent of the major part; and in case of an equality, the defendant was held to be acquitted m.

WHEN they are all unanimously agreed, the jury return back to the bar; and, before they deliver their verdict, the plaintiff is bound to appear in court, by himself, attorney, or counsel, in order to answer the amercement
to which by the old law he is liable, as has been formerly mentioned, in case he fails in his suit, as a punishment for his false claim. To be amerced, or a mercie, is to be at the king's mercy with regard to the fine to be imposes; in misericordia domini regis pro falso clamore suo. The amercement is disused, but the form still continues; and if the plaintiff does not appear, no verdict can be given, but the plaintiff is said to be nonsuit, non sequitur clamorem suum. Therefore it is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or withdraw himself: whereupon the crier is ordered to call the plaintiff; and if neither he, nor any body for him, appears, he is nonsuited, the jurors are discharged, the action is at an end, and the defendant shall recover his costs.

i Mirr. c. 4. 24.  
k Lib. Aff. fol. 40. pl. 11.  
l See Barrington on the statutes. 17, 18, 19.  
m Stiernh. l. 1. c. 4.  
n pag. 275.

The reason of this practice is, that a nonsuit is more eligible for the plaintiff, than a verdict against him: for after a nonsuit, which is only a default, he may commence the same suit again for the same cause of action; but after a verdict had, and judgment consequent thereupon, he is for ever barred from attacking the defendant upon the same ground of complaint. But, in case the plaintiff appears, the jury by their foreman deliver in their verdict.

A VERDICT, vere dictum, is either privy, or public. A privy verdict is when the judge hath left or adjourned the court; and the jury, being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court o: which privy verdict 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. So that the privy verdict is indeed a mere nullity; and yet it is a dangerous practice, allowing time for the parties to tamper with the jury, and therefore very seldom indulged. But the only effectual and legal verdict is the public verdict: in which they openly declare to have found the issue for the plaintiff, or for the defendant; and if for the plaintiff, they assess the damages also sustained by the plaintiff, in consequence of the injury upon which the action is brought.
SOMETIMES, if there arises in the case any difficult matter of law, the jury for the sake of better information, and to avoid the danger of having their verdict attainted, will find a special verdict; which is grounded on the statute Westm. 2. 13 Edw. I. c. 30. 2. And herein they state the naked facts, as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that if upon the whole matter the court shall be of opinion that the plaintiff and cause of action, they then find for the plaintiff; if otherwise, then for the de-

If the judge hath adjourned the court to his own lodgings, and there receives the verdict, it is a public and not a privy verdict.

Another method of finding a species of special verdict, is when the jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the judge or the court above, on a special case stated by the counsel on both sides with regard to a matter of law: which has this advantage over a special verdict, that it is attended with much less expense, and obtains a much speedier decision; the postea (of which in the next chapter) being stayed in the lands of the officer of nisi prius, till the question is determined, and the verdict is then entered for the plaintiff or defendant as the case may happen. But, as nothing appears upon the record but the general verdict, the parties are precluded hereby from the benefit of a writ of error, if dissatisfied with judgment of the court or judge upon the point of law. Which makes it a thing to be wished, that a method could be devised of either lessening the expense of special verdicts, or else of entering the case at length upon the postea. But in both these instances the jury may, if they thing proper, take upon themselves to determine at their own hazard, the complicated question of fact and law; and, without either special verdict or special case, may find a verdict absolutely either for the plaintiff or defendant p.

WHEN the jury have delivered in their verdict, and it is recorded in court, they are then discharged. And so ends the trial by jury: a trial, which besides the other vast advantages which we have occasionally observed in its progress, is also as expeditious and cheap, as it is convenient, equitable,
and certain; for a commission out of chancery, or the civil law courts, for
examining witnesses in one cause will frequently last as long, and of
course be full as expenfive, as the trial of a hundred issues at nisi prius:
and yet the fact cannot be determined by such com-
p Litt. 386.

missioners at all; no, not till the depositions are published and read at the
hearing of the cause in court.

UPON these accounts the trial by jury even has been, and I trust ever will
be, looked upon as the glory of the English law. And, if it has so great an
advantage over others in regulating civil property, how much must that
advantage be heightened, when it is applied to criminal cases! But this we
must reafer to the ensuing book of these commentaries: only observing for
the present, that it is the most transcendent privilege which any subject
can enjoy, or with for, that he cannot be affected either in his property, his
liberty, or his person, but by the unanimous consent of twelve of his
neighbours and equals. A constitution, that I may venture to affirm has,
under providence, secured the just liberties of this nation for a long
succession of ages. And therefore a celebrated French writer q, who
concludes, that because Rome, Sparta, and Carthage have lost their
liberties, therefore those of England in time must perish, should have
recollected that Rome, Sparta, and Carthage, were strangers to the trial by
jury.

GREAT as this eulogium may seem, it is no more than this admirable
constitution, when traced to its principles, will be found in sober reason to
deserve. The impartial administration of justice, which secures both our
persons and our properties, is the great end of civil society. But if that be
entirely entrusted to the magistracy, a select body of men, and those
generally selected by the prince or such as enjoy the highest offices in the
state, their decisions, in spight of their own natural integrity, will have
frequently an involuntary bias towards those of their own rank and
dignity: it is not to be expected from human nature, that the few should be
always attentive to the interests and good of the many. On the other hand,
if the power of judicature were placed at random in the hands of the
multitude, their decisions would be wild and capricious, and a new rule of action
would be every day established in our courts. It is wisely therefore ordered, that the principles and axioms of law, which are general propositions, flowing from abstracted reason, and not accommodated to times or to men, should be deposited in the breasts of the judges, to be occasionally applied to such facts as come properly ascertained before them. For here partiality can have little scope: the law is well known, and is the same for all ranks and degrees; it follows as a regular conclusion from the premises of fact pre-established. But in settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to range in; either by boldly asserting that to be proved which is not so, or more artfully by suppressing some circumstances, stretching and warping others, and suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here therefore a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice. For the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once that fact is ascertained, the law must of course redress it. This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens. Every new tribunal, erected for the decision of facts, without the intervention of a jury, (whether composed of justices of the peace, commissioners of the revenue, judges of a court of conscience, or any other standing magistrates) is a step towards establishing aristocracy, the most oppressive of absolute governments. The feodal system, which, for the sake of military subordination, pursued an aristocratical plain in all its arrangements of property, had been intolerable in times of peace, had it not been wisely counterpoised by that privilege, so universally diffused through every part of it, the trial by the feodal peers. And in every country of the continent, as the trial by the peers has been gradually disused, so the nobles have increased in power, till the state has been torn to pieces by rival factions, and oligarchy in effect has been established, though under the shadow or regal government; unless where the miserable commons have taken shelter under absolute monarchy, as the lighter evil of the two. And, particularly, it is a circumstance well worthy an
Englishman's observation, that in Sweden the trial by jury, that bulwark of northern liberty, which continued in its full vigor so lately as the middle of last century, is now fallen into disuse; and that there, though the regal power is in no country so closely limited, yet the liberties of the commons are extinguished, and the government is degenerated into a mere aristocracy. It is therefore, upon the whole, a duty which every man owes to his country, his friends, his posterity, and himself, to maintain to the utmost of his power this valuable constitution in all its rights; to restore it to its ancient dignity, if at all impaired by the different value of property, or otherwise deviated from its first institution; to amend it, wherever it is defective; and, above all, to guard with the most jealous circumspection against the introduction of new and arbitrary methods of trial, which, under variety of plausible pretences, may in time imperceptibly undermine this best preservative of English liberty.

YET, after all, it must be owned, that the best and most effectual method to preserve and extend the trial by jury in practice, would be by endeavouring to remove all the defects, as well as to improve the advantages, incident to this mode of enquiry. If justice is not done to the entire satisfaction of the people, in this method of deciding facts, in spite of all encomiums and panegyrics on trials at the common law, they will resort in search of that justice to another tribunal; though more dilatory, though more expensive, though more arbitrary in its frame and constitution. If justice is not done to the crown by the verdict of a jury, the necessities of the public revenue will call for the erection of summary tribunals. The principal defects seem to be,

1. THE want of a complete discovery by the of the parties. This each of them is now intitled to have, by going through the expense and circuity of a court of equity, and therefore it is sometimes had by consent, even in the courts of law. How far such a mode of compulsive examination is agreeable to the rights of mankind, and ought to be introduced in any country, may be a matter of curious discussion, but is foreign to our present enquiries. It has long been introduced and established in our courts of equity, not to mention the civil law courts; and it seems the

r 2 Whitelocke of parl. 427.
s Mod. Un. Hist. xxxiii. 22.
t Ibid. 17.
height of judicial absurdity, that in the same cause, between the same parties, in the examination of the same facts, a discovery by the oath of the parties should be permitted on one side of Westminster-hall, and denied on the other: or that the judges of one and the same court should be bound by law to reject such a species of evidence, if attempted on a trial at bar; but, when fitting the next day as a court of equity, should be obliged to hear such examination read, and to found their decrees upon it. In short, common reason will tell us, that in the same country, governed by the same laws, such a mode of enquiry should be universally admitted, or else universally rejected.

2. A SECOND defect is a nature somewhat familiar to the first: the want of a compulsive power for the production of books and papers belonging to the parties. In the hands of third persons they can generally be obtained by rule of court, or by adding a clause of requisition to the writ of subpoena, which is then called a subpoena duces tecum. But, in mercantile transactions especially, the firth of the party's own books is frequently decisive; such, for instance, as the daybook of a trader, where the transaction must be recently entered, as really understood at the time; though subsequent events may tempt him to give it a different colour. And as, this evidence may be finally obtained, and produced on a trial at law, by the circuitous course of filing a bill in equity, the want of an original power for the same purposes in the courts of law is liable to the same observations as were made on the preceding article.

3. ANOTHER want is that of powers to examine witnesses abroad, and receive their depositions in writing, where the witnesses reside, and especially when the cause of action arises in a foreign country. To which may be added the power of examining witnesses that are aged, or going abroad, upon interrogatories de bene esse; to be read in evidence if the trial should be deferred till after their death or departure, but otherwise to be totally suppressed. Both these are now very frequently effected by mutual consent, if the parties are open and candid; and they may also be done indirectly at any time, through the channel of a court of equity: but such a practice has never yet been directly adopted as the rule of a court of law.

4. THE administration of justice should not only be chaste, but (like Caesar's wife) should not even be suspected. A jury coming from the neighbourhood is in some respects a great advantage; but is often liable to
strong objections: especially in small jurisdictions, as in cities which are counties of themselves, and such where assises are but seldom holden; or where the question in dispute has an extensive local tendency; where a cry has been raised and the passions of the multitude been inflamed; or where one of the parties is popular, and the other a stranger or obnoxious. It is true that if a whole county is interested in the question to be tried, the trial by the rule of law must be in some adjoining court: but, as there may be a strict interest so minite as not to occasion any bias, so there may be the strongest bias, where the whole county cannot be said to have any pecuniary interest. In all these cases, to summon a jury, labouring under local prejudices, is laying a snare for their consciences: and, though they should have virtue and vigor of mind sufficient to keep them upright, the parties will grow suspicious, and resort under various pretences to another mode of trial. The courts of law will therefore in transitory actions very often change the venue, or county wherein the cause is to be tried: but in local actions, though they sometimes do it indirectly and by mutual consent, yet to effect it directly had absolutely, the parties are driven to the delay and expense of a court of equity; where, upon making out a proper case, it is done upon the ground of being necessary to a fair, impartial, and satisfactory trial.

u See pag. 75.
W Stra. 1777.

cient to keep them upright, the parties will grow suspicious, and resort under various pretences to another mode of trial. The courts of law will therefore in transitory actions very often change the venue, or county wherein the cause is to be tried: but in local actions, though they sometimes do it indirectly and by mutual consent, yet to effect it directly had absolutely, the parties are driven to the delay and expense of a court of equity; where, upon making out a proper case, it is done upon the ground of being necessary to a fair, impartial, and satisfactory trial. The locality of trial required by the common law seems a consequence of the ancient locality of jurisdiction. All over the world, actions transitory follow the person of the defendant, territorial suits must be discussed in the territorial tribunal. I may sue a Frenchman here for a debt contracted abroad: but lands lying in France must be sued for there, and English lands must be sued for in the kingdom of England. Formerly they were usually demanded only in the court-baron of the manor, where the steward could summon of jurors but such as were the tenants of the lord. When the cause was removed to the hundred court, (as seems to have been the course in the Saxon times) the lord of the hundred had a farther power to convoke the inhabitants of different vills to form a jury; observing probably always to intermix among them a stated number of tenants of that manor wherein the dispute arose. When afterwards it came to the county court, the great tribunal of Saxon justice, the sheriff had wider authority, and could impanel a jury from the men of his county at
large: but was obliged (as a mark of the original locality of the cause) to return a competent number of hundredors; omitting the inferior distinction, if indeed it ever existed. And when at length, after the conquest, the king's justiciars drew the cognizance of the cause from the county court, though

x See pag. 294.
y This, among a number of other instances, was the case of the issues directed by the house of lords in the cause between the duke of Devonshire and the miners of the county of Derby, A. D. 1762.
z LL. Edw. Conf. c. 32. Wilk. 203.

they could have summoned a jury from any part of the kingdom, yet they chose to take the cause as they found it, with all its local appendages; triable by a stated number of hundredors, mixed with other freeholders of the county. The restriction as to hundredors hath gradually worn away, and at length entirely vanished a; that of counties still remains, for many beneficial purposes: but, as the king's courts have a jurisdiction co-extensive with the kingdom, there surely can be no impropriety in departing from the general rule, when the great ends of justice warrant and require an exception.

I HAVE ventured to mark these defects, that the just panegyric, which I have given on the trial by jury, might appear to be the result of sober reflection, and nor of enthusiasm or prejudice. But should they, after all, continue unremedied and unsupplied, still (with all its imperfections) I trust that this mode of decision will be found the best criterion, for investigating the truth of facts, that was ever established in any country.

a See pag. 360.

CHAPTER THE TWENTY FOURTH.
OF JUDGMENT, AND ITS INCIDENTS.

IN the following chapter we are to consider the transactions in a cause, next immediately subsequent to arguing the demurrer, or trial of the issue.

IF the issue be an issue of fact; and, upon trial by any of the methods mentioned in the two preceding chapters, it be found for either the
plaintiff or defendant, or specially; or if the plaintiff makes default, or is nonsuit; or whatever, in short, is done subsequent to the joining of issue and awarding the trial, it is entered on record, and is called a postea a. The substance of which is, that postea, afterwards, the said plaintiff and defendant appeared by their attorneys at the place of trial; and a jury, being sworn, found such a verdict; or, that the plaintiff after the jury sworn made default, and did not prosecute his suit; or, as the case may happen. This is added to the roll, which is now returned to the court from which it was sent; and the history of the cause, from the time it was carried out, is thus continued by the postea.

a Append. No. 11. 6.

NEXT follows, sixthly, the judgment of the court upon what has previously passed; both the matter of law and matter of fact being now fully weighed and adjusted. Judgment may however for certain causes be suspended, or finally arrested: for it cannot be entered till the next term after trial had, and that upon notice to the other party. So that if any defect of justice happened at the trial, by surprize, inadvertence, or misconduct, the party may have relief in the court above, by obtaining a new trial; or if, notwithstanding the issue of fact be regularly decided, it appears that the complaint was either not actionable in itself, or not made with sufficient precision and accuracy, the party may supersede it, by arresting or staying the judgment.

1. CAUSES of suspending the judgment by granting a new trial, are at present wholly extrinsic, arising from matter foreign to or dehors the record. Of this fort are want of notice of trial; or any flagrant misbehaviour of the party prevailing towards the jury, which may have influenced their verdict; or any gross misbehaviour of the jury among themselves: also if it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith b; or if they have given exorbitant damages c; or if the judge himself has mis-directed the jury, so that they found an unjustifiable verdict; for these, and other reasons of the like kind, it is the practice of the court to award a new, or second, trial. But if two juries agree in the same or a similar verdict, a third trial is seldom awarded d: for the law will not readily suppose, that the verdict of any one subsequent jury can countervail the oaths of two preceding ones.
THE exertion of these superintendent powers of the king's courts, in setting aside the verdict of a jury and granting a new trial, on account of misbehaviour in the jurors, is of a date ex-

b Law of nisi prius. 303, 4.
c Comb. 357.
d 6 Mod. 22. Salk. 649.
tremely ancient. There are instances, in the year books of the reigns of Edward III e, Henry IV f, and Henry VIII g, of judgments being (stayed (even after a trial at bar) and new venire's awarded, because the jury had eat and drank without consent of the judge, and because the plaintiff had privately given a paper to a juryman before he was sworn. And upon these the chief justice, Glyn, in 1655, grounded the first precedent that is reported in our books h for granting a new trial upon account of excessive damages given by the jury: apprehending with reason, that notorious partiality in the jurors was a principal species of misbehaviour. And, a few years before, a practice took rife in the common pleas i, of granting new trials upon the mere certificate of the judge, unfortified by any report of the evidence, that the verdict had passed against his opinion; though justice Rolle (who allowed of new trials in case of misbehaviour, surprize, or fraud, or if the verdict was notoriously contrary to evidence k) refused to adopt that practice in the court of king's bench. And at that time it was clearly held for law l, that whatever matter was of force to avoid a verdict, ought to be returned upon the postea, and not merely surmised to the court; lest posterity should wonder why a new venire was awarded, without any sufficient reason appearing upon the record. But very early in the reign of Charles the second new trials were granted upon affidavits m; and the former strictness of the courts of law, in respect of new trials, having driven many parties into equity to be relieved from oppressive verdicts, they are now more liberal in granting them: the maxim at present adopted being this, that (in all cases of moment) where justice is not done upon one trial, the injured party is intitled to another n.

g 14 Hen. VII. 1. Bro. Abr. t. verdite. 18.
h Styl. 466.
FORMERLY the only remedy for reversal of a verdict unduly given, was by writ of attaint; of which we shall speak in the next chapter, and which is at least as old as the institution of the grand assise by Henry II o, in lieu of the Norman trial by battle. Such a sanction was probably thought necessary, when, instead of appealing to providence for the decision of a dubious right, it was referred to the oath of fallible or perhaps corrupted men. Our ancestors saw, that a jury might give an erroneous verdict; and, if they did, that it ought not finally to conclude the question in the first instance: but the remedy, which they provided, shews the ignorance and ferocity of the times, and the simplicity of the points then usually litigated in courts of justice. They supposed that, the law being told to the jury by the judge, the proof of fact must be always so clear, that, if they found a wrong verdict, they must be willfully and corruptly perjured. Whereas a juror may find a just verdict from unrighteous motives, which can only be known to the great searcher of hearts; and he may, on the contrary, find a verdict very manifestly wrong, without any bad motive at all: from inexperience in business, incapacity, misapprehension, inattention to circumstances, and a thousand other innocent causes. But such a remedy as this laid the injured party under an insuperable hardship, by making a conviction of the jurors for perjury the condition of his redress.

THE judges saw this; and very early, even for the misbehaviour of jurymen, instead of prosecuting the writ of attain, awarded a second trial: and subsequent resolutions, for more than a century past, have so extended the benefit of this remedy, that the attaint is now as obsolete as the trial by battle which it succeeded: and we shall probably see the revival of the one as soon as the revival of the other. And there I cannot but again admirep the wisdom of suffering time to bring to perfection new remedies, more easy and beneficial to the subject; which, by

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o Ipsi regali institutioni eleganter inserta. (Glanv. l. 2. c. 19.)
p See pag. 268.
degrees, from the experience and approbation of the people supersede the necessity or desire of using or continuing the old.

IF every verdict was final in the first instance, it would tend to destroy this valuable method of trial, and would drive away all causes of consequence to be decided according to the forms of the imperial law, upon depositions in writing; which might be reviewed in a course of appeal. Causes of great importance, titles to land, and large questions of commercial property, come often to be tried by a jury, merely upon the general issue: where the facts are complicated and intricate, the evidence of great length and variety, and sometimes contradicting each other; and where the nature of the dispute very frequently introduces nice questions and subtilities of law. Either party may be surprized by a piece of evidence, which (had he known of its production) he could have explained or answered; or may be puzzled by a legal doubt, which a little recollection would have solved. In the hurry of a trial the ablest judge may mistake the law, and misdirect the jury: he may not be able so to state and range the evidence as to lay it clearly before them; nor to take off the artful impressions which have been made on their minds by learned and experienced advocates. The jury are to give their opinion instanter; that is, before they separate, eat, or drink. And under these circumstances the most intelligent and best intentioned men may bring in a verdict, which they themselves upon cool deliberation would wish to reverse.

NEXT to doing right, the great object in the administration of public justice should be to give public satisfaction. If the verdict be liable to many objections and doubts in the opinion of his counsel, or even in the opinion of by-standers, no party would go away satisfied unless he had a prospect of reviewing it. Such doubts would with him be decisive: he would arraign the determination as manifestly unjust; and abhor a tribunal which he imagined had done him an injury without a possibility of redress.

GRANTING a new trial, under proper regulations, cures all these inconveniences, and at the same preserves entire and renders perfect that most excellent method of decision, which is the glory of the English law. A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party, as if it had never been heard before. No advantage is taken of the former verdict on the one side, or the rule of court for awarding such second trial on the other: and the subsequent verdict, though contrary to the first, imports no tittle of blame upon the
former jury; who, had they possessed the same lights and advantages,
would probably have altered their own opinion. The parties come better
informed, the counsel better prepared, the law is more fully understood,
the judge is more master of the subject; and nothing is now tried but the
real merits of the case.

A SUFFICIENT ground must however be laid before the court, to satisfy
them that is necessary to justice that the cause should be farther
considered. If the matter be such, as did not or could not appear to the
judge who presided at nisi prius, it is desclosed to the court by affidavit: if
it arises from what passed at the trial, it is taken from the judge's
information; who usually makes a special and minute report of the
evidence. Counsel are heard on both sides to impeach or establish the
verdict, and the court give their reasons at the large why a new
examination ought or ought not to be allowed. The true import of the
evidence is duly weighed, false colours are taken off, and all points of law
which arose at the trial are upon full deliberation clearly explained and
settled.

NOR do the courts lend to easy an ear to every application for a review of
the former verdict. They must be satisfied, that there are strong probably
grounds to suppose that the merits have not been fairly and fully
discussed, and that the decision is not agreeable to the justice and truth of
the case. A new trial is not granted, where the value is too inconsiderable
to merit a second examination. It is not granted upon nice and formal
objections, which do not go to the real merits. It is not granted in cases of
strict right or summam jus, where the rigorous exaction of extreme legal
justice is hardly reconcileable to conscience. Nor is it granted where the
scales of evidence hang nearly equal: that, which leans against the former
verdict, ought always very strongly to preponderate.

IN granting such farther trial (which is matter of found discretion) the
court has also an opportunity, which it seldom fails to improve, of
supplying those defects in this mode of trial which were stated in the
preceeding chapter; by laying the party applying under all such equitable
terms, as his antagonist shall desire and mutually offer to comply with:
such as the discovery of some facts upon oath; the admissions of others,
not intended to be litigated; the production of deeds, books, and papers;
the examination of witnesses, infirm or going beyond sea; and the like.
And the delay and expense of this proceeding are so small and trifling, that
it never can be moved for to gain time or to gratify humour. The motion must be made within the first four days of the next succeeding term, within which term it is usually heard and decided. And it is worthy observation, how infinitely superior to all others the trial by jury approves itself, even in the very mode of its revision. In every other country of Europe, and in those of our own tribunals which conform themselves to the process of the civil law, the parties are at liberty, whenever they please, to appeal from day to day and from court to court upon questions merely of fact; which is a perpetual source of obstinate chicane, delay, and expensive litigation q. With us no new trial is allowed

q Not many years ago an appeal was brought to the house of lords from the court of session in Scotland, in a cause between Napier and Macfarlane. It was instituted in March 1745; and, after many interlocutory orders and sentences below, appealed from and reheard as far as the course of proceeding's would admit, was finally determined in April 1749: the question being only on the property in an ox, adjudged to be of the value of three guineas. No pique or spirit could have made such a cause, in the court of king's bench or common pleas, have lasted a tenth of the time, or have cost a twentieth part of the expense.

unless there by a manifest mistake, and the subject matter be worthy of interposition. The party who thinks himself aggrieved may still, if he pleases, have recourse to his writ of attaint after judgment; in the course of the trial he may demur to the evidence, or tender a bill of exceptions. And, if the first is totally laid aside, and the other two very seldom put in practice, it is because long experience has shewn, that a motion for a second trial is the shortest, cheapest, and most effectual cure for all imperfections in the verdict; whether they arise from the mistakes of the parties themselves, of their counsel or attornies, or even the judge or jury.

2. ARRESTE of judgment arise from intrinsic causes, appearing upon the face of the record. Of this kind are, first, where the declaration varies totally from the original writ; as where the writ is in debt or detinue, and the plaintiff declares in an action on the case for an assumpsit: for, the original writ out of chancery being the foundation and warrant of the whole proceedings in the common pleas, if the declaration does not pursue the nature of the writ, the court's authority totally fails. Also, secondly, where the verdict materially differs from the pleadings and issue thereon; as if, in an action for words, it is laid in the declaration that the defendant
said, the plaintiff is a bankrupt;? and the verdict finds specially that he
said, the plaintiff will be a bankrupt. Or, thirdly, if the case laid in the
declaration is not sufficient in point of law to found an action upon. And
this is an invariable rule with regard to arrests of judgment upon matter of
law, that whatever is alleged in arrest of judgment must be such matter, as
would upon demurrer have been sufficient to overturn the action or plea.
As if, on an action for slander in calling the plaintiff a Jew, the defendant
denies the words, and issue is joined thereon; now, if a verdict be found for
the plaintiff, that the words were actually spoken, whereby the fact is
established, still the defendant may move in arrest of judgment, that to call
a man a Jew is not actionable: and, if the court be of that opinion, the
judgment shall be arrested, and never entered
for the plaintiff. But the rule will not hold e converso, that every thing that
may be alleged as cause of demurrer will be good in arrest of judgment:?
for if a declaration or plea omits to state some particular circumstance,
without proving of which, at the trial, it is impossible to support the action
or defence, this omission shall be aided by a verdict. As if, in an action of
trespass, the declaration doth not allege that the trespass was committed
on any certain dayr; or if the defendant justifies, by prescribing for a right
of common for his cattle, and does not plead that his cattle were levant and
couchant on the lands; though either of these defects might be good cause
to demur to the declaration or plea, yet if the adverse party omits to take
advantage of such omission in due time, but takes issue, and has a verdict
against him, these exceptions cannot after verdict be moved in
arrest of
judgment. For the verdict ascertains those facts, which before from the
inaccuracy of the pleadings might be dubious; since the law will not
suppose, that a jury under the inspection of a judge would find a verdict
for the plaintiff or defendant, unless he had proved those circumstances,
without which his general allegation is defective t. Exceptions therefore,
that are moved in arrest of judgment, must be much more material and
glaring than such as will maintain a demurrer: or, in other words, many
inaccuracies and omissions, which would be fatal, if early observed, are
cured by a subsequent verdict; and no suffered in the last stage of a cause,
to unravel the whole proceedings. But if the thing omitted be essential to
the action or defence, as if the plaintiff does not merely state his title in a
defective manner, but sets forth a title that is totally defective in itselfu, or
if to an action of debt the defendant pleads not guilty instead of nil debetw,
these cannot be cured by a verdict for the plaintiff in the first case, or for
the defendant in the second.
IF, by the misconduct or inadvertence of the pleaders, the issue be joined on a fact totally immaterial, or insufficient to determine the right, so that the court upon the finding cannot know for whom judgment ought to be given; as if, on an action on the case in assumpsit against an executor, he pleads that he himself (instead of the testator) made no such promise; or if, in an action of debt on bond conditioned to pay money on or before a certain day, the defendant pleads payment on the day (which, if found for the plaintiff, would be inconclusive, as it might have been paid before) in these cases the court will after verdict award a repleader, quod partes replacitent: unless it appears from the whole record that nothing material can possibly be pleaded in any shape whatsoever, and then a repleader would be fruitless. And, whenever a repleader is granted, the pleadings must begin de novo at that stage of them, whether it be the plea, replication, or rejoinder, &c, wherein there appears to have been the first defect, or deviation from the regular course.

IF judgment is not by some of these means arrested within the first four days of the next term after the trial, it is then to be entered on the roll, or record. Judgments are the sentence of the law, pronounced by the court upon the matter contained in the record; and are of four sorts. First, where the facts are confessed by the parties, and the law determined by the court; as in case of judgment upon demurrer: secondly, where the law is admitted by the parties, and the facts disputed; as in case of judgment on a verdict: thirdly, where both the fact and the law arising thereon are admitted by the defendant: which is the case of judgments by confession or default: or, lastly, where the plaintiff is convinced that either fact, or law, or both, are insufficient to support his action, and, therefore abandons or withdraws his prosecution; which is the case in judgments upon a nonsuit or retraxit.
THE judgment, though pronounced or awarded by the judges, is not their
determination or sentence, but the determination and sentence of the law.
It is the conclusion that naturally and regularly follows from the premises
of law and fact, which stand thus: against him, who hath rode over my
corn, I may recover damages by law; but A hath rode over my cord;
therefore I shall recover damages against A. If the major proposition be
denied, this is a demurrer in law: if the minor, it is then an issue of fact:
but if both be confessed (or determined) to be right, the conclusion or
judgment of the court cannot but follow. Which judgment or conclusion
depends not therefore on the arbitrary caprice of the judge, but on the
settled and invariable principles of justice. The judgment, in short, is the
remedy prescribed by law for the redress of injuries; and the suit or action
is the vehicle or means of administering it. What that remedy may be, is
indeed the result of deliberation and study to point out, and therefore the
style of the judgment is, not that it is decreed or resolved by the court, for
then the judgment might appear to be their own; but, it is considered,?
consideratum est per curiam, that the plaintiff do recover his damages,
this debt, his possession, and the like: which implies that the judgment is
none of their own; but the act of law, pronounced and declared by the
court, after due deliberation and enquiry.

ALL these species of judgments are either interlocutory or final.
Interlocutory judgments are such as are given in the middle of a cause,
on upon some plea, proceeding, or default, which is only intermediate, and
does not finally determine or complete the suit. Of this nature are all
judgments for the plaintiff upon pleas in abatement of the suit or action: in
which it is considered by the court, that the defendant do answer over,
respondeat oysters that is, put in a more substantial plea b. It is easy to
observe, that the judgment here given is not final, but merely interlocu-
b 2 Saund. 30.

tory; for there are afterwards farther proceedings to be had, when the
defendant hath put in a better answer.

BUT the interlocutory judgments, most usually spoken of, are those
incomplete judgments, whereby the right of the plaintiff is indeed
established, but the quantum of damages sustained by him is not
ascertained: which is a matter that cannot be done without the
intervention of a jury. As by the old Gothic constitution the cause was not completely finished, till the nemenda or jurors were called inad executionem decretorum judicii, ad aestimationem pretii, damni, lucri, &c. This can only happen where the plaintiff recovers; for when judgment is given for the defendant, it is always complete as well as final. And this happens, it the first place, where the defendant suffers judgment to go against him by default, or nihil dicit; as if he puts in no plea at all to the plaintiff’s declaration: by confession or cognovit actione, where he acknowledges the plaintiff’s demand to be just: or by non sum informatus, when the defendant’s attorney declares he has no instructions to say any thing in answer to the plaintiff, or in defence of his client; which is a species of judgment by default. If these, or any of them, happen in actions where the specific thing sued for is recovered, as in actions of detinue or debt for a sum or thing certain, the judgment is absolutely complete. And therefore it is very usual, in order to strengthean a bond-creditor’s security, for the debtor to execute a warrant of attorney to any one, empowering him to confess a judgment by either of the ways just now mentioned (by nihil dicit, cognovit actione, or non sum informatus) in an action of debt to be brought by the creditor for the specific sum due: which judgment, when confessed, is absolutely complete and binding. But where damages are to be recovered, a jury must be called in to assess them; unless the defendant, to save charges, will confess the whole damages laid in the declaration: otherwise the entry of the judgment is, that the plaintiff ought to recover his damages, (indifferently) but, because the court know not what damages the said plaintiff hath sustained, therefore the sheriff is commanded, that by the oaths of twelve honest and lawful men he enquire into the said damages, and return such inquisition when taken into court. This process is called a writ of enquiry: in the execution of which the sheriff fits as judge, and tries by a jury, subject to nearly the same law and conditions as the trial by jury at nisi prius, what damages the plaintiff hath really sustained; and when their verdict is given, which must asses some damages (but to what amount they please) the sheriff returns the inquisition into court, which is entered upon the roll in manner of a postea; and thereupon it is considered, that the plaintiff do recover the exact sum of the damages so assessed. In like manner, with a demurrer is determined for the plaintiff upon an action wherein damages are
recovered, the judgment is also incomplete, till a writ of enquiry is awarded to assess damages, and returned; after which the judgment is completely entered.

FINAL judgments are such as at once put an end to the action, by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for. In which case if the judgment be for the plaintiff, it is also considered that the defendant be either amerced, for his willful delay of justice in not immediately obeying the king's writ by rendering the plaintiff his due d; or be taken up, capiatur, to pay a fine to the king, in case of any forcible injury e. Though now by statute 5 & 6 W. 7 M. c. 12. no writ of capias shall issue for this fine, but the plaintiff shall pay 6 s 8 d, and be allowed it against the defendant among his other costs. And therefore in judgments in the court of common pleas they enter that the fine is remitted, and in the court of king's bench they now take no notice of any fine or capias at all f. But if judgment be for the defendant, then it is considered, that the plaintiff and his pledges of prosecuting be (nominally) amerced for his false suit, and that the defendant

d 5 Rep. 49.
e Append. No. II. 4.
f Salk. 54. Carth. 390.

may go without a day, eat fine die, that is, without any farther continuance or adjournment; the king's writ, commanding his attendance, being now fully satisfied, and his innocence publicly cleared g.

THUS much for judgments; to which costs are a necessary appendage; it being now as well the maxim of ours as of the civil law, that victus victori in expensis condemnandus est h. Though the common law did not professedly allow any, the amercement of the vanquished party being his only punishment. The first statute which gave costs, eo nomine, to the demandant in a real action was the statute of Gloucester, 6 Edw. I. c. 1. as did the statute of Marlbridge 52 Hen. III. c. 6. to the defendant in one particular case, relative to wardship in chivalry: though in reality costs were always considered and included in that quantum of damages, in such actions where damages are given; and, even now, costs for the plaintiff are always entered on the roll as increase of damages by the court i. But, because those damages were frequently inadequate to the plaintiff's expenses, the statute of Gloucester orders costs to be also added; and

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d 5 Rep. 49.
e Append. No. II. 4.
f Salk. 54. Carth. 390.
gh i
farther directs, that the same rule shall hold place in all cases where the party is to recover damages. And therefore in such actions where no damages were then recoverable (as in quare impedit, in which damages were not given till the statute of Westm. 2. 13. Edw. I.) no costs are now allowed k; unless they have been expressly given by some subsequent statute. The statute 3. Hen. VII. c. 10. was the first which allowed any costs on a writ of error. But no costs were allowed the defendant in any shape, till the statutes 23 Hen. VIII. c. 15. 4 Jac. I. c. 3. 8 & 9 W. III. c. 11. and 4 & 5 Ann. c. 16. which very equitably gave the defendant, if he prevailed, the same costs as the plaintiff would have had, in case he had recovered. These costs on both sides are taxed and moderated by the prothonotary, or other proper officer of the court.

g Append. No. III. 6.
h Cod. 3. 1. 13.
i Append. No. II. 4.

THE king (and any person suing to his usel) shall neither pay, nor receive costs: for besides that he is not included under the general words of these statutes, as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them. And it seems reasonable to suppose, that the queen-consort participates of the same privilege; for, in actions brought by her, she was not at the common law obliged to find pledges of prosecution, nor could be amerced in case there was judgment against her m. In two other cases an exemption also lies from paying costs. Executors and administrators, when sui
n at law for the right of the deceased, shall pay none n. And paupers, that is such as will swear themselves not worth five pounds, are, by statute 11 Hen. VII. c. 12. to have original writs and subpoenas gratis, and counsel and attorney assigned them without fee; and are excused from paying costs, when plaintiffs, by the statute 23 Hen. VIII. c. 15. but shall suffer other punishment at the discretion of the judges. And it was formerly usual to give such paupers, if nonsuited, their election either to be whipped or pay the costso: though that practice is now disused p. It seems however agreed, that a pauper may recover costs, though he pay none; for the counsel and clerks are bound to give their labour to him, but not to his antagonistsq. To prevent also trifling and malicious actions, for words, for assault and battery, and for trespass, it is enacted by statutes 43 Eliz. c. 6. 21 Jac. I. c. 16. and 22 & 23 Car. II. c. 9 136. that, where the jury who try any of these actions shall given less
damages than 40 s. the plaintiff shall be allowed no more costs than
damages, unless the judge before whom the cause is tried shall certify
under his hand on the back of the record, that an actual battery (and not
an assault only) was proved, or that in trespass the freehold or title of the
land came chiefly in question. Also by statute 4 & 5 W. & M. c. 23. and 8 &
9 W. III. c. 11. if the trespass were committed

m F. N. B. 101. Co. Litt. 133.
n Cro. Jac. 229.
o 1 Sid. 261. 7 Mod. 114.
p Salk. 506.
q 1 Equ. Caf. abr. 125.

in hunting or sporting by an inferior tradesman, or if it appear to be
willfully and maliciously committed, the plaintiff shall have full costs r,
though his damages as assessed by the jury amount to less than 40 s.

AFTER judgment is entered, execution will immediately follow, unless the
party condemned thinks himself unjustly aggrieved by any of these
proceedings; and then he has his remedy to reverse them by several writs
in the nature of appeals, which we shall consider in the succeeding
chapter.

r See pag. 214, 215.

CHAPTER THE TWENTY FIFTH.
OF PROCEEDINGS, IN THE NATURE OF APPEALS.

PROCEEDINGS, in the nature of appeals from the proceedings of the
king's courts of law, are of various kinds; according to the subject matter
in which they are concerned. They are principally three.

I. A WRIT of attaint: which lieth to enquire whether a jury of twelve men
gave a false verdict a; that so the judgment following thereupon may be
reversed: and this must be brought in the life-time so him for whom the
verdict was given, and of two at least of the jurors who gave it. This lay, at
the common law, only upon verdicts in actions for such personal injuries
as did not amount to trespass. For in real wrongs the party injured had
redress by writ of right; but, after verdict against him in personal suits, he
had no other remedy: and it did not lie in actions of trespass, for a very
extraordinary reason; because, if the verdict was set aside, the king would
lose his fine. But by statute Westm. 1. 3 Edw. I. c. 38. it was given in all
pleas of land, franchise, or freehold: and, by several subsequent statutes,
a Finch. L. 484.
b Bro. Abr. t. atteint. 42.
in the reigns of Edward III c and his grandson d, it was allowed in almost
every action, except in a writ of right; for there no attaint lay, either by
common law or statute, because it was determined by the grand assise,
consisting of sixteen jurors e.

THE jury who are to try this falve verdict must be twenty four, and are
called the grand jury; for the law wills not that the oath of one jury of
twelve men should be attainted or set aside by an equal number, nor by
less indeed than double the former. And he that brings the attaint can give
no other evidence to the grand jury, than what was originally given to the
petit. For as their verdict is now trying, and the question is whether or no
they did right upon the evidence that appeared to them, the law judged it
the highest absurdity to produce any subsequent proof upon such trial,
and to condemn the prior jurisdiction for not believing evidence which
they never knew. But those against whom it is brought are allowed, in
affirmance of the first verdict, to produce new matter f: because the petit
jury may have formed their verdict upon evidence of their own knowledge,
which never appeared in court; and because very terrible was the
judgment which the common law inflicted upon them, if the grand jury
found their verdict a false one. The judgment was, 1. That they should
lose their liberam legem, and become for ever infamous. 2. That they should
forfeit all their goods and chattels. 3. That their lands and tenements
should be seised into the king’s hands. 4. That their wives and children
should be thrown down. 6. That their trees should be rooted up. 7. That
their meadows should be ploughed. 8. That their bodies should be cast into
goal. 9. That the party should be restored to all that he lost by reason of the
unjust verdict. But as the severity of this punishment had its usual effect,
in preventing the law from being executed, therefore by the statute

c Stat 1 Edw. c. 6. 5 Edw. III. c. 7. 28 Edw. III. c. 8. 34 Edw. III. c. 7.
d Stat. 9 Ric. II. c. 3.
11 Hen. VII. c. 24. revived by 23 Hen. VIII. c. 3. a more moderate punishment was inflicted upon attainted jurors; viz. perpetual infamy, and, if the cause of action were above 40 l. value, a forfeiture of 20 l. apiece by the jurors; or, if under 40 l, then 5 l. apiece; to be divided between the king and the party injured. So that a man may now bring an attaint either upon the statute or at common law, at his election; and in both of them may reverse the former judgment. But the practice of setting aside verdicts upon motion, and granting new trials, has so superseded the use of both sorts of attains, that I have not observed any instance of an attaint in our books, later than the sixteenth century.

By the old Gothic constitution indeed no certificate of a judge was allowed, in matters of evidence, to counteract the oath of the jury: but their verdict, however erroneous, was absolutely final and conclusive. Testes sunt de judice et de actis ejus; judex vero de ipsis vicissim testari non potest, vere an falsa jurent: qualicunque enim eorum assertioni standum est et judicandum. Yet they had a proceeding from whence our attaint may be derived. If, upon a lawful trial before a superior tribunal, they were found to have given a false verdict, they were fined, and rendered infamous for the future.

II. AN audita querela is where a defendant, against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, may be relieved upon good matter of discharge, which has happened since the judgment: as if the plaintiff hath given him a general release; or if the defendant hath paid the debt to the plaintiff, without entering satisfaction on the record. In these and the like cases, wherein the defendant hath good matter to plead, but hath had no opportunity of pleading it, (either at the beginning of the

suit, or puis darrein continuance, which, as was shewn in a former chapter, must always be before judgment) an audita querela lies, in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. It is a
writ directed to the court, stating that the complaint of the defendant hath been heard, audita querela defendentis, and then setting out the matter of the complaint, it at length enjoins the court to call the parties before them, and having heard their allegations and proofs, to cause justice to be done between them. It also lies for bail, when judgment is obtained against them by scire facias to answer the debt of their principal, and it happens afterwards that the original judgment against their principal is reversed: for here the bail, after judgment had against them, have no opportunity to plead this special matter, and therefore they shall have redress by audita querela; which is a writ of a most remedial nature, and seems to have been invented, lest in any case there should be an oppressive defect of justice, where a party has a good defence, but by the ordinary forms of law had no opportunity to make it. but the indulgence now shewn by the courts in granting a summary relief upon motion, in cases of such evident oppression, and driven it quite out of practice.

III. BUT, thirdly, the principal method of redress for erroneous judgments in the king's courts of record, is by writ of error to some superior court, of appeal.

A WRIT of error lies for some supposed mistake in the proceedings of a court of record; for, to amend errors in a base court, not of record, a writ of false judgment lies. The writ of error only lies upon matter of law arising upon the face of the proceedings; for that no evidence is required to substantiate or support it: and there is no method of reversing an error in the de-

k See pag. 317.
m 1 Roll. Abr. 308.
n Lord Raym. 439.
o Append. No. III. 6.
p Finch. L. 484.

termination of facts, but by an attaint, or a new trial, to correct the mistakes of the former verdict.

FORMERLY the suitors were much perplexed by writs of error brought upon very slight and trivial grounds, as mis-spellings and other mistakes of the clerks, all which might be amended at the common law, while all the
proceedings were in paper q; for they were then considered as only in fieri, and therefore subject to the control of the courts. But, when once the record was made up, it was formerly held, that by the common law no amendment could be permitted, unless within the very term in which the judicial act so recorded was done: for during the term the record is in the breast of the court; but afterwards it admitted of no alteration r. But now the courts are become more liberal; and, where justice requires it, will allow of amendments at any time while the suit is depending, notwithstanding the record be made up, and the term be past. For they at present consider the proceedings as in fieri, till judgment is given; and therefore that, till then, they have power to permit amendments by the common law. Mistakes are also effectually helped by the statutes of amendment and jeofails: so called, because when a pleader perceives any slip in the form of his proceedings, and acknowledges such error (jeo faile) he is at liberty by those statutes to amend it; which amendment is seldom actually made, but the benefit of the acts is attained by the court's overlooking the exception s. These statutes are many in number, and the provisions in them too minute and particular to be here taken notice of, otherwise than by referring to the statutes themselves t; by which all trifling exceptions are so thoroughly guarded against, that writs of error cannot now be maintained, but for some material mistake assigned.

q 4 Bur. 1099.
r Co. Litt. 260.
s Stra,. 1011.
(styled in 1 Ventr. 100. an omnipotent act) 4 & 5 Ann. c. 16. 9 Ann. c. 20. 5 Geo. I. c. 13.

THIS is at present the general doctrine of amendments; and its rise and history are somewhat curious. In the early ages of our jurisprudence, when all pleadings were ore tenus, if a slip was perceived and objected to by the opposite party or the court, the pleader instantly acknowledged his error and rectified his plea; which gave occasion to that length of dialogue reported in the ancient year-books. So liberal were then the sentiments of the crown as well as the judges, that in the statute of Wales, made at Rothelan, 12 Edw. I. the pleadings are directed to be carried on in that principality, sine calumpnia verborum, non observata illa dura consuetudine, qui cadit a syllaba cadit a tota causa. The judgments were
entered up immediately by the clerks and officers of the court; and if any mis-entry was made, it was rectified by the minutes or the remembrance of the court itself.

WHEN the treatise by Britton was published, in the name and by authority of the king, (probably about the 13 Edw. I. because the last statutes therein referred to are those of Winchester and Westminster the second) a check seems intended to be given to the unwarrantable practices of some judges, who had made false entries on the rolls to cover their own misbehaviour, and had taken upon them by amendments and rasures to falsify their own records. The king therefore declares that although we have granted to our justices to make record of pleas pleaded before them, yet we will not that their own record shall be a warranty for their own wrong, nor that they may erase their rolls, nor amend them, nor record them, contrary to their original enrollment. The whole of which, taken together, amounts to this, that a record surreptitiously or erroneously made up, to stifle or pervert the truth, should not be a sanction for error; and that a record, originally made up according to the truth of the case, should not afterwards by any private rasure or amendment be altered to any sinister purpose.

u Britt. proëm. 2, 3.

BUT when afterwards king Edward, on his return from his French dominions is the seventeenth year of his reign, after upwards of three years absence, found it necessary (or convenient) to prosecute his judges for their corruption and other mal-practices, the perversion of judgments by erasing and altering records was one of the causes assigned for the heavy punishments inflicted upon almost all the king’s justices, even the most able and upright. The severity of which proceedings seems so to have alarmed the succeeding judges, that, through a fear of being said to do wrong, they hesitated at doing that which was right. As it was so hazardous to alter a record, even from compassionate motives, (as happened in Hengham's case, which in strictness was

w Judicia perverterunt, et in aliis erraverunt. (Matth. Westm. A. D. 1289.)

x Among the other judges, sir Ralph Hengham chief justice of the king’s bench is said to have been fined 7000 marks, sir Adam Stratton chief baron of the exchequer 34000 marks, and Thomas Wayland chief justice of the common pleas to have been attainted of felony, and to have abjured the realm, with a forfeiture of all his estates; the whole amount of the
forfeitures being upwards of 100000 marks, or 70000 pounds, (3 Pryn. Rec. 401, 402.) An incredible sum in those days, before paper credit was in use, and when the annual salary of a chief justice was only sixty marks. (Clauf. 6 Edw. I. m. 6. Dugd. chron. fer. 26.) The charge against sir Ralph Hengham (a very learned judge, to whom we are obliged for two excellent treatises of practice) was only, according to a tradition that was current in Richard the third's time, (Yearbook. M. 2 Ric. III. 10.) his altering out of mere compassion a fine, which was set upon a very poor man, from 13 s. 4 d. to 6 s. 8 d. for which he was fined 800 marks; a more probable sum that 7000. It is true, the book calls the judge so punished Ingham and not Hengham: but I find no judge of the name of Ingham in Dugdale's Series; and sir Edward Coke (r Inst. 255.) and sir Matthew Hale (1 P. C. 646.) understand it to have been the chief justice. And certainly his offences was nothing very atrocious or disgraceful: for though removed from the king's bench at this time (together with the rest of the judges) we find him about twelve years afterwards made chief justice of the common pleas, (Pat. 29 Edw. I. m. 7. Dugd. chron. fer. 32.) in which office he continued till his death in 2 Edw. II. (Clauf. 1 Edw. II. m. 19. Pat. 2 Edw. II. p. 1. m. 9. Dugd. 34. Selden. pref. to Hengham.) There is an appendix to this tradition, remembered by justice Southcote in the reign of queen Elizabeth; (3 Inst. 72. 4 Inst. 255.) that with this fine of chief justice Hengham a clock-house was built at Westminster, and furnished with a clock, to be heard into Westminster-hall. Upon which story I shall only remark, that the first introduction of clocks was not till an hundred years afterwards, about the end of the fourteenth century. (Encyclopedie. tit. horloge.)

certainly indefensible) they resolved not to touch a record any more; but held that even palpable errors, when enrolled and the term at an end, were too sacred to be rectified or called in question: and, because Britton had forbidden all criminal and clandestine alterations, to make a record speak a falsity, they conceived that they might not judicially and publicly amend it, to make it agreeable to truth. In Edward the third's time indeed, they once ventured (upon the certificate of the justice in eyre) to estreat a larger fine than had been recorded by the clerk of the court below; but, instead of amending the clerk's erroneous record, they made a second enrollment of what the justice had declared ore tenus; and left it to be settled by posterity in which of the two rolls that absolute verity resides, which every record is said to import in itself. And, in the reign of Richard the second, there are instances of their refusing to amend the most palpable errors and mis-entries, unless by the authority of parliament.
TO this real sullenness, but affected timidity, of the judges such a narrowness of thinking was added, that every slip (even of a fallable or a letter b) was now held to be fatal to the pleader, and overturned his client's cause. If they durst not, or would not, set right mere formal mistakes at any time upon equitable terms and conditions, they at least should have held, that trifling objections were at all times inadmissible; and that more solid exceptions in point of form came too late when the merits had been tried. They might, through a decent degree of tenderness, have excused themselves from amending in criminal, and especially in capital, cases. They needed not have granted an amendment, where it would work in injustice to either party; or where he could not be put in as good a condition, as if his adversary

y 1 Hal. P. C. 647.
z 1 Leon. 183. Co. Litt. 117. See pag. 331.
a 1 Hal. P. C. 648.
c In those days it was strictly true, what Ruggle (in his ignoramus) has humorously applied to more modern pleadings; inoffra lege unum comma evertit totum placitum.

had made no mistake. And, if it was feared that an amendment after trial might subject the jury to an attaint, how easy was it to make waiving the attaint the condition of allowing the amendment! And yet these were among the absurd reasons alleged for never suffering amendments at alleged for never suffering amendments at all d!

THE precedents then set were afterwards most scrupulously followed c, to the great obstruction of justice, and ruin of the suitors; who have formerly suffered as much by these obstinate scruples and literal strictness of the courts, as they could have done even by their iniquity. After verdicts and judgments upon the merits, they were frequently reversed for slips of the pen or mis-spellings: and justice was perpetually intangled in a net of mere technical jargon. The legislature hath therefore been forced to interpose, by no less than twelve statutes, to remedy these opprobrious niceties: and its endeavours have been of late of well seconded by judges of a more liberal cast, that this unseemly degree of strictness is almost entirely eradicated; and will probably in a few years be no more
remembered, that the learning of essoins and defaults, or the counterpleas of voucher, are at present. But, to return to our writs of error.

IF a writ of error be brought after verdict, he that brings the writ, or that is plaintiff in error, must in most cases find substantial pledges of prosecution, or bail f: to prevent delays by frivolous pretences to appeal; and for securing payment of costs and damages, which are now payable by the vanquished party in all, except a few particular, instances, by virtue of the several statutes, recited in the margin g.

A WAIT of error lies from the inferior courts of record in England into the king's bench h, and not into the common pleas i. Also from the king's bench in Ireland to the king's bench in England. It likewise may be brought from the common pleas at Westminster to the king's bench; and then from the king's bench the cause is removeable to the house of lords. From proceedings on the law side of the exchequer a writ of error lies into the court of exchequer chamber before the lords. From proceedings on the law side of the exchequer a writ of error lies into the court of exchequer chamber before the lord chancellor, lord treasurer, and the judges of the court of king's bench and common pleas: and from thence it lies to the house of peers. From proceedings in the king's bench, in debt, detinue, covenant, account, case, ejectment, or trespass, originally begun therein (except where the king is party) it lies to the exchequer chamber, before the justices of the common pleas, and barons of the exchequer; and from thence also to the house of lords h: but where the proceedings in the king's bench are commenced by original writ, sued out of chancery, (which must be for some forcible injury, in which the king is supposed to be a party, in order to punish the trespass committed in a criminal manner) this takes the case out of the general rule laid down by the statute; so that the writ of error then lies, without any intermediate stage of appeal, directly to the house of lords, the dernier resort for the ultimate decision of every civil action. Each court of appeal, in their respective stages, may upon hearing the matter of law in
which the error is assigned, reverse or affirm the judgment of the inferior courts; but none of them are final, save only the house of peers, to whose judicial decisions all other tribunals must therefore submit and conform their own. And thus much for reversal or affirmance of judgments by writs in the nature of appeals.

i Finch. L. 480. Dyer. 250.
k Stat. 27 Eliz. c. 8.

CHAPTER THE TWENTY SIXTH.
OF EXECUTION.

IF the regular judgment of the court, after the decision of the suit, be not suspended, superseded, or reversed, by one or other of the methods mentioned in the two preceding chapters, the next and last step is the execution of that judgment; or, putting the sentence of the law in force. This is performed in different manners, according to the nature of the action upon which it is founded, and of the judgment which is had or recovered.

IF the plaintiff recovers in an action real or mixed, wherein the seisin or possession of land is awarded to him, the writ of execution shall be an habere facias seisinam, or writ of seisin, of a freehold; or an habere facias possessionem, or writ of possession a, of a chattel interest b. These are writs directed to the sheriff of the county, commanding him to give actual possession to the plaintiff of the land of recovered: in the execution of which, the sheriff may take with him the posse comitatus, or power of the county; and may justify breaking open doors, if the possession be not quietly delivered. But, if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of the door, in the name of seisin, is sufficient execution of the writ. Upon a presentation to a benefice recovered in a quare impedit, or assise

a Append. No. II. 4  
b Finch. L. 470.

of darrein presentment, the execution is by a writ de clerico admittendo; directed, not to the sheriff, but to the bishop or his metropolitan, requiring them to admit and institute the clerk of the plaintiff.
IN other actions where the judgment is, that something in special be done or rendered by the defendant, then, in order to compel him so to do, and to see the judgment executed, a special writ of execution issues to the sheriff according to the nature of the case. As upon an assise or quod permittal prosternere for a nuisance, where one part of the judgment is quod amoveatur, a writ goes to the sheriff to abate it at the charge of the party, which likewise issues even in case of an indictment c. Upon a replevin the writ of execution is that de retorno habendo d; and, if the distress be eloigned, the defendant shall have a capias in withernam e, but on the plaintiff's tendering the damages and submitting to a fine the process in withernam shall be stayed f. In detinue, after judgment, the plaintiff shall have a distringas, to compel the defendant to deliver the goods, by repeated distresses of his chattels; or else a scire facias against any third person in whose hands they may happen to be, to shew cause why they should not be delivered: and, if the defendant still continues obstinate, the sheriff shall summon an inquest to ascertain the plaintiff's damages, which shall be levied (like other damages) by seizure of the person or goods of the defendant. So that, after all, in replevin and detinue, (the only actions for recovering specific possession of personal chattels) if the wrongdoer be very perverse, he cannot be compelled to a restitution of the identical thing taken or detained; but he still has his election, to deliver the goods, or their value h: in imperfection in the law, that results from the nature of personal property, which is easily concealed or conveyed out of the reach of justice, and not, like land and other real property, always amenable to the magistrate.

c Comb. 10.
d See pag. 150.
e See pag. 148.
f 2 Leon. 174.
h Keilw. 64.

EXECUTIONS in actions where money only is recovered, as a debt or damages, (and not any specific chattel) are of five sorts: either against the body of the defendant; or against his goods and chattels; or against his goods and the profits of his lands; or against his goods and the possession of his land; or against all three, his body, lands, and goods.
1. THE first of these species of execution, is by writ of capias ad satisfaciendum i; which distinguishes it from the former capias, ad respondendum, which lies to compel an appearance at the beginning of a suit. And, properly speaking, this cannot be sued out against any but such as were liable to be taken upon the former capias k. The intent of it 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, peers or members of parliament, nor against executors or administrators, nor against such other persons as could not be originally held to bail. And sir Edward Coke also gives us a fungular instance l, where a defendant in 14 Edw. III. was discharged from a capias because he was of so advanced an age, quod poenam imprisonamenti fubire non potest. If an action be brought against an husband and wife for the debt of the wife, when sole, and the plaintiff recovers judgment, the capias shall issue to take both the husband and wife in executionm: but, if the action was originally brought against herself, when sole, and pending the suit she marries, the capias shall be awarded against her only, and not against her husband n. Yet, if judgment be recovered against an husband and wife for the contract, nay even for the personal misbehaviour o, of the wife during her coverture, the capias shall issue against the husband only: which is one of the greatest privileges of English wives.

i Append. No. III. 7.
k 3 Rep. 12.
l 1 Inst. 289.
m Moor. 704.
n Cro. Jac. 323.
o Cro. Car. 513.

THE writ of capias ad satisfaciendum is an execution of the highest nature, in as much as it deprives a man of his liberty, till he makes the satisfaction awarded; and therefore, when a man is once taken in execution upon this writ, no other process can be sued out against his lands or goods. Only, by statute 21 Jac. I. c. 24. if the defendant dies, while charged in execution upon this writ, the plaintiff may, after his death, sue out new executions against his lands, goods, or chattels. The writ is directed to the sheriff, commanding him to take the body of the defendant and have him at Westminster, on a day therein named, to make the plaintiff satisfaction for his demand. And if he does not then make satisfaction, he must remain in custody till he does. This writ may be sued out as may all other executory
process, for costs, against a plaintiff as well as a defendant, when judgment is had against him.

WHEN a defendant is once in custody upon this process, he is to be kept in arcta et salva custodia: and, if he be afterwards seen at large, it is an escape; and the plaintiff may have an action thereupon against the sheriff for his whole debt. For though, upon arrests and what is called mesne process, being such as intervenes between the commencement and end of a suit, the sheriff, till the statute 8 & 9 W. III. c. 27. might have indulged the defendant as he pleased, so as he produced him in court to answer the plaintiff at the return of the writ: yet, upon a taking in execution, he could never give any indulgence; for, in that case, confinement is the whole of the debtor's punishment, and of the satisfaction made to the creditor. Escapes are either voluntary, or negligent. Voluntary are such as are by the express consent of the keeper, after which he never can retake his prisoner again (though the plaintiff may retake him at any time) but the sheriff must answer for the debt. Negligent escapes are where the prisoner escapes without his keeper's knowledge or consent; and then upon fresh pursuit the defendant may be re-

p See pag. 279.
q 3 Rep. 52. 1 Sid. 330.
r Stat. 8 & 9 W. III. c. 27.

taken, and the sheriff shall be excused, if he has him again before any action brought against himself for the escapt. A rescue of a prisoner in execution, either going to gaol or in gaol, or a breach of prison, will nor excuse the sheriff from being guilty of and answering for the escape; for he ought to have sufficient force to keep him, seeing he may command the power of the county. But by statute 32 Geo. II. c. 28. if a defendant, charged in execution for any debt less than 100 l, will surrender all his effects to his creditors, (except his apparel, bedding, and tools of his trade, not amounting in the whole to the value of 10 l.) and 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 2 s. 4 d. per week, to be paid on the first day of every week, and on failure of regular payment the prisoner shall be discharged. Yet the creditor may at any future time have execution against the lands and goods of the defendant, though never more against his person. And, on the other hand, the creditors may, as in case of bankruptcy, compel (under
pain of transportation for seven years) such debtor charged in execution for any debt under 100 l, to make a discovery and surrender of all his effects for their benefit; whereupon he is also entitled to the like discharge of his person.

IF a capias ad satisfaciendum is sued out, and a non est inventus is returned thereon, the plaintiff may sue out a process against the bail, if any were given: who, we may remember, stipulated in this triple alternative; that the defendant should, if condemned in the suit, satisfy the plaintiff his debt and costs; or, that he should surrender himself a prisoner; or, that they would pay it for him: as therefore the two former branches of the alternative are neither of them complied with, the latter must immediately take place u. In order to which a writ of scire facias may be sued out against the bail, commanding them to shew cause why the plaintiff should not have execution against them

s F. N. B. 130.
t Cro. Jac. 419.
u Lutw. 1269?1273.

for his debt and damages: and on such writ, if they shew no sufficient cause, or the defendant does not surrender himself on the day of the return, or of shewing cause (for afterwards is not sufficient) the plaintiff may have judgment against the bail, and take out a writ of capias ad satisfaciendum, or other process of execution against them.

2. THE next species of execution is against the goods and chattels of the defendant; and is called a writ of fieri facias, from the words in it where the sheriff is commanded, quod fieri faciat de bonis, that he cause to be made of the goods and chattels of the defendant the sum or debt recovered. This lies as well against privileged persons, peers, &c, as other common persons; and against executors or administrators with regard to the goods of the deceased. The sheriff may not break open any outer doors x, to execute either this, or the former, writ: but must enter peaceably; and may then break open any inner door, belonging to the defendant, in order to take the goods y. And he may sell the goods and chattels (even an estate for years, which is a chattel real z) of the defendant, till he has raised enough to satisfy the judgment and costs: first paying the landlord of the premises, upon which the goods are found, the arrears of rent the due, not exceeding one year’s rent in the whole a. If part only of the debt be levied
on a fieri facias, the plaintiff may have a capias ad satisfaciendum for the residue b.

3. A THIRD species of execution is by writ of levari facias; which affects a man's goods and the profits of his lands, by commanding the sheriff to levy the plaintiff's debt on the lands and goods of the defendant; whereby the sheriff may seise all his goods, and receive the rents and profits of his lands, till satisfaction be made to the plaintiff c. Little use is now made of this writ; the remedy by elegit, which takes possession of the lands themselves, being much more effectual. But of this species is a writ of execution proper only to ecclesiastics; which is given when the sheriff, upon a common writ of execution sued, returns that the defendant is a beneficed clerk, not having any lay fee. In this case a writ goes to the bishop of the diocese, in the nature of a levari or fieri facias d, to levy the debt and damages de bonis ecleesiasticis, which are not to be touched by lay hands: and thereupon the bishop sends out a sequestration of the profits of the clerk's benefice, directed to the churchwardens, to collect the same and pay them to the plaintiff, till the full sum be raised e.

4. THE fourth species of execution is by the writ of elegit; which is a judicial writ given by the statute Westm. 2. 13 Edw. I. c. 18. either upon a judgment for a debt, or damages; or upon the forfeiture of a recognizance taken in the king's court. By the common law a man could only have satisfaction of goods, chattels, and the present profits of lands, by the two last mentioned writs of fieri facias, or levari facias; but not the possession of the lands themselves: which was a natural consequence of the feodal principles, which prohibited the alienation, and of course the incumbring of the fief with the debts of the owner. And, when the restriction of alienation began to wear away, the consequence still continued; and no creditor could taken the possession of lands, but only levy the growing
profits: so that, if the defendant aliened his lands, the plaintiff was ousted of his remedy. The statute therefore granted this writ, (called an elegit, because it is in the choice or one of the former) by which the defendant's goods and chattels are not sold, but only appraised; and all of them (except oxen and beasts of the plough) are delivered to the plaintiff, at such reasonable appraisement and price, in part of satisfaction of his debt. If the goods are

d Pegiftr. orig. 300. judic. 22. 2 Inst. 4.
e 2 Burn. eccl. law. 329.

not sufficient, then the moiety or one half 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 till the defendant's interest be expired; as, till the death of the defendant, if he be tenant for life or in tail. During this period the plaintiff is called tenant by elegit, of whom we spoke in a former part of these commentaries g. We there observed that till this statute, by the ancient common law, lands were not liable to be charged with, or seised for, debts; because by this means the connection between lord and tenant might be destroyed, fraudulent alienations might be made, and the services be transferred to be performed by a stranger; provided he tenant incurred a large debt, sufficient to cover the land. And therefore, even by this statute, only one half was, and now is, subject to execution; that out of the remainder sufficient might be left for the lord to distrein upon for his services. And, upon the same feodal principle, copyhold lands are at this day not liable to be taken in execution upon a judgment h. But, in case of a debt to the king, it appears by magna carta, c. 8. that it was allowed by the common law for him to take possession of the lands till the debt was paid. for, he, being the grand superior and ultimate proprietor of all landed estates, might seise the lands into his own hands, if any thing was owing from the vasal; and could not be said to be defrauded of his services, when the ouster of the vasal proceeded from his own command. This execution, or seising of lands by elegit, is of so high a nature, that after it the body of the defendant cannot be taken: but if execution can only be had of the goods, because there are no lands, and such goods are not sufficient to pay the debt, a capias ad satisfaciendum may then be had after the elegit; for such elegit is in this case no more in effect than a fieri facias. So that body and goods may be taken in execution, or land and goods; but not body and land too,
upon any judgment between subject and subject in the course of the common law. but

5. UPON some prosecutions given by statute; as in the case of recognizances or debts acknowledged on statutes merchant, or statutes staple; (pursuant to the statutes 13 Edw. I. de mercaribus, and 27. Edw. III. c. 9.) upon forfeiture of these, the body lands, and goods, may all be taken at once in execution, to compel the payment of the debt. The process hereon is usually called an extent or extendi facias, because the sheriff is to cause the lands, & c, to be appraised to their full extended value, before he delivers them to the plaintiff, that it may be certainly known how soon the debt will be satisfied. And by statute 33 Hen. VIII. c. 39. all obligations made to the king shall have the same force, and of consequence the same remedy to recover them, as a statute staple: though indeed, before this statute, the king was intitled to sue out execution against the body, lands, and goods of his accountant or debtor. And his debt shall, in suing out execution, be preferred to that of every other creditor, who hath not obtained judgment before the king commenced his suit. The king's judgment also affects all lands, which the king's debtor hath at or after the time of contracting his debt, or which any of his officers mentioned in the statute 13 Eliz. c. 4. hath at or after the time of his entering on the office: so that, if such officer of the crown alienes for a valuable consideration, the land shall be liable to the king's debt, even in the hands of a bona side purchaser; though the money for which he is accountable was received by the vendor many years after the alienation. Whereas judgments between subject and subject related, even at common law, no farther back than the first day of the term in which they were recovered, in respect of the lands of the debtor; and did not bind his goods and chattels, but from the date of the writ of execution. And now, by the statute of frauds, 29 Car. II. c. 3. the judgment shall not bind the land in the hands of a

k F. N. B. 131.
l 3 Rep. 12.
m Stat. 33. Hen. VIII. c. 29.
n 10 Rep. 55, 56.

bona side purchaser, but only from the time of actually signing the same; nor the goods in the hands of a stranger, or a purchaser o, but only from the actual delivery of the writ to the sheriff.

THESE are the methods which the law of England has pointed out for the execution of judgments: and when the plaintiff's demand is satisfied, either by the voluntary payment of the defendant, or by this compulsory process, or otherwise, satisfaction ought to be entered on the record, that the defendant may not be liable to be hereafter harrassed a second time on the same account. But all these writs of execution must be sued out within a year and a day after the judgment is entered; otherwise the court concludes prima facie that the judgment is satisfied and extinct: yet however it will grant a writ of fiere facias in pursuance of statute Westm. 2. 13 Edw. I. c. 45. for the defendant to shew cause why the judgment should not be revived, and execution had against him; to which the defendant may plead such mater as he has to allege, in order to shew why process of execution should not be issued: or the plaintiff may still bring an action of debt, founded on this dormant judgment, which was the only method of revival allowed by the common law p.

IN this manner are the several remedies given by the English law for all sorts of injuries, either real or personal, administered by the several courts of justice, and their respective officers. In the course therefore of the present volume we have, first, seen and considered the nature of remedies, by the mere act of the parties, or mere operation of law, without any suit in courts. We have next taken a view of remedies by suit or action in courts: and therein have contemplated, first, the nature and species of courts, instituted for the redress of injuries in general; and then have shewn in what particular courts application must be made for the redress of particular injuries, or the doctrine of jurisdictions and
cognizance. We afterwards proceeded to consider the nature and distribution of wrongs and injuries, affecting every species of personal and real rights, with the respective remedies by suit, which the law of the land has afforded for every possible injury. And, lastly, we have deduced and
pointed out the method and progress of obtaining such remedies in the courts of justice: proceeding from the first general complaint or original writ; through all the stages of process, to compel the defendant's appearance; and of pleading, or formal allegation on the one side, and excuse or denial on the other; with the examination of the validity of such complaint or excuse, upon demurrer, or the truth of the facts alleged and denied, upon issue joined, and its several trials; to the judgment or sentence of the law, with respect to the nature and amount of the redress to be specifically given: till, after considering the suspension of that judgment by writs in the nature of appeals, we arrived at its final execution; which puts the party in specific possession of his right by the intervention of ministerial officers, or else gives him an ample satisfaction, either by equivalent damages, or by the confinement of his body, who is guilty of the injury complained of.

THIS care and circumspection in the law, --- in providing that no man's right shall be affected by any legal proceeding without giving him previous notice, and yet that the debtor shall not be receiving such notice take occasion to escape from justice; in requiring that every complaint be accurately and precisely ascertained in writing, and be as pointedly and exactly answered; in clearly stating the question either of law or of fact; in deliberately resolving the former after full argumentative discussion, and indisputably fixing the latter by a diligent and impartial trial; in correcting such errors as may have arisen in either of those modes of decision, from accident, mistake, or surprize; and in finally enforcing the judgment, when nothing can be alleged to impeach it; -- this anxiety to maintain and restore to every individual the enjoyment of his civil rights, without intrenching upon those of any other individual in the nation, this parental solicitude which pervades our whole legal constitution, is the genuine off-spring of that spirit of equal liberty which is the singular felicity of Englishmen. At the same time it must be owned to have given an handle, in some degree, to those complaints, of delay in the practice of the law, which are not wholly without foundation, but are greatly exaggerated beyond the truth. There may be, it is true, in this, as in all other departments of knowledge, a few unworthy professors: who study the science of chicane and sophistry rather than of truth and justice; and who, to gratify the spleen, the dishonesty, and wilfulness of their clients, may endeavour to screen the guilty, by an unwarrantable use of those means which were intended to protect the innocent. But the frequent disappointments and the constant
discountenance, that they meet with in the courts of justice, have confined these men (to the honour of this age be it spoken) both in number and reputation to indeed a very despicable compass.

YET some delays there certainly are, and must unavoidably be, in the conduct of a suit, however desirous the parties and their agents may be to come to a speedy determination. These arise from the same original causes as were mentioned in examining a former complaint q; from liberty, property, civility, commerce, and an extent of populous territory: which whenever we are willing to exchange for tyranny, poverty, barbarism, idleness, and a barren desert, we may then enjoy the same dispatch of causes that is so highly extolled in some foreign countries. But common sense and a little experience will convince us, that more time and circumspection are requisite in causes, where the suitors have valuable and permanent rights to lose, than where their property is trivial and precarious; and what the law gives them to-day may be seised by their prince tomorrow. In Turkey, says Montesquieu r, where little regard is shewn to the lives or fortunes of the subject, all causes are quickly decided: the basha, on a summary hearing, orders which party he pleases to be bafstinadoed, and then sends them about their business. But in free states the trouble, expense, and delays of

q See pag. 327.
r Sp. L. b. 6. ch. 2.

judicial proceedings are the price that every subject pays for his liberty: and in all governments, he adds, he formalities of law increase, in proportion to the value which is set on the honour, the fortune, the liberty, and life of he subject.

FROM these principles it might reasonably follow, that the English courts should be more subject to delays than those of other nations; as they set a greater value on life, on liberty, and on property. But it is our peculiar felicity to enjoy the advantage, and by to be exempted from a proportionable share of the burden. For the course of the civil law, to which most other nations conform their practice, is much more tedious than ours; for proof of which I need only appeal to the suitors of those courts in England, where the practice of the Roman law is allowed in its full extent. And particularly in France, not only our Fortescue' accuses (of his own knowledge) their courts of most unexampled delays in
administering justice; but even a writer of their own has not scrupled to testify, that there were in his time more causes there depending than in all Europe besides, and some of them an hundred years old. But (not to enlarge upon the prodigious improvements which have been made in the celerity of justice by the disuse of real actions, by the statutes of amendments and jeofails, and by other more modern regulations, which it now might be indelicate to mention, but which posterity will never forget) the time and attendance afforded by the judges in our English courts are also greater than those of many other countries. In the Roman calendar there were in the whole year but twenty eight judicial or triverbial days allowed to the praetor for hearing causes; whereas with us, one fourth of the year is term time, in which three courts constantly fit for the dispatch of matters of law; besides the very close attendance of the court of chancery for determining suits

s de Laud. LL. c. 53.
t Bodin. de Republ. l. 6. c. 6.
v See pag. 406.
u Otherwise called dies fafti, in quibus licebat praetori fari tria verba, do, dico, addico. (Calv. Lex. 285.)
w Spelman of the terms. 4. c. 2.

in equity, and the numerous courts of assise and nisi prius that sit in vacation for the trial of matters of fact. Indeed there is no other country in the known world, that hath an institution so commodious and so adapted to the dispatch of causes, as our trials by jury in those courts for the decision of facts: in no other nation under heaven does justice make her progress twice in each year into every part of the kingdom, to decide upon the spot by the voice of the people themselves the disputes of the remotest provinces.

AND here this part of our commentaries, which regularly treats only of redress at the common law, would naturally draw to a conclusion. But, as the proceedings in the courts of equity are very different from those at common law, and as those courts are of a very general and extensive jurisdiction, it is in some measure a branch of the task I have undertaken, to give the student some general idea of the forms of practice adopted by those courts. These will therefore be the subject of the ensuing chapter.
CHAPTER THE TWENTY SEVENTH.
OF PROCEEDINGS IN THE COURTS OF EQUITY.

BEFORE we enter on the proposed subject of the ensuing chapter, viz, the nature and method of proceedings in the courts of equity, it will be proper to recollect the observations, which were made in the beginning of this book a on the principal tribunals of that kind, acknowledged by the constitution of England ; and to premise a few remarks upon those particular causes, wherein nay of them claims and exercises a sole jurisdiction, distinct from and exclusive of the other.

I HAVE already b attempted to trace (though every concisely) the history, rise, and progress , of the extraordinary court, or court of equity, in chancery. The same jurisdiction is exercised, and the same system of redress pursued, in the equity court of the exchequer : with a distinction however as to some few matters, peculiar to each tribunal, and in which the other cannot interfere. And, first, of those peculiar to the chancery.

1. UPON the abolition of the court of wards, the care, which the crown was bound to take as guardian of its infant tenants, was totally extinguished in every feodal view ; but resulted to

the king in his court of chancery, together with the general protection c of all other infants in the kingdom. When therefore a fatherless child has no other guardian, the court of chancery hath a right to appoint one : and, from all proceedings relative thereto, an appeal lies to the house of lords. The court of exchequer can only appoint a guardian ad litem, to manage the defence of the infant if a suit be commenced against him ; a power which is incident to the jurisdiction of every court of justice d : but when the interest of a minor comes before the court judicially, in the progress of a cause, or upon a bill for that purpose filed, either tribunal indiscriminately will take care of the property of the infant.

2. AS to idiots and lunatics : the king himself used formerly to commit the custody of them to proper committees, in every particular case ; but now, to avoid solicitations and the very shadow of undue partiality, a warrant is
issued by the king e under his royal sign manual to the chancellor or keeper of his seal, to perform this office for him: and, if he acts improperly in granting such custodies, the complaint must be made to the king himself in council f. But the previous proceedings on the commission, to inquire whether or on the party be an idiot or a lunatic, are on the law-fide of the court of chancery, and can only be redressed (if erroneous) by writ of error in the regular course of law.

3. THE king, as parens patriae, has the general superintendence of all charities; which he exercises by the keeper of his conscience, the chancellor. And therefore, whenever it is necessary, the attorney general, at the relation of some informant, (who is usually called the relator) files ex officio an information in the court of chancery to have the charity properly established. By statute also 43 Eliz. c. 4. authority is given to the lord chancellor or lord keeper, and to the chancellor of the duchy of Lan-

c F. N. B. 27.
c See book I. ch. 8.
f 3 P. Wms. 108.

caster, respectively, to grant commissions under their several seals, to inquire into any abuses of charitable donations, and rectify the same by decree; which may be reviewed in the respective courts of the several chancellors, upon exceptions taken thereto. But, though this is done in the petty bag office in the court of chancery, because the commission is there returned, it is not a proceeding at common law, but treated as an original cause in the court of equity. The evidence below is not taken down in writing, and the respondent in his answer to the exceptions may allege what new matter he pleases; upon which they go to proof, and examine witnesses in writing upon all the matters in issue: and the court may decree the respondent to pay all the costs, though no such authority is given by the statute. And, as it is thus considered as an original cause throughout, an appeal lies of course from the chancellor's decree to the house of peers g, notwithstanding any loose opinions to the contrary h.

4. BY the several statutes, relating to bankrupts, a summary jurisdiction is given to the chancellor, in many matters consequential or previous to the commissions thereby directed to be issued; from which the statutes give no appeal.
ON the other hand, the jurisdiction of the court of chancery doth not extend to some causes, wherein relief may be had in the exchequer. No information can be brought, in chancery, for such mistaken charities, as are given to the king by the statutes for suppressing superstitious uses. Nor can chancery give any relief against the king, or direct any act to be done by him, or make any decree disposing of or affecting his property; not even in cases where he is a royal trustee. Such causes must be determined in the court of exchequer, as a court of revenue; which alone has power over the king's treasure, and the officers employed in its management: unless where it properly belongs to the duchy court of Lancaster, which hath also a similar jurisdiction as a court of revenue; and like the other, consists of both a court of law and a court of equity.

IN all other matters, what is said of the court of equity in chancery will be equally applicable to the other courts of equity. Whatever difference there may be in the forms of practice, it arises from the different constitution of their officers: or, if they differ in any thing more essential, one of them must certainly be wrong; for truth and justice are always uniform, and ought equally to be adopted by them all.

LET us next take a brief, but comprehensive, view of the general nature of equity, as now understood and practiced in our several courts of judicature. I have formerly touched upon it, but imperfectly: it deserves a more complete explication. Yet, as nothing is hitherto extant, that can give a stranger a tolerable idea of the courts of equity subsisting in England, as distinguished from the courts of law, the compiler of these observations cannot but attempt it with diffidence: they, who know them best, are too much employed to find time to write; and they, who have attended but little in those courts, must be often at a loss for materials.
EQUITY then, 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 found interpretation of the rule. But the very terms of a court of equity and a court of law, as contrasted to each other, 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 now draws a line between the two jurisdictions, by setting law and equity in opposition to each other, will be found either totally erroneous, or erroneous to certain degree.

1. Thus in the first place it is said, that it is the business of a court of equity in England to abate the rigor of the common law. But on such power is contended for. Hard was the case of bond-creditors, whose debtor devised away his real estate; rigorous and unjust the rule, which put the devisee in a better condition than the heir: yet a court of equity had no power to interpose. Hard is the common law still subsisting, that land devised, or descending to the heir, shall not be liable to simple contract debts of the ancestor or devisor, although the money was laid out in purchasing the every land; and that the father shall never immediately succeed as heir to the real estate of the son; but a court of equity can give no relief; though in both these instances the artificial reason of the law, arising from feodal principles, has long ago entirely ceased. The like may be observed of the descent of lands to remote relation of the whole blood, or even their escheat to the lord, in preference to the owner's half-brother; and of the total stop to all justice, by causing the parol to demur, whenever an infant is sued as heir or is party to a real action. In all such cases of positive law, the courts of equity, as well as the courts of law, must say with Ulpian, hoc quidem perquam durum est, sed ita lex scripta est.

2. It is said, that a court of equity determines according to the spirit of the rule, and not according to the strictness so the letter. But so also does a court of law. Both, for instance, are equally bound, and equally profess, to interpret statutes according to the true intent of the legislature. In general laws all cases cannot be foreseen; or, if foreseen, cannot be expressed:
some will arise that will fall within the meaning, though not within the
words, of the legislator; and others, which may fall within the letter, may
be contrary to his meaning though not expressly excepted. These cases,
thus out of the letter, are often said to be within the equity, of an act of
parliament; and so, cases within the letter are frequently out of the equity.
Here by equity we mean nothing but the found interpretation of the law;
though the words of the law itself may be too general, too special, or
otherwise inaccurate or defective. These then are the cases which, as
Grotius t says, lex non exacte definit, sed arbitrio 'boni viri permittit;? in
order to find out the true sense and meaning of the lawgiver, from every
other topic of construction. But there is not a single rule of interpreting
laws, whether equitably or strictly, that is not equally used by the judges in
the courts both of law and equity: the construction must in both be the
same; or, if they differ, it is only as one court of law may also happen to
differ from another. Each endeavours to fix and adopt the true sense of the
law in question; neither can enlarge, diminish, or alter, that sense in a
single tittle.

3. AGAIN, it hath been said u, that fraud, accident, and trust are the
proper and peculiar objects of a court of equity. But every kind of fraud is
equally cognizable, and equally adverted to, in a court of law: and some
frauds are only cognizable there, as fraud in obtaining a devise of lands,
which is always sent out of the equity courts to be there determined. Many
accidents are also supplied in a court of law; as loss of deeds, mistakes in
receipts or accounts, wrong payments, deaths which make it impossible to
perform a condition literally, and a multitude of other contingencies: and
many cannot be relieved even in a court of equity; as, if by accident a
recovery is ill suffered, a devise ill executed, a contingent remainder
destroyed, or a power of leafing omitted in a family settlement. A technical
trust indeed, created by the limitation of a second use, was forced into
a court of equity, in the manner formerly mentioned w: and this species of
trusts, extended by inference and construction, have ever since remained
as a kind of peculium in those courts. But there are other trusts, which are
cognizable in a court of law: as deposits, and all manner of bailments;
and especially that implied contract, so highly beneficial and useful, of
having undertaken to account for money received to another's use x, which
is the ground of an action on the case almost as universally remedial as a
bill in equity.

4. ONCE more; it has been said that a court of equity is not bound by rules
or precedents, but acts from the opinion of the judge y, founded on the
circumstances of every particular case. Whereas the system of our courts
of equity is a laboured connected system, governed by established rules,
and bound down by precedents, from which they do not depart, although
the reason of some of them may perhaps be liable to objection. Thus, the
refusing a wife her dower in a trust-estate z, yet allowing the husband his
curtesy: the holding the penalty of a bond to be merely a security for the
debt and interest, yet considering it sometimes as the debt itself, so that
the interest shall not exceed that penalty a: the distinguishing between a
mortgage at five per cent, with a clause of reduction to four, if the interest
be regularly paid, and a mortgage at four per cent, with a clause of
enlargement to five, if the payment of the interest be deferred; so that the
former shall be deemed a conscientious, the latter an unrighteous, bargain
b: all these, and other cases that might be instanced, are plainly rules of
positive law; supported

w Book II. ch. 20.
x See pag. 162.
y This is stated by Mr Selden (Tabletalk. tit. equity.) with more pleasantry
than truth. For law, we have a measure, and know what to trust to: equity
is according to the conscience of him that is chancellor; and as that is
larger or narrower, so is equity. 'Tis all one, as if they should 'make the
standard for the measure a chancellor's foot. What an uncertain
measure would this be! One chancellor has a longfoot, another a short
foot, a third an in-different foot. It is the same thing with the chancellor's
conscience.
z 2 P. Wms. 640. See Vol. II. pag. 337.
only by the reverence that is shewn, and generally very properly shewn, to a series of former determinations; that the rule of property may be uniform and stead. Nay, sometimes a precedent is so strictly followed, that a particular judgment, founded upon special circumstances, gives rise to a general rule.

IN short, if a court of equity in England did really act, as a very ingenious writer in the other part of the island supposes it (from theory) to do, it would rise above all law, either common or statute, and be a most arbitrary legislator in every particular case. No wonder he is so often mistaken. Grotius, or Puffendorf, or any other of the great masters of jurisprudence, would have been as little able to discover, by their own light, the system of a court of equity in England, as the system of a court of law. Especially, as the notions before-mentioned, of the character, power, and practice of a court of equity, were formerly adopted and propagated (though not with approbation of the thing) by our principal antiquarians and lawyers; Spelman, Coke, Lambard, and Selden, and even the great Bacon himself. But this was in the infancy of our courts of equity, before their jurisdiction was settled, and when the chancellors themselves, partly from their ignorance of law (being frequently bishops or statesmen) partly from ambition and lust of power (encouraged by the arbitrary principles of the age they lived in) but principally from the narrow and unjust decisions of the courts of law, had arrogated to themselves such unlimited authority, as hath totally been disclaimed by their successors for now above a century past. The decrees of a court of equity were then rather in the nature of awards, formed on the sudden pro re nata, with more probity of intention than knowledge of he subject; founded

c See the of Foster and Munt, 1 Vern. 473. with regard to the undisposed residuum of personal estates.
d 2 uae in summis tribunalibus multi e legum canone decernunt judices, solus (si res exegerit) cohibet cancellarius ex arbitrio; nec aliter decretis tenetur suae curiae vel sui ipsius, quin, elucente nova ratione, recognascat quae voluerit, mutet et deleat prout suae videbitur prudentiat. (gloss. 108.)
e See pag. 53. 54.
f Archeion. 71, 72, 73.
g ubi supra.
on no settled principles, as being never deigned, and therefore never used, for precedents. But the systems of jurisprudence, in our courts both of law and equity, are now equally artificial systems, founded in the same principles of justice and positive law; but varied by different usages in the forms and mode of their proceedings: the one being originally derived (though much reformed and improved) from the feudal customs, as they prevailed in different ages in the Saxon and Norman judicatures; the other (but with equal improvements) from the imperial and pontifical formularies, introduced by their clerical chancellors.

THE suggestion indeed of every bill, to give jurisdiction to the courts of equity, (copied from those early times) is, that the complainant hath no remedy at the common law. But he, who should from thence conclude, that no case is judged of in equity where there might have been relief at law, and at the same time casts his eye on the extent and variety of the cases in our equity-reports, must think the law a dead letter indeed. The rules of property, rules of evidence, and rules of interpretation, in both courts, are, or should be, exactly the same: both ought to adopt the best, must cease to be courts of justice. Formerly some causes, which now no longer exist, might occasion a different rule to be followed in one court, from what was afterwards adopted in the other, as founded in the nature and reason of the thing: but, the instant those causes ceased, the measure of substantial justice ought to have been the same in both. Thus the penalty of a bond, originally contrived to evade the absurdity of those monkish constitutions which prohibited taking interest for money, was therefore very pardonably considered as the real debt in the courts of law, when the debtor neglected to perform his agreement for the return of the loan with interest: for the judges could not, as the law then stood, give judgment that the taking of interest became legal, as the necessary companion of commerce I, nay after the statute of 37 Hen. VIII. c. 9. had declared the debt or loan itself to be the just and true intent? for which the obligation was given, their narrow minded successors still adhered wilfully and technically to the letter so the ancient precedents, and refused to consider the payment of principal, interest, and costs, as a full satisfaction of the
bond. At the same time more liberal men, who sate in the courts of equity, construed the instrument, according to its just and true intent, as merely a security for the loan: in which light it was certainly understood by the parties, at least after these determinations; and therefore this construction should have been universally received. So in mortgages, being only a landed as the other is a personal security for the money lent, the payment of principal, interest, and costs ought at any time, before judgment executed, to have saved the forfeiture in a court of law, as well as in a court of equity. And the inconvenience as well as injustice, of putting different constructions in different courts upon one and the same transaction, obliged the parliament at length to interfere, and to direct by the statutes 4 & 5 Ann. c. 16. and 7 Geo. II. c. 20. that, in the cases of bonds and mortgages, what had long been the practice of the courts of equity should also for the future be followed in the courts of law.

AGAIN; neither a court of equity nor of law can vary men’s wills or agreements, or (in other words) make wills or agreements for them. Both are to understand them truly, and therefore both of them uniformly. One court ought not to extend, nor the other abridge, a lawful provision deliberately settled by the parties, contrary to its just intent. A court of equity, no more than a court of law, can relieve against a penalty in the nature of stated damages; as a rent of 5 l. an acre for ploughing up ancient meadow k: nor against a lapse of time, where the time is material to the contract; as in covenants for renewal of leases. Both courts will equitably construe, but neither pretends to control or change, a lawful stipulation or engagement.

k 2 Atk. 239.

THE rules of decision are in both courts equally apposite to the subjects of which they take cognizance. Where the subject-matter is such as requires to be determined secundum aequum et bonum, as generally upon actions on the case, the judgments of the courts of law are guided by the most liberal equity. In matters of positive right, both courts must submit to and follow those ancient and invariable maxims quae relicta sunt et tradita l. Both follow the law of nations, and collect it from history and the most approved authors of all countries, where the question is the subject of that law: as in case of the privileges of ambassadors m, hostages, or ransom-bills n. In mercantile transactions they follow the marine law o, and argue from the usages and authorities received in all maritime countries. Where
they exercise a concurrent jurisdiction, they both follow the law of the proper forum p; in matters originally of ecclesiastical cognizance, they both equally adopt the canon or imperial law, according to the nature of the subject q; and, if a question came before either, which was properly the object of a foreign municipal law, they would both receive information what is the rule of the country r, and would both decide accordingly.

SUCH then being the parity of law and reason which governs both species of courts, wherein (it may be asked) does their essential difference consist? It principally consists in the different modes of administering justice in each; in the mode of proof, the mode of trial, and the mode of relief. Upon these, and upon two other accidental grounds of jurisdiction, which were formerly driven into those courts by narrow decisions of the courts of law, viz. the true construction of securities for money

l De jure naturat cogitare per nos atque dieere debumus; de jure populi Romani, quae relitta sunt et tyadita. (Cic. de. Leg. l. 3. ad calc.)
m See Vol. I. pag. 253.
n Ricord v. Lettenham. Tr. 5 Geo. III. B. R.
p See Vol. II. pag. 513.
q Ibid. 504.
r Ibid. 463.

lent, and the form and effect of a trust or second use; upon these main pillars hath been gradually erected that structure of jurisprudence, which prevails in our court of equity, and is inwardly botomed upon the same substantial foundations as the legal system which hath hitherto been delineated in these commentaries; however different they may appear in their outward form, from the different taste of their architects.

1. AND, first, as to the mode of proof. When facts, or their leading circumstances, rest only in the knowledge of the party, a court of equity applies itself to his conscience, and purges him upon oath with regard to the truth of the transaction; and, that being once discovered, the judgment is the same in equity as it would have been at law. But, for want of this discovery at law, the courts of equity acquired a concurrent jurisdiction with every other court in all matters of account s. As incident to accounts, they take a concurrent cognizance of the administration of personal assets t, consequently of debts, legacies, the distribution of the

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residue, and the conduct of executors and administrators u. As incident to accounts, they also take the concurrent jurisdiction of tithes, and all questions relating thereto w; of all dealings in partnership z, and many other mercantile transactions; and so of bailiffs, receivers, factors, and agents y. It would be endless to point out all the several avenues in human affairs, and in this commercial age, which lead to or end in accounts.

FROM the same fruitful source, the compulsive discovery upon oath, the courts of equity have acquired a jurisdiction over almost all matters of fraud/z; all matters in the private knowledge of the party, which, though concealed, are binding in conscience; and all judgments at law, obtained through such fraud or concealment. And this, not by impeaching or reversing the judgment itself, but by prohibiting the plaintiff from taking any advantage of a judgment, obtained by suppressing the truth a; and which, and the same facts appeared on the trial, as now are discovered, he would never have obtained at all.

2. AS to the mode of trial. This is by interrogatories administered to the witnesses, upon which their depositions are taken in writing, wherever they happen to reside. If therefore the cause arises in a foreign country, and the witnesses reside upon the spot; if, in causes arising in England, the witnesses are abroad, or shortly to leave the kingdom; or if witnesses residing at home are aged or infirm; any of these cases lays a ground for a court of equity, to grant a commission to examine them, and (in consequence) to exercise the same jurisdiction, which might have been exercised at law, if the witnesses could probably attend.

3. WITH respect to the mode of relief. The want of a more specific remedy, than can be obtained in the courts of law, gives a concurrent jurisdiction to a court of equity in a great variety of cases. To instance in executory
agreements. A court of equity will compel them to be carried into strict execution b, unless where it is improper or impossible, instead of giving damages for their non-performance. And hence a fiction is established, that what ought to be done shall be considered as being actually done c, and shall relate back to the time when it ought to have been done originally: and this fiction is so closely pursued through all its consequences, that it necessarily branches out into many rules of jurisprudence, which form a certain regular system. So, of waste, and other similar injuries, a court of equity takes a concurrent cognizance, in order to prevent them by injunction d. Over questions that may be tried at law, in a great multiplicity of actions, a court of equity assumes a juris-

\[\text{a 3 P. Wms. 148. Yearbook, 22 Edw. IV. 37. pl. 21.}\]
\[\text{b 1 Equ. Caf. abr. 16.}\]
\[\text{c 3 P. Wms. 215.}\]
\[\text{d 1 Ch. Rep. 14. 2 Chan. Caf. 32.}\]

diction, to prevent the expense and vexation of endless litigations and suits e. In various kinds of frauds it assumes a concurrent f jurisdiction, not only for the sake of a discovery, but of a more extensive and specific relief: as by setting aside fraudulent deeds g, decreeing re-conveyances h, or directing an absolute conveyance merely to stand as a security i. And thus, lastly, for the sake of a more beneficial and complete relief by decreeing a sale of lands k, a court of equity holds plea of all debts, incumbrances, and charges, that may affect it or issue thereout.

4. THE true construction of securities for money lent is another fountain of jurisdiction in courts of equity. When they held the penalty of a bond to be the form, and that in substance it was only as a pledge to secure the repayment of the sum bona side advanced, with a proper compensation for he use, they laid the foundation of a regular series of determinations, which have settled the doctrine of personal pledges or securities, and are equally applicable to mortgages of real property. The mortgagor continues owner of the land, the mortgagee of the money lent upon it: but this ownership is mutually transferred, and the mortgagor is barred from redemption, if, when called upon by the mortgagee, he does not redeem within a time limited by the court; or he may when out of possession be barred by length of time, by analogy to the statute of limitations.
5. THE form of a trust or second use gives the courts of equity an exclusive jurisdiction as to the subject-matter of all settlements and devises in that form, and of all the long terms created in the present complicated mode of conveyancing. This is a very ample source of jurisdiction: but the trust is governed by very nearly the same rules, as would govern the estate in a court of law, if no trustee was interposed; and, by a regular positive system 
f 2 P. Wms. 156.
g 2 Vern. 32. 1 P. Wms. 239.
h 1 Vern. 237.
l 2 Vern. 84.
k 1 Equ. Caf. abr. 337.
l 2 P. Wms. 645. 668, 669.

established in the courts of equity, the doctrine of trusts is now reduced to as great a certainty as that of legal estates in the courts of the common law.

THESE are the principal (for I omit the minuter) grounds of the jurisdiction at present exercised in our courts of equity: which differ, we fee, very considerably from the notions entertained by strangers, and even by those courts themselves before they arrived to maturity; as appears from the principles laid down, and the jealousies entertained of their abuse, by our early juridical writers cited in a former page; and which have been implicitly received and handed down by subsequent compliers, without attending to those gradual accessions and derelictions, by which in the course of a century this mighty river hath imperceptibly shifted its channel. Lambard in particular, in the reign of queen Elizabeth, laid it down n, that equity should not be appealed unto, but only in rare and extraordinary matters: and that a good chancellor will not arrogate authority in every complaint that shall be brought before him, upon whatsoever suggestion; and thereby both overthrow the authority of the courts of common law, and bring upon men such a confusion and uncertainty, as hardly any man should know how or how long to hold his own assured to him. And certainly, if a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to preside might entertain of conscience in every particular case, the inconvenience, that would arise from this uncertainty, would be a worse evil than any hardship that could follow from rules too strict and
inflexible. Its powers would have become too arbitrary to have been endured in a country like this o, which boasts of being governed in all respects by law and not be will. But since the time when Lambard wrote, a set of great and eminent lawyers p, who have successively held the great seal, have by degrees erected the system or relief administered by a court of equity into a regular science,

m See pag. 433.

n Archeion. 71. 73.

o 2 P. Wms. 685, 686.

p See pag. 53. 54. 55.

which cannot be attained without study and experience, any more than the science of law: but from which, when understood, it may be known what remedy a suitor is intitled to expect, and by what mode of suit, as readily and with as much precision, in a court of equity as in a court of law.

IT were much to be wished, for the sake of certainty, peace, and justice, that each court would as far as possible follow the other, in the best and most effectual rules for attaining those desirable ends. It is a maxim, that equity follows the law ; and in former days the law has not scrupled to follow even that equity, which was laid down by the clerical chancellors. every one, who is conversant in our ancient books, knows that many valuable improvements in the state of our tenures (especially in leaseholds q and copyholds r) and the forms of administering justice f, have arisen from this single reason, that the same thing was constantly effected by means of a subpoena in the chancery. And sure there cannot be a greater solecism, than that in two sovereign independent courts, established in the same country, exercising concurrent jurisdiction, and over the same subject-matter, there should exist in a single instance two different rules of property, clashing with or contradicting each other.

IT would carry me beyond the bounds of my present purpose, to go farther into this matter. I have been tempted to go so far, because the very learned author to whom I have alluded, and whose works have given exquisite pleasure to every contemplative lawyer is (among many others) a strong proof how easily names, and loose or unguarded expressions to be met with in the best or our writers, are apt to confound a stranger ; and to give him erroneous ideas of separate jurisdictions now existing in England, which never were separated in any other country in the universe. It hath
also afforded me an opportunity to vindicate, on the one hand, the justice
of our courts of law from being

q Gilbert of ejectm. 2. 2 Bac. Abr. 160.
r Bro. Abr. t. tenant per copie. 10. Litt. 77.
f See pag. 200.

that harsh and illiberal rule, which many are too ready to supposed it;
and, on the other, the justice of our courts of equity from being the result
of mere arbitrary opinion, or an exercise of dictatorial power, which rides
over the law of the land, and corrects, amends, and controls it by the loose
and fluctuating dictates of the conscience of a single judge. It is now high
time to proceed to the practice of our courts of equity, thus explained and
thus understood.

THE first commencement of a suit in chancery is by preferring a bill to the
lord chancellor in the style of a petition; humbly complaining sheweth to
your lordship your orator A. B. that, & c. This is in the nature of a
declaration at common law, or a libel and allegation in the spiritual courts:
setting forth the circumstances of the case at length, as, some fraud, trust,
or hardship; in tender consideration whereof,? (which is the usual
language of the bill) and for that your orator is wholly without remedy at
the common law,? relief is therefore prayed at the chancellor's hands, and
also process of subpoena against the defendant, to compel him to answer
upon oath to all the matter charged in the bill. And if it be to quiet the
possession of lands, to stay waste, or to stop proceedings at law, an
injunction is also prayed in the nature of the interdictum of the civil law,
commanding the defendant to cease.

THIS bill must call all necessary parties, however remotely concerned in
interest, before the court; otherwise no decree can be made to bind them:
and must be signed by counsel, as a certificate of its decency and
propriety. For it must not contain matter either scandalous or impertinent:
if it does, the defendant may refuse to answer it, till such scandal or
impertinence is expunged, which is done upon an order to refer it to one of
the officers of the court, called a master in chancery; of whom there are in
number twelve, including the master of the rolls, all of whom, so late as
the reign of queen Elizabeth, were commonly
doctors of the civil law s. The master is to examine the propriety of the bill:
and, if the reports it scandalous or impertinent, such matter must be
struck out, and the defendant shall have his costs; which ought of right to be paid by the counsel who signed the bill.

WHEN the bill is filed in the office of the six clerks, (who originally were all in orders; and therefore, when the constitution of the court began to alter, a law was made to permit them to marry) when, I say, the bill is thus filed, if an injunction be prayed therein, it may be had at various stages of the cause, according to the circumstances of the case. If the bill be to stay execution upon an oppressive judgment, and the defendant does not put in his answer within the stated time allowed by the rules of the court, an injunction can only be continued upon a sufficient ground appearing from the answer itself. But if an injunction be wanted to stay waste, or other injuries of an equally urgent nature, then upon the filing of the bill, and a proper case supported by affidavits, the court will grant an injunction immediately, to continue till the defendant has put in his answer, and till the court shall make some farther order concerning it: and, when the answer comes in, whether it shall then be dissolved or continued till the hearing of the cause, is determined by the court upon argument, drawn from considering the answer and affidavits together.

BUT, upon common bills, as soon as they are filed, process of subpoena is taken out; which is a writ commanding the defendant to appear and answer to be bill, on pain of 100 l. But this is not all: for, if the defendant, on service of the subpoena, does not appear within the time limited by the rules of the court, and plead, demur, or answer to the bill, he is then said to be in contempt; and the respective processes of contempt are in successive order awarded against him. The first of which is an attach-

s Smith's commonw. b. 2. c. 12.

tachment, which is a writ in the nature of a capias, directed to the sheriff, and commanding him to attach, or take up, the defendant, and bring him into court. If the sheriff returns that the defendant non est inventus, then an attachment with proclamations issues; which, besides the ordinary form of attachment, directs the sheriff that he cause public proclamations to be made, throughout the county, to summon the defendant, upon his allegiance, personally to appear and answer. If this be also returned with a non est inventus, and he still stands out in contempt, a commission of rebellion is awarded against him, for not obeying the proclamations
according to his allegiance; and four commissioners therein named, or any of them, are ordered to attach him wheresoever he may be found in Great Britain, as a rebel and contemner of the king's laws and government, by refusing to attend his sovereign when thereunto required: since, as was before observed u, matters of equity were originally determined by the king in person, assisted by his council; though that business is now devolved upon his chancellor. If upon this commission of rebellion a non est inventus is returned, the court then sends a serjeant at arms in quest of him; and, if he eludes the search of the serjeant also, then a sequestration issues to seise all his personal estate, and the profits of his real, and to detain them, subject to the order of the court. Sequestrations were first introduced by sir Nicholas Bacon, lord keeper in the reign of queen Elizabeth; before which the court found some difficulty in enforcing its process and decrees w. After an order for a sequestration issued, the plaintiff's bill is to be taken pro confesso, and a decree to be made accordingly. So that the sequestration does not seem to be in the nature of process to bring in the defendant, but only intended to enforce the performance of the decree. Thus much if the defendant absconds.

IF the defendant is taken upon any of this process, he is to be committed to the fleet, or other prison, till he puts in his appearance, or answer, or performs whatever else this process is issued to enforce, and also clears his contempts by paying the costs which the plaintiff has incurred thereby. For the same kind of process is issued out in all sorts of contempts during the progress of the cause, if the parties in any point refuse or neglect to obey the order of the court.

THE process against a body corporate is by distringas, to distrein them by their goods and chattels, rents and profits, till they shall obey the summons or directions of the court. And, if a peer is a defendant, the lord chancellor sends a letter missive to him to request his appearance, together with a copy of the bill; and, if he neglects to appear, then he may be served with a subpoena; and, if he continues still in contempt, a sequestration issues out immediately against his lands and goods, without any of the mesne process of attachments, &c, which are directed only against the person, and therefore cannot affect a lord of parliament. The same process
issues against a member of the house of commons, except only that the
lord chancellor fends him no letter missive.

THE ordinary process before-mentioned cannot be sued out, till after
service of the subpoena, for then the contempt begins; otherwise he is not
presumed to have notice of the bill: and therefore, by absconding to avoid
the subpoena, a defendant might have eluded justice, till the statute 5 Geo.
II. c. 25. which enacts that, where the defendant cannot be found to be
served with process of subpoena, and absconds (as is believed) to avoid
being served therewith, a day shall be appointed him to appear to the bill
of the plaintiff; which is to be inserted in the London gazette, read in the
parish church where the defendant last lived, and fixed up at the royal
exchange: and if the defendant doth not appear upon that day, the bill
shall be taken pro confesso.

BY if the defendant appears regularly, and takes a copy of the bill, he is
next to demur, plead, or answer.

A DEMURRER in equity is nearly of the same nature as a demurrer in law;
being an appeal to the judgment of the court, whether the defendant shall
be bound to answer, the plaintiff's bill: as, for want of sufficient matter of
equity therein contained; or where the plaintiff, upon his own shewing,
appears to have no right; where the bill seeks a discovery of a thing which
may cause a forfeiture of any kind, or may convict a man of any criminal
mis-behaviour. For any of these causes a defendant may demur to the bill.
And if, on demurrer, the defendant prevails, the plaintiff's bill shall be
dismissed: if the demurrer be overruled, the defendant is ordered to
answer.

A PLEA may be either to the jurisdiction; shewing that the court has no
cognizance of the cause: or to the person; shewing some disability in the
plaintiff, as by outlawry, excommunication, and the like: or it is in bar;
shewing some matter wherefore the plaintiff can demand no relief, as an
act of parliament, a fine, a release, or a former decree. And the truth of this
plea the defendant is bound to prove, if put upon it by the plaintiff. But as
bills are often of a complicated nature, and contain various matter, a man
may plead as to part, demur as to part, and answer to the residue. But no
exceptions to formal minutiae in the pleadings will be here allowed; for
the parties are at liberty, on the discovery of any errors in form, to amend
them x.
AN answer is the most usual defence that is made to a plaintiff's bill. It is given in upon oath, or the honour of a peer or peeress; but, where there are amicable defendants, their answer is usually taken without oath by consent of the plaintiff. This method of proceeding is taken from the ecclesiastical courts, like the rest of the practice in chancery: for there, in almost every case, the plaintiff may demand the oath of his adversary in supply of proof. Formerly this was done in those courts with compurgators, in the manner of our wagering of law: but this has been long disused; and instead of it the present kind of purgation, by the single oath of the party himself, was introduced. This oath was made use of in the spiritual courts, as well in criminal cases of ecclesiastical cognizance, as in matters of civil right: and it was then usually denominated the oath ex officio, whereof the high commission court in particular made a most extravagant and illegal use; forming a court of inquisition, in which all persons were obliged to answer, in cases of bare suspicion, if the commissioners thought proper to proceed against them ex officio for any supposed ecclesiastical enormities. But when the high commission court was abolished by statute 16 Car. I. c. 11. this oath ex officio was abolished with it; and it is also enacted by statute 13 Car. II. ft. 1. c. 12. that it shall not be lawful for any bishop or ecclesiastical judge to gender to any person the oath ex officio, or any other oath whereby the party may be charged or compelled to confess, accuse, or purge himself of any criminal matter. But this does not extend to oaths in a civil suit, and therefore it is still the practice both in the spiritual courts, and in equity, to demand the personal answer of the party himself upon oath. Yet if in the bill any question be put, that tends to the discovery of any crime, the defendant may thereupon demur, as was before observed, and may refuse to answer.

If the defendant lives within twenty miles of London, he must be sworn before one of the masters of the court; if farther off, there may be a dedimus potestatem or commission to take his answer in the country, where the commissioners administer him the usual oath; and then, the
answer being sealed up, either one of the commissioners carries it up to the court; or it is sent by a messenger, who swears he received it from one of the commissioners, and that the same has not been opened or altered since he received it. An answer must be signed by counsel, and must either deny or confess all the material parts of the bill; or it may confess and avoid, that is, justify or palliate the facts. If one of these is not done, the answer may be excepted to for insufficiency, and the defendant be compelled to put in a more sufficient answer. A defendant cannot pray any thing in this his answer, but to be dismissed the court: if he has any relief to pray against the plaintiff, he must do it by an original bill of his own, which is called a cross bill.

AFTER answer put in, the plaintiff, upon payment of costs, may amend his bill, either by adding new parties, or new matter, or both, upon the new lights given him by the defendant; and the defendant is obliged to answer afresh to such amended bill. But this must be before the plaintiff has replied to the defendant's answer, whereby the cause is at issue; for afterwards, if new matter arises, which did not exist before, he must set it forth by a supplemental bill. There may be also a bill of revivor, when the suit is abated by the death of any of the parties; in order to set the proceedings again in motion, without which they remain at a stand. And there is likewise a bill of interpleader; where a person who owes a debt or rent to one of the parties in suit, but, till the determination of it, he knows not to which, desires that they may interplead, that he may be safe in the payment. In this last case it is usual to order the money to be paid into court, for the benefit of such of the parties, to whom upon hearing the court shall decree it to be due. But this depends upon circumstances: and the plaintiff must also annex an affidavit to his bill, swearing that he does not collude with either of the parties.

IF the plaintiff finds sufficient matter confessed in the defendant's answer to ground a decree upon, he may proceed to the hearing of the cause upon bill and answer only. But in that case he must take the defendant's answer to be true in every point. Otherwise the course is for the plaintiff to reply generally to the answer, averring his bill to be true, certain, and sufficient, and the defendant's answer to be directly the reverse; which he is ready to prove as the court shall award: upon which the defendant rejoins, averring the like on his side; which is joining issue upon the facts in dispute. To prove which facts is the next concern.
THIS is done by examination of witnesses, and taking their depositions in writing, according to the manner of the civil law. And for that purpose interrogatories are farmed, or questions in writing; which, and which only, are to be proposed to, and asked of, the witnesses in the cause. These interrogatories must be short and pertinent: not leading ones; (as did not you see this, or, did not you hear that) for if they be such, the depositions taken thereon will be suppressed and not suffered to be read. For the purpose of examining witnesses in or near London, there is an examiner's officer appointed; but, for evidence who live in the country, a commission to examine witnesses is usually granted to four commissioners, two named of each side, or any three or two of them, to take the depositions there. And if the witnesses reside beyond sea, a commission may be had to examine them there upon their own oaths, and (if foreigners) upon the oaths of skillful interpreters. And it hath been held/ythat the deposition of an heathen who believes in the supreme being, taken by commission in the most solemn manner according to the custom of his own country, may be read in evidence.

THE commissioners are sworn to take the examinations truly and without partiality, and not to divulge them till published in the court of chancery; and their clerks are also sworn to secrecy. The witnesses are compellable by process of subpoena, as in the courts of common law, to appear and submit to examination. And when their depositions are taken, they are transmitted to the court with the same care that the answer of a defendant is sent.

y Omichund v. Barker. 1 Atk. 21.

IF witnesses to a disputable fact are old and infirm, it is very usual to file a bill to perpetuate the testimony of those witnesses, although no suit is depending; for, it may be, a man's antagonist only waits for the death of some of them to begin his suit. This is most frequent when lands are devised by will away from the heir at law; and the devisee, in order to perpetuate the testimony of the witnesses to such will, exhibits a bill in chancery against the heir, and sets forth the will verbatim therein, suggesting that the heir is inclined to dispute its validity: and then, the defendant having answered, they proceed to issue as in other cases, and examine the witnesses to the will; after which the cause is at an end, without proceeding to any decree, no relief being prayed by the bill: but
the heir is intitled to his costs, even though he contests the will. This is what is usually meant by proving a will in chancery.

WHEN all the witnesses are examined, then, and not before, the depositions may be published, by a rule to pass publication; after which they are open for the inspection of all the parties, and copies may be taken of them. The cause is then ripe to be set down for hearing, which may be done at the procurement of the plaintiff, or defendant, before either the lord chancellor or the master of the rolls, according to the discretion of the clerk in court, regulated by the nature and importance of the suit, and the arrear of causes depending before each of them respectively. Concerning the authority of the master of the rolls to hear and determine causes, and his general power in the court of chancery, there were (not many years since) divers questions and disputes very warmly agitated; to quiet which it was declared by statute 3 Go. II. c. 30. that all orders and decrees by him made, except such as by the course of the court were appropriated to the great seal alone, shold be deemed to be valid; subject never-theless to be discharged or altered by the lord chancellor, and so as they shall not be inrolled, till the same are signed by his lordship. Either party may be subpoena'd to hear judgment on the day so fixed for the hearing: and then, if the plaintiff does not attend, his bill is dismissed with costs; or, if the defendant makes default, a decree will be made against him, which will be final, unless he pays the plaintiff's costs of attendance, and shews good cause to the contrary on a day appointed by the court. A plaintiff's bill may also at any time be dismissed for want of prosecution, which is in the nature of a nonsuit at law, if he suffers three terms to elapse without moving forward in the cause.

WHEN there are cross causes, on a cross bill filed by the defendant against the plaintiff in the original cause, they are generally contrived to be brought on together, that the same hearing and he same decree may serve for both of them. The method of hearing causes in court is usually this. The parties on both sides appearing by their counsel, the plaintiff's bill is first opened, or briefly abridged, and the defendant's answer also, by the junior counsel on each side: after which the plaintiff's leading counsel states the case and the matters in issue, and the points of equity arising therefrom: and then such depositions as are called for by the plaintiff are read by one of the six clerks, and the plaintiff may also read such part of the defendant's answer, as he thinks material or convenient: and after this the rest of the counsel for the plaintiff make their observations and
arguments. Then the defendant's counsel go through the same process for him, except that they may not read any part of his answer; and the counsel for the plaintiff are heard in reply. When all are heard, the court pronounces the decree, adjusting every point in debate according to equity and good conscience; which decree being usually very long, the minutes of it are taken down, and read openly in court by the registrar. The matter of costs to be given to either party, is not here held to be a point of right, but merely discretionary (by the statute 17 Ric. II. c. 6.) according to the circumstances of the case, as they appear.

z On a trial at law if the plaintiff reads any part of the defendant's answer, he must read the whole of it; for by reading any of it he shews a reliance on the truth of the defendant's testimony, and makes the whole of his answer evidence.

more or less favourable to the party vanquished. And yet the statute 15 Hen. IV. c. 4. seems expressly to direct, that as well damages as costs shall be given to the defendant, if wrongfully vexed in this court.

THE chancellor's decree is either interlocutory or final. It very seldom happens that the first decree can be final, or conclude the cause; for, if any matter of fact is strongly controverted, this court is so sensible of the deficiency of trial by written depositions, that it will not bind the parties thereby, but usually directs the matter to be tried by jury; especially such important facts as the validity of a will, or whether A is the heir at law to B, or the existence of a modus decimandi or real and immemorial composition for tithes. But, as no jury can be summoned to attend this court, the facts is usually directed to be tried at the bar of the court of king's bench or at the assises, upon a feigned issue. For, (in order to bring it there, and have the point in dispute, and that only, put in issue) an action is feigned to be brought, wherein the pretended plaintiff declares, that he laid a wager of 5 l. with the defendant, that A was heir at law to B; and then avers that he is so; and brings his action for the 5 l. The defendant allows the wager, but avers that A is not be heir to B; and thereupon that issue is joined, which is directed out of chancery to be tried: and thus the verdict of the jurors at law determines the fact in the court of equity. These feigned issues seem borrowed from the sponsio judicialis of the Romans a: and are also frequently used in the courts of law, by consent of the parties, to determine some disputed right without the
formality of pleading, and thereby to save much time and expense in the
decision of a cause.

SO likewise, if a question of mere law arises in the course of a cause, as
whether by the words of a will an estate for life or

a Nota est specsio judicialis :spondesnequingentos, si mcus sit spondeo, si
tuus sit.Et tu quoque spondesne quingentos, in tuus sit spondeo, ni mcus
sit. Vide Heinecc. Antiquitat. l. 3. t. 16. 3. & Sigon. de judiciis l. 21. p. 466.
citat. ibid.

in tail is created, or whether a future interest devised by a testator shall
operate as a remainder or an executory devise, it is the practice of this
court to refer it to the opinion of the judges of the court of king's bench,
upon a case stated for that purpose; wherein all the material facts are
admitted, and the point of law is submitted to their decision: who
thereupon hear it solemnly argued by counsel on both sides, and certify
their opinion to the chancellor. And upon such certificate the decree is
usually founded.

ANOTHER thing also retards the completion of decrees. Frequently long
accounts are to be settled, incumbrances and debts to be enquired into,
and a hundred little facts to be cleared up, before a decree can do full and
sufficient justice. These matters are always by the decree on the first
hearing referred to a master in chancery to examine; which examinations
frequently last for years: and then he is to report the fact, as it appears to
him, to the court. This report may be excepted to, disproved, and over-
rulled; or otherwise is confirmed, and made absolute, by order of the
court.

WHEN all issues are tried and settled, and all references to the master
ended, the cause is again brought to hearing upon the matters of equity
reserved; and a final decree is made: the performance of which is inforced
(if necessary) by commitment of the person or sequestration of the party's
state. And if by this decree either party thinks himself aggrieved, he may
petition the chancellor for a rehearing; whether it was heard before his
lordship, or any of the judges, fitting for him, or before the master of the
rolls. For whoever may have heard the cause, it is the chancellor's decree,
and must be signed by him before it is enrolled b; which is done of course
unless a rehearing be desired. Every petition for a rehearing must be
signed by two counsel of character, usually such as have been concerned in the cause, certifying that they apprehend the cause is proper to be

h Stat. 3 Geo. II. c. 30. See pag. 450.

reheard. And upon the rehearing all the evidence taken in the cause, whether read before or not, is now admitted to be read: because it is the decree of the chancellor himself, who only now fits to hear reasons why it should not be enrolled and perfected; at which time all omissions of either evidence or argument may be supplied c. But, after the decree is once signed and enrolled, it cannot be reheard or rectified, but by bill of review, or by appeal to the house of lords.

A BILL of review may be had upon apparent error in judgment, appearing on the face of the decree; or, by special leave of the court, upon oath made of the discovery of new matter or evidence, which could not possibly be had or used at the time when the decree passed. But no new evidence or matter then in the knowledge of the parties, and which might have been used before, shall be a sufficient ground for a bill a review.

AN appeal to parliament, that is, to the house of lords, is the dernier resort of the subject who thinks himself aggrieved by any interlocutory order or final determination in this court: and it is effected by petition to the house of peers, and not by writ of error, as upon judgments at common law. This jurisdiction is said d to have begun in 18 Jac. I. and certainly the first petition, which appears in the records of parliament, was preferred in that year e; and the first that was heard and determined (though the name of appeal was then a novelty) was presented in a few months after f: both leveled against the lord keeper Bacon for corruption, and other misbehaviour. It was afterwards warmly controverted by the house of commons in the reign of Charles the second g. But this dispute is now at rest h: it being obvious to the reason of all mankind, that, when the courts of equity became principal tribunals for deciding causes of property, a revision of their decrees (by way of appeal) became equally ne-

c Gilb. Rep. 151, 152.
d Com. journ. 13 Mar. 1704.
e Lord's journ. 23 Mar, 1620.
f Ibid. 3, 11, 12 Dec. 1621.
g Com. journ. 19 Nov. 1675, & c.
cessary, as a writ of error from the judgment of a court of law. And, upon
the same principle, from decrees of the chancellor relating to the
commissioners for the dissolution of chauntries, & c, under the statute 37
Hen. VIII. c. 4. (as well as for charitable uses under statute 43 Eliz. c. 4.)
an appeal to the king in parliament was always unquestionably allowed i.
But no new evidence is admitted in the house of lords upon any account,
for this is a distinct jurisdiction k: which differs it very considerably from
those instances, wherein the same jurisdiction revises and corrects its own
acts, as in rehearings and bills of review. For it is a practice unknown to
our law, (though constantly followed in the spiritual courts) when a
superior court is reviewing the sentence of an inferior, to examine the
justice of the former decree by evidence that was never produced below.
This is the general method of proceeding in the courts of equity.

THE END OF THE THIRD BOOK.

BOOK THE FOURTH
OF PUBLIC WRONGS

CHAPTER THE FIRST.
OF THE NATURE OF CRIMES; AND
THEIR PUNISHMENT.

WE are now arrived at the fourth and last branch of these commentaries;
which treats of PUBLIC WRONGS., or crimes and misdemeSnors. For we
may remember that, in the beginning of the preceding volume a, wrongs
were divided into sorts or species; the one private, and the other public.
Private wrongs, which are frequently termed civil injuries, were the subject
of that entire book: we are now therefore, lastly, to proceed to the
consideration of PUBLIC WRONGS. of PUBLIC WRONGS., or crimes and
misdemeSnors; with the means of their prevention and punishment. In
the pursuit of which subject I shall consider, in the first place, the general
nature of crimes and punishments; secondly, the persons capable of committing crime; thirdly, their several degrees of guilt,

as principals or accessories; fourthly, the several species of crimes, with the punishment annexed to each by the laws of England; fifthly, the means of preventing their perpetration; and, sixthly, the method of inflicting those punishments, which the law has annexed to each several crime and misdemeanour.

FIRST, as to the general nature of crimes and their punishment: the discussion and admeasurement of which forms in every country the code of criminal law; or, as it is more usually denominated with us in England, the doctrine of the pleas of the crown: so called, because the king, in whom centers the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public right belonging to that community, and is therefore in all cases the proper prosecutor for every public offence b.

THE knowledge of this branch of jurisprudence, which teaches the nature, extent, and degrees of every crime, and adjust to it its adequate and necessary penalty, is of the utmost importance to every individual in the state, for (as a very great master of the crown law c has observed upon a similar occasion) no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct. Should tempt a man to conclude, that he many not at some time or other be deeply interested in these researches. The infirmities of the best among us, the vice and ungovernable passions of other, the instability of all human affairs, and the numberless unforeseen events, which the compass of a day may bring forth, will teach us (upon a moment's reflection) that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a willful disobedience may expose us, is a matter of universal concern.

IN proportion to the importance of the criminal law, ought also to be the care and attention of the legislature in properly

sb See Vol.1. p.268
c Sir Michael Foster. pref.to rep.
forming and enforcing it. It should be founded upon principles that are permanent, uniform, and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind: though it sometimes (provided there be no transgression of these eternal boundaries) may modified, narrowed, or enlarged, according to the local or occasional necessities of the state which it is meant to govern. And yet, either from a want of attention to these principles in the first concoction of the laws, and adopting in their stead the impetuous dictates of avarice, ambition, and revenge; from retaining the discordant political regulations, which successive conquerors or factions have established, in the various revolutions of government; from giving a lasting efficacy to sanctions that were intended to be temporary, and made (as Lord Bacon expresses it) merely upon the spur of the occasion; or from, lastly, too hastily employing such means as are greatly disproportionate to their end, in order to check the progress of some very prevalent offence; from, or from all of these causes it hath happened, that the criminal law is in every country of Europe more rude and imperfect than the civil. I shall not here enter into any minute enquire concerning the local constitutions of other nations; the inhumanity and mistake policy of which have been sufficiently pointed out by ingenious writers of their own d. But even with us in England, where our crown-law is with justice supposed to be more nearly advanced to perfection; where crimes are more accurately defined, and penalties less uncertain and arbitrary; where all our accusations are public, and our trials in the face of the world; where torture is unknown, and every delinquent is judged by such of his equals, against whom he can form no exception nor even a personal dislike; --- even here we shall occasionally find room to remark some particulars, that seem to want revision and amendment. These have chiefly arisen from too scrupulous an adherence to some rules of the ancient common law, when the reasons have ceased upon which those rules were founded; from not repeal

Baron Montesquicu, marquis Beccaria, & c.

ing such of the old penal laws as are either obsolete or absurd; and from too little care attention in framing and passing new ones. The enacting of penalties, to which a whole nation shall be subject, ought not to be left as matter of indifference to the passions or interests of a few, who upon temporary motives may prefer or support such a bill; but be calmly and
maturely considered by persons, who know what provisions the law has already made to remedy the mischief complained of, who can from experience foresee the probable consequences of those which are now proposed, and who will judge without passion or prejudice how adequate they are to the evil. It never usual in the house of peers even to read a private bill, which may affect the property of an individual, without first referring it to some of the learned judges, and hearing their report thereone.

And surely equal precaution is necessary, when laws are to be established, which may affect the property, liberty, and perhaps even lives, of thousands. Had such a reference taken place, it is impossible that in the eighteenth century it could ever have been made a capital crime, to break down (however maliciously) the mound of a fishpond, whereby any fish shall escape; or cut down a cherry tree in an orchard. Were even a committee appointed but once in an hundred years to revise the criminal law, it could not have continued to this hour a felony without benefit of clergy, to be seen for one month in the company of persons who call themselves, or are called, Egyptians.

IT is true, that these outrageous penalties, being seldom or never inflicted, are hardly known to be law by the public; but that rather aggravates the mischief, by laying a snare for the unwary. Yet they cannot but occur to the observation of any one, who hath undertaken the task of examining the great outlines of the English law, and tracing them up to their principles: and it is the duty of such a one to hint them with decency to those, whose abilities and stations enable them to apply the remedy. Having therefore premised this apology for some of the ensuing remarks, which might otherwise seem to favour of arrogance, I proceed now to consider (in the first place) the general nature of crimes.

1. A CRIME, or misdemeinor, is a act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous term: though, in common usage, the word, crimes, is made to denote such offences as are of a deeper and more
atrocious dye; while smaller faults, and omissions of less consequence, are comprized under the gentler name of misdemeanors? only.

THE distinction of PUBLIC WRONGS. from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; wrongs, or crime and misdemeanors, are breach and violation of the public rights and duties, due to the whole community, considered as community, in its social aggregate capacity. As if I detain a field from another man, to which the law has given him a right, this is a civil injury, and not a crime; for here only the right of an individual is concerned, and it is immaterial to the public, which of us in possession of the land: but treason, murder, and robbery are properly ranked among crimes; since, besides the injury done to individuals, they strike at the very being of society; which cannot possibly subsist, where actions of sort are suffered to escape with impunity.

IN all cases the crime includes an injury: every public offence is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community. Thus treason in imagining the king's death involves in it conspiracy against an individual, which is also a civil injury: but as this species of treason in its consequences principally tends to the dissolution of government, and destruction thereby of the order and peace of society, this denominates it a crime of the highest magnitude. Murder is an injury to the life of an individual: but law of society considers principally the loss which the state sustains by being deprived of a member, and the pernicious example thereby set, for others to do the like. Robbery may be considered in the same view: it is an injury to private property: but, were that all, a civil satisfaction in damages might atone for it: the public mischief is the things, for the prevention of which our laws have made it a capital offence. In these gross and atrocious injuries the private wrong is swallowed up in the public: we seldom hear any mention made of satisfaction to the individual; the satisfaction to the community being so very great.

And indeed, as the public crime is not otherwise avenged than by forfeiture of life and property, it is impossible afterwards to make any reparation for the private wrong; which can only be had from the body or goods of the aggressor. But there are crimes of an inferior nature, in which the public
punishment is not so severe, but it affords room for a private compensation also: and herein the distinction of crime from civil is very apparent. For instance; in the case of battery, or beating another, the aggressor may be indicted for this at the suit of the king, for disturbing the public peace, and be punished criminally by fine imprisonment: and the party beaten may also have his private remedy by action of trespass for the injury, which he in particular sustains, and recover a civil satisfaction in damages. So also, in case of a public nuisance, as digging a ditch a highway, this is punishable by indictment, as a common offence to the whole kingdom and all his majesty's subjects: but if any individual sustains any special damage thereby, as laming his horse, breaking his carriage, or the like, the offender may be compelled to make ample satisfaction, as well for the private injury, as for the public wrong.

UPON the whole we may observe, that in taking cognizance of all wrongs, or unlawful acts, the law has a double view: viz. not only to redress the party injured, by either restoring to him his right, if possible; or by giving him an equivalent; the manner of doing which was the object of our enquiries in the preceding book of these commentaries: but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws, which the sovereign power has thought proper to establish, for the government and tranquillity of the whole. What those breaches are, and how prevented or punished, are to be considered in the present book.

II. THE nature of crimes and misdemesnors in general being thus ascertained and distinguished, I proceed in the next place to consider the general nature of punishments: which are evils or inconveniences consequent upon crimes and misdemesnors; being devised, denounced, and inflicted by human laws, in consequence of disobedience or misbehaviour in those, to regulate whose conduct such laws were respectively made. And herein we will briefly consider the power, the end, and the measure of human punishment.

1. AS to the power of human punishment, or the right of the temporal legislator to inflict discretionary penalties for crimes and misdemesnors h. It is clear, that the right of punishing crimes against the law of nature, as murder and the like, is in a state of mere nature vested in every individual.
For it must be vested in somebody; otherwise the laws of nature would be
vain and fruitless, if none were empowered to put them in execution: and
if that power is vested in any one, it must also be vested in all mankind;
since all are by nature equal. Whereof

h See Grotius, de j.b.&. p.l.2.c.20. Puffendorf, L. of Nat. and N. b.8.c.3.

the first murderer Cain was so sensible, that we find him i expressing his
apprehensions, that whoever should find him would flay him. In a state of
society this right is transferred from individuals to the sovereign power;
whereby men are prevented from being judges in their own causes, which
is one of the evils that civil government was intended to remedy. Whatever
power therefore individuals had of punishing offences against the law of
nature, that is now vested in the magistrate alone; who bears the sword of
justice by the consent of the whole community. And to this precedent
natural power of individuals must be referred that right, which some have
argued to belong to every state, (though, in fact, never exercised by any) of
punishing not only their own subjects, but also foreign ambassadors, even
with death itself; in case they have offended, not indeed against the
municipal laws of the country, but against the divine laws of nature, and
become liable thereby to forfeit their lives for their guilt k.

AS to offences merely against the laws of society, which are only mala
prohibita, and not mala in se; the temporal magistrate is also empowered
to inflict coercive penalties for such transgressions: and this by the
consent of individuals; who, in forming societies, did either tacitly or
expressly invest the sovereign power with a right making laws, and of
enforcing obedience to them when made, by exercising, upon their
nonobservance, severities adequate to the evil. The lawfulness therefore
of punishing such criminals is founded upon this principle, that the law by
which they suffer was by their own consent; it is part to the original
contract into which they entered, when first they engaged in society; it
was calculated for, and has long contributed to, their own security.

THIS right therefore, being thus conferred by universal consent, gives to
the state exactly the same power, and no more, over all its members, as
each individual member had naturally

i Gen.iv.14.
k See Vol.1. pag.254.
over himself or others. Which has occasioned some to doubt, how far a human legislature ought to inflict capital punishments for positive offences; offences against municipal law only, and not against the law of nature; since no individual has, naturally, a power of inflicting death upon himself or other for actions in themselves indifferent. With regard to offences mala in se, capital punishments are in some instances inflicted by the immediate command of God himself to all mankind; as, in the case of murder, by the precept delivered to Noah, their common ancestor and representative 1, whoso sheddeth man's blood, by man shall his blood be shed. In other instances they are inflicted after the example of the creator, in his positive code of laws for the regulation of the Jewish republic; as in the case of the crime against nature. But they are sometimes inflicted without such express warrant or example, at will and discretion of the human legislature; as for forgery, for robbery, and sometimes for offences of a lighter kind. Of these we are principally to speak: as these crimes are, none of them, offences against natural, but only against social, rights; not even robbery itself, unless it be a robbery from one's person: all others being an infringement of that right of property, which, as we have formerly seen m, owes its origin not to the law of nature, but merely to civil society.

THE practice of inflicting capital punishments, for offences of human institution, is thus justified by that great and good man, sir Matthew Hale n: when offences grow enormous, frequent, and dangerous to a kingdom or state destructive or highly pernicious to civil societies, and to the great insecurity and danger of the kingdom or its inhabitants, severe punishment and even death itself is necessary to be annexed to laws in many cases by the prudence of lawgivers. It is therefore the enormity, or dangerous tendency, of the crime that alone can warrant any earthly legislature in putting him to death that commits it. It is not its frequency only, or the difficulty of otherwise preventing it, that will excuse our attempting to prevent it by a wanton effusion of human blood. For, though the end of punishment is to deter men from offending, it never can follow from thence, that it is lawful to deter them at any rate and by any means; since there may be unlawful

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1 Gen. ix. 6.
m Book I F. ch. 1.
n 1 Hal. P. C. 13.
methods of enforcing obedience even to the justest laws. Every humane legislator will be therefore extremely cautious of establishing laws that inflict the penalty of death, especially for slight offences, or such as are merely positive. He will expect a better reason for his so doing, than that loose one which generally is giver; that it is found by former experience that no lighter penalty will be effectual. For is it found upon farther experience, that capital punishments are more effectual? Was the vast territory of all the Russias worse regulated under the late empress Elizabeth, than under her sanguinary predecessors? Is it now, under Catherine II, less civilized, less social, less secure? And yet we are assured, that neither of these illustrious princesses have throughout their whole administration, inflicted the penalty of death: and latter has, upon, full experience of its being useless, nay even pernicious, given orders for abolishing it entirely throughout her extensive dominions. But indeed, were capital punishments proved by experience to be a sure and effectual remedy, that would not prove the necessity (upon which the justice and propriety depend) of inflicting them upon all occasions when other expedients fail. I fear this reasoning would extend a great deal too far. For instance, the damage done to our public roads by loaded wagons is universally allowed, and many laws have been made to prevent it; none which have hitherto proved effectual. But it does not therefore follow, that would be just for the legislature to inflict death upon every obstinate carrier, who defeats or eludes the provisions of former statutes. Where the evil to be prevented is not adequate to the violence of the preventive, a sovereign that thinks seriously can never justify o Grand instructions for framing a new code of laws for the Ruffian empire. 210.

such a law to the dictates of conscience and humanity. To shed the blood of our fellow creature is a matter that requires the greatest deliberation, and the fullest conviction of our own authority: for life is the immediate gift of God to man; which neither he can resign, nor can resign, nor can it be taken from him, unless by the command or permission of him who gave it; either expressly revealed, or collected from the laws of nature or society by clear and indisputable demonstration.

1. WOULD not be understood to deny the right of the legislature in any country to enforce its own laws by the death of the transgressor, though persons of some abilities have doubted it; but only to suggest a few for the
consideration of such as are, or may hereafter become, legislators. When a question arises, whether death may be lawfully inflicted for this or that transgression, the wisdom of the laws must decide it: and to this public judgment or decision all private judgments must submit; else there is an end of the principle of all society and government. The guilt of blood if any, must lie at their doors, who misinterpret the extent of their warrant; and not at the doors of the subject, who is bound to receive the interpretations, that are given by the sovereign power.

2. As to the end, or final cause of human punishments. This is not by way of atonement or expiation for the crime committed; for that must be left to the just determination of the supreme being: but as a precaution against future offences of the same kind. This is effected three ways: either by the amendment of the offender himself; for which purpose all corporal punishments, fines, and temporary exile or imprisonment are inflicted: or, by deterring others by the dread of his example from offending in the like way, ut poena (as Tully p expresses it) ad paucos, metus ad omnes perveniat; which gives rise to all ignominious punishments, and to such executions of justice as are open and public: or, lastly, by depriving the party injuring of the power to do future mischief; which is effected by either putting him to death, or condemning him to perpetual confinement, slavery, or exile. The same one end, of preventing future crimes, is endeavoured to be answered by each of these three species of punishment. The public gains equal security, whether the offender himself be amended by wholesome correction; or he be disabled from doing any farther harm: and if the penalty fails of both these effects, as it may do, still the terror of his example remains as a warning to other citizens. The method however of inflicting punishment ought always to be proportioned to the particular purpose it is means to serve, and by no means to exceed it: therefore the pains of death, and perpetual disability by exile, slavery, or imprisonment, ought never to be inflicted, but when the offender appears incorrigible: which may be collected either from a repetition of minuter offences; or from the perpetration of some one crime of deep malignity, which itself demonstrates a disposition without hope or probability of amendment and in such cases it would be cruelty to the public, to defer the punishment of
such criminal, till had an opportunity of repeating perhaps the worst of villanies.

3. AS to the measure of human punishments. From what has been observed in the former articles we may collect, that the quantity of punishment can never be absolutely determined by any standing invariable rule; but it must be left to the arbitration of legislature to inflict such penalties as are warranted by the laws of nature and society, and such as appear to be the best calculated to answer the end of precaution against future offences.

HENCE it will be evident, that what some have so highly extolled for its equity, the lex talionis or law of retaliation, can never be in all cases an adequate or permanent rule of punishment. In some cases indeed it seems to be dictated by natural reason; as in case of conspiracies to do an injury, or false accusations of the innocent: to which we may add that law of the Jews and Egyptians, mentioned by Josephus and Diodorus Siculus, that whoever without sufficient cause was found with any mortal poison in his custody, should himself be obliged to take it. But, in general, the difference of persons, place, time provocation, or other circumstances, may enhance or mitigate the offence; and in such cases retaliation can never be proper measure of justice. If a nobleman strikes a peasant, all mankind will see, that if a court of justice awards a return of the blow, it is more than a just compensation. On the other hand, retaliation may sometimes be too easy a sentence; as, if a man maliciously should put out the remaining eye him who had lost one before, it is too slight a punishment for the maimer to lose only one of his: and therefore the law of the Locrians, which demanded an eye for an eye, was in this instance judiciously altered; by decreeing, in imitation of Solon's law, that he who struck out the eye a one-eyed man, should lose both his own in return. Besides, there are many crimes, that will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery, and the like. And we may add, that those instances, wherein retaliation appears to be used, even by the divine authority, do not really proceed upon the of exact retribution, by doing to the criminal the same hurt he has done to his neighbour, and no more; but this correspondence between the crime and punishment is barely a consequence from some other principle. Death is
ordered to be punished with death; not because one is equivalent to the other, for that be expiation, and not punishment. Nor is death always an equivalent for death: the execution of a needy decrepit assassin is poor satisfaction or the murder of a nobleman in the bloom of his youth, and full enjoyment of his friends, his honours, and his fortune. But the reason upon which this sentence is grounded seems to be, that this the highest penalty that man can inflict,


and tends most to the security of the world; by removing one murderer from the earth, and setting a dreadful example to deter others: so that even this grand instance proceeds upon other principles than those of retaliation. And truly, if any measure of punishment is to be taken from the damage sustained by the sufferer, the punishment ought rather to exceed than equal the injury: since it seems contrary to reason and equity, that the guilty (if convicted) should suffer no more than the innocent has done before him; especially as the suffering of the innocent is past and irrevocable, that of the guilty is future, contingent, and liable to be escaped or evaded. With regard indeed to crimes that are incomplete, which consist merely in the intention, and are not yet carried into act, as conspiracies and the like; the innocent has a chance to frustrate or avoid the villany, as the conspirator has also a chance to escape his punishment: and this may be one reason why the lex talionis is more proper to be inflicted, if at all, for crimes that consist in intention, than for such as are carried into act. It seems indeed consonant to natural reason, and has therefore been adopted as a maxim by several theoretical writerst, that the punishment, due to the crime of which one falsely accuses another, should be inflicted on the perjured informer. Accordingly, when it was once attempted to introduce into England the law of retaliation, it was intended as a punishment or such only as preferred malicious accusations against others; it being enacted by statute 37Edw. III. C.18. that such as professed any suggestions to the king's to the king's great council should put in sureties of retaliation; that is, to incur the same pain that the other should have had, in case the suggestion were found untrue. But, after one year's experience, this punishment of retaliation was reject, and imprisonment adopted in its stead s.
But though from what has been said it appears, that there cannot be any
regular or determinate method of rating the

r Beccar.c.15.
s Stat. 38Edw.III.c.9.

quantity of punishments for crimes, by any one uniform rule; but they
must be referred to the will and discretion of the legislative power: yet
there are some general principles, drawn from the nature and
circumstances of the crime, that may be of some assistance in allotting it
an adequate punishment.

AS, first, with regard to the object of it: for the greater and more exalted
the object of an injury is, the more care should be taken to prevent that
injury, and of course under this aggravation the punishment should be
more severe. Therefore treason in conspiring the king's death is by the
English law punished with greater rigor than even actually killing any
private subject. And yet, generally, a design to transgress is not so flagrant
an enormity, as the actual completion of that design. For evil, the nearer
we approach it, is the more disagreeable and shocking; so that it requires
more obstinacy in wickedness to perpetrate an unlawful action, than
barely to entertain the thought of it: and it is an encouragement to
repentance and remorse, even till the last stage of any crime, that it never
is too late to retract; and that if a man stops even here, it is better for him
than if he proceeds: for which reasons an attempt to rob, to ravish, or to
kill, is far less penal than the actual robbery, rape, or murder. But in the
case of a conspiracy, the object whereof is the king's majesty, the intention
will deserve the highest degree of severity: not because the intention is
equivalent to the act itself; but because the greatest rigor is no more than
adequate to a reasonable purpose of the heart, and there is no greater to
inflict upon the actual execution itself.

AGAIN: the violence of passion, or temptation, may sometimes alleviate a
crime; as theft, in case of hunger, is far more worthy of compassion, than
when committed through avarice, or to supply one in luxurious excesses.
To kill a man upon sudden and violent resentment is less penal, than upon
cool deliberate malice. The age, education, and character of the offender;
the repetition (or otherwise) of the offence; the time,
the place, the company wherein it was committed; all these, and a thousand other incidents, may aggravate or extenuate the crime.t

FARThER: as punishment are chiefly intended for the prevention of future crimes, it is but reasonable that among crime of different natures those be most severely punished, which are the most destructive of the public safety and happiness v: and, among crimes of an equal malignity, those which a man has the most frequent and easy opportunities of committing, which cannot be so easily guarded against as others, and which therefore the offender has the strongest inducement to commit: according to what Cicero observes u, ea sunt animadvertenda peccata maxime, quae difficilime praecaventur. Hence it is, that for a servant to rob his master is in more cases capital, than for a stranger: if a servant kills his master, it is a species of treason; in another it is only murder: to steal a handkerchief, or other trifle, privately from one's person, is made capital; but to carry off a load of corn from an open field, though of fifty times greater value, is punished with transportation only. And in the island of Man, this rule was formerly carried so far, that to take away an horse or an ox was there no felony, but a trespass; because of the difficulty in that little territory to conceal them or carry them off: but to steal a pig or a fowl, which is easily done, was a capital misdemesnor, and the offender was punished with death w.

LASTLY, as a conclusion to the whole, we may observe that punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes, and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions

t Thus Demosthenes (in his oration against Mídias) finely works up the aggravations of the insult he had received. I was abused, says he, by my enemy, in cold blood, out of malice, not by heat of wine, in the morning, publicly, before strangers as well as citizens; and that in the temple, whither the duty of my office called me.

v Beccar. c.6.
u pro Sexto Rofcio, 40.
w 4 Inst. 285.
of severity. It is the sentiment of an ingenious writer, who seems to have well studied the springs of human action, that crimes are more effectually prevented by the certainty, than by the severity, of punishment. For the excessive severity of laws (says Montesquieu) hinders their execution: when the punishment surpasses all measure, the public will frequently out of humanity prefer impunity to it. Thus the statute 1 Mar. st.1.c.1.recites in its preamble, that the state of every king consists more assuredly in the love of the subject towards their prince, than in the dread of laws made with rigorous pains; and that laws made for the preservation of the commonwealth without great penalties are more often obeyed and kept, than laws made with extreme punishments. Happy had it been for the nation, if the subsequent practice of that deluded princess in matters of religion, had been correspondent to these sentiments of herself and parliament, in matters of state and government! We may farther observe that sanguinary laws are a bad symptom of the distemper of any state, or at least, or at least of its weak constitution. The laws of the Roman kings, and the twelve tables of the decemviri, were full of cruel punishments: the porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period the republic flourished: under the emperors severe punishments were revived; and then the empire fell.

IT is moreover absurd and impolitic to apply the same punishment to crimes of different malignity. A multitude of sanguinary law (besides the doubt that may be entertained concerning the right of making them) do likewise prove a manifest defect either in the wisdom of the legislative, or the strength of the executive power. It is kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the ultimum supplicium, to every case of difficulty. It is, it must be owned, much easier to extirpate than to amend mankind:

x Beccar. c.7.

yet that magistrate must be esteemed both a weak and a cruel surgeon, who cuts off limb, which through ignorance or indolence he will not attempt to cure. It has been therefore ingeniously proposed, that in every state a scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least: but, if that be too romantic an idea, yet at last a wise legislator will the principal divisions, and not assign penalties of the degree to offences of an inferior rank.
where men see no distinction made in the nature and gradations of punishment, the generality will be led to conclude there is no distinction in the guilt. Thus in France the punishment of robbery, either with or without murder, is the same a: hence it is, that thought perhaps they are therefore subject to fewer robberies, yet they never rob but they also murder. In China murderers are cut to pieces, and robbers not b: hence in that country they never murder on the highway, though they often rob. And in England, besides the additional terrors of speedy execution, and a subsequent exposure or dissection, robbers have a hope of transportation, which seldom is extended to murderers. This has the same effect here as in China: in preventing frequent assassination and slaughter.

YET, though in this instance we may glory in the wisdom of the English law, we shall find it more difficult to justify the frequency of capital punishment to found therein; inflicted (perhaps inattentively) by a multitude of successive independent statutes, upon crimes very different in their natures. It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than an hundred and sixty have been declared by act of parliament b to be felonies without benefit of clergy; or, in other words, to be worthy of instant death. So dreadful a lift, instead of diminishing, increases the number of offenders. The injured, through compassion, will often forbear to prosecute: juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence: and judges, through compassion, will resbite one half of the convicts, and recommend them to the royal mercy. Among so many chances of escaping, the needy or hardened offender overlooks the multitude that suffer; he boldly engages in some desperate attempt, to relieve his wants or supply his vices; and, if unexpectedly the of justice overtakes him, he deems himself peculiarly unfortunate, in falling at last a sacrifice to those laws, which long impunity has taught him to contemn.

CHAPTER THE SECOND
OF THE PERSONS CAPABLE OF COMMITTING CRIMES

HAVING, in the preceding chapter, considered in general the nature of crimes, and punishments, we are next led, in the order of our distribution, to enquire what persons are, or are not, capable of committing crimes; or, which is all one, who are exempted from the censures of the law upon the commission of those acts, which in other persons would be Severely punished. In the process of which enquiry, we must have recourse to particular and special exceptions: for the general rule is, that no person shall be excused from punishment for desobedience to the laws of his country, excepting such as are expressly defined and exempted by the laws themselves.

ALL the several pleas and excuses, which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, the want or defect of will. An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime, cognizable by human laws, there must be both a will and an act. For though, in soro conscientiae, a fixed design or will to do an unlawful act is almost as heinous as the commission of it, yet, as no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward action, it therefore cannot punish for what it cannot know. For which reason in all temporal jurisdictions an overt act, or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will, before the man is liable to punishment. And, as a vicious will without a vicious act is no civil crime, so on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.

NOW there are cases, in which will does not join with the act: 1. Where there is a defect of understanding. For where there is no discernment, there is no choice; and where there in on choice, there can be no act of the will, which is nothing else but a determination of one's choice, to do or to
abstain from a particular action: he therefore, that has no understanding, can have no will to guide his conduct. 2. Where there is understanding and will sufficient, residing in the party; but not called forth and exerted at the time of the action done: which is the case of all offences committed by chance or ignorance. Here the will fits neuter; and neither concurs with the act, nor disagrees to it. 3. Where the action is constrained by some outward force and violence. Here the will counteracts the deed; and is so far from concurring with, that loaths and disagrees to, what the man is obliged to perform. It will be the business of the present chapter briefly to consider all the several species of defect in will, as they fall under one or other of these general heads: as infancy, idiocy, lunacy, and intoxication, which fall under the first class; misfortune, and ignorance, which may be referred to the second; and compulsion or necessity, which may properly rank in the third.

1. FIRST, we will consider the case of infancy, or nonage; which is a defect of the understanding. Infants, under the age of discretion, ought not to be punished by any criminal prosecution whatever a. What the age of discretion is, in various nations is matter of some variety. The civil law distinguished the age of minors, or those under twenty five years old, into three stages: infantia, from the birth till seven years of age; pueritia, from seven to fourteen; and pubertas from fourteen upwards. The period of pucritia, or childhood, was again subdivided into two equal parts; from seven to ten and an half was aetas infantiae proxima; from ten and an half to fourteen was aetas pubertati proxima. During the first stage of infancy, and the next half stage of childhood, infantiae proxima, they were not punishable for any crime b. During the other half stage of childhood, approaching to puberty, from ten and an half to fourteen, they were indeed punishable, if found to be doli capaces, or capable of mischief; but with many mitigations, and not with the utmost rigor of the law. During the last stage (at the age of puberty, and afterwards) minors were liable to be punished, as well capitally, as otherwise.

THE law of England does in some cases privilege an infant, under the age of twenty one, as to common misdemesnors; so as to escape fine, imprisonment, and the like: and particularly in cases of omission, as not repairing a bridge, or a highway, and other similar offences c: for, not having the command of his fortune till twenty one, he wants the capacity to do those things, which the law requires. But where there is any
notorious breach of the peace, a riot, battery, or the like, (which infants, when full grown, are at least liable as others to

a Hawk. P.C.2.
b Inst.3.20.10.
c 1 Hal. P.C.20,21,22.

commit) for these an infant, above the age of fourteen, is equally liable to suffer, as a person of the full age of twenty one.

WITH regard to capital crimes, the law is still more minute and circumspect; distinguishing with greater nicety the several degrees of age and discretion. By the ancient Saxon law, the age of twelve years was established for the age of possible discretion, when first the understanding might open d: and from thence till the offender was fourteen, it was aetas pubertati proxima, in which he might, or might not, be guilty of a crime, according to his natural capacity or incapacity. This was the dubious stage of discretion: but, under twelve, it was held that he could not be guilty in will, neither after fourteen could he be supposed innocent, of any capital crime which he in fact committed. But by the law, as it now stands, and has stood at least ever since the time of Edward the third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. for none lad of eleven years old may have as much cunning as another of fourteen; and in these case our maxim is, that malitia supplet aetatem. Under seven years of age indeed an infant cannot be guilty of felony e; for then a felonious discretion is almost an impossibility in nature: but at eight years old he may be guilty of felony f. Also, under fourteen, though an infant shall be prima facie adjudged to be doli incapax; yet if it appear to the court and jury, that he was doli capax, and could discern between good and evil, he may be convicted and suffer death. Thus a girl of thirteen has been burnt for killing her mistress: and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged; because it appeared upon their trials, that the one hid himself, and the other hid the body he had killed: which hiding manifested a consciousness of guilt, and a discretion to discern be-

d LL. Athelftan. Wilk. 65.
e Mirr. c. 4.16. 1. Hal. P.C. 27.
tween good and evil. And there was an instance in the last century, where a boy of eight years old was tried at Abingdon for firing two barns; and, it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly. Thus also, in very modern times, a boy of ten years old was convicted on own confession of murdering his bedfellow; there appearing in his whole behaviour plain tokens of a mischievous discretion: and, as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment. But, in all such cases, the evidence of that malice, which is to supply age, ought to be strong and clear beyond all doubt or contradiction.

II. THE second case of a deficiency in will, which excuses from the guilt of crimes, arises also a defective or vitiated understanding, viz. in an idiot or a lunatic. For the rule of law as to the latter, which may easily be adapted also to the former, is, that furiofus furore folum punitur. In criminal cases therefore idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his found 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 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? 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 nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged some-

g 1. Hal. P.C. 26, 27.
h Emlyn on 1 Hal. P.C. 25.
i foster. 72.
k 3 Inst. 6.

thing in stay of judgment or execution. Indeed, in the bloody reign of Henry the eighth, a statute was made, which enacted, that if a person,
being compos mentis, should commit high treason, and after fall into
madness, he might be tried in his absence, and should suffer death, as if he
were of perfect memory. But this savage and inhuman law was repealed by
the statute 1 & 2 Ph. & M.c.10. For, as is observed by sir Edward Coke n, the
execution of an offender is for example, ut poena ad paucos, metus ad
omnes perveniat: but so it is not when a madman is executed; but should
be a miserable spectacle, both against law, and of extreme inhumanity and
cruelty, and can be no example to others. But there be any doubt, whether
the party be compos or not, this shall be tried by a jury. And if he be so
found a total idiocy, or absolute insanity, excuses from the guilt, and of
course from the punishment, of any criminal action committed under
depprivation of the senses: but, if a lunatic hath lucid intervals of
understanding, he shall answer for what he does in those intervals, as if he
had no deficiency o. Yet, in the case absolute madmen, as they are not
answerable for their actions, they should not be permitted the liberty of
acting unless under proper control; and, in particular, they ought not to
be suffered to go loose, to the terror of the king's subject. It was the
doctrine of our ancient law, that persons deprived of their reason might be
confined till they recovered their p, without waiting for the forms of a
commission or other special authority from the crown: and now, by the
vagrant acts q, a method is chalked out for imprisoning, chaining, and
fending them to their proper homes.

III. THIRDLY; as to artificial, voluntarily contracted madness, by
drunkenness or intoxication, which, depriving men of their reason, puts
them in a temporary frenzy; our law looks upon this as an aggravation of
the offence, rather than as an

l 1 Hal. P.C.34.
m 33 Hen. VIII.c.20
n Inst.6.
o 1 Hal. P.C.31.
q 17 Geo.II.c.5.

excuse for any criminal misbehaviour. A drunkard, says sir Edward Coke r,
who is voluntarius daemon, hath no privilege thereby; but what hurt or ill
soever he doth, his drunkenness doth aggravate it: nam omne crimen
ebrietas, et incondit, et detegit. It hath been observed, that the real use of
strong liquors, and the abuse of them by drinking to excess, depend much
upon the temperature of climate in which we live. The same indulgence, which may be necessary to make the blood move in Norway, would make an Italian mad. A German therefore, says the president Montesquieu s, drinks through custom, founded upon constitutional necessity; a Spaniard drinks through choice, or out of the mere wantonness of luxury of luxury: and drunkenness, he adds, ought to be more severely punished, where it makes men mischievous and mad, as in Spain and Italy, than where it only renders them stupid and heavy, as in Germany and more northern countries. And accordingly, in the warmer climate of Greece, a law of Pittacus enacted, that he who committed a crime, when drunk, should receive a double punishment; one for the crime itself, and the other for the ebriety which prompted him to commit it. The Roman law indeed made great allowances for this vice: per vinum delapsis capitalis poena remittitur. But the law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, (though real) will not suffer any man thus to privilege one crime by another.

IV. A FOURTH deficiency of will, is where man commits an unlawful act by misfortune or chance, and not by design. Here the will observes a total neutrality, and does not co-operate with the deed; which therefore wants one main ingredient of a crime. Of this, when it affects the life of another, we shall find more occasion to speak hereafter; at present only observing, that if any accidental mischief happens to follow from the performance of a lawful act, the party stands excused from all guilt: but if a man b doing any thing unlawful, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for, being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour.

V. FIFTHLY, ignorance or mistake is another defect of will; when a man, intending to do a lawful act, does that which is unlawful. For here deed and the will acting separately, there in not that conjunction between them,
which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error in point of law. As if a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family, this is no criminal action y: but if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does so; this is wilful murder. For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. Ignorantia juris, quod quifque tenetur scire, neminem excusat, is as well the maxim of our own law z, as it was of the Roman a.

VI. A SIXTH species of defect of will is that arising from compulsion and inevitable necessity. These are a constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will (if left to itself) would reject. As punishments are therefore only inflicted for the abuse of that free-will, which God has given to man, it is highly just and equitable that a man should be excused for those acts, which are done through unavoidable force and compulsion.

x 1 Hal. P.C.39.
y Cro. Car.538.
z Plowd.343.
a Ff.22.6.9.

1. OF this nature, in the first place, is the obligation of civil subjection, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest: as when a legislator establishes iniquity by a law, and commands the subject to do an act contrary to religion or found morality. How far this excuse will be admitted in foro conscientiae, or whether the inferior in this case is not bound to obey the divine, rather than the human law, it is not may business to decide; though the question I believe, among the casuists, will hardly bear a doubt. But, however that may be, obedience to the laws in being is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal. The sheriff, who burnt Latimer and Ridley, in the bigoted days of queen Mary, was not liable to punishment from Elizabeth, for executing so horrid an office; being justified by the commands of that magistracy, which endeavoured to restore superstition under the holy auspices of its merciless sister, persecution.
As to persons in private relations; the principal case, where constraint of a superior is allowed as an excuse for criminal misconduct, is with regard to the matrimonial subjection of the wife to her husband: for neither son or a servant are excused for the commission of any crime, whether capital or otherwise, by the command or coercion of the parent or master b; though in some cases the command or authority of the husband, either express or implied, will privilege the wife from punishment, even for capital offences. And therefore if a woman commit theft, burglary, or other civil offices the laws of society, by the coercion of her husband; or merely by his command, which the law construes a coercion; or even in his company, his example being equivalent to a command; she is not guilty of any crime: being considered as acting by compulsion and not of her own will c. Which doctrine is at least a thousand years old in this kingdom, being to be found among the laws of

b Hawk. P.C.3.
c 1 Hal. P.C.45.

ing the West Saxon d. And it appears that, among the northern nations on the continent, this privilege extended to any woman transgressing in concert with a man, and to any servant that committed a joint offence with a freeman: the male or freeman only was punished, the female or slave dismissed; procul dubio quod alterum libertas, alterum necessitas impelleret c. But (besides that in our law, which is a stranger to slavery, no impunity is given to servants, who are as much free agents as their masters) even with regard to wives, this rule admits of an exception in crimes that are mala in se, and prohibited by the law of nature, as murder and the like: not only because these are of a deeper dye; but also, since in a state of nature no one is in subjection to another, it would be unreasonable to screen an offender from the punishment due to natural crimes, by the refinements and ubordinations of civil society. In treason also, (the highest crime which a member of society can, as such, be guilty of) no plea of coverture shall excuse the wife; no presumption of the husband’s coercion shall extenuate her guilt f: as well because of the odiousness and dangerous consequence of the crime itself, as because the husband, having broken through the most sacred tie of social community by rebellion against the state, has no right to that obedience from a wife, which he himself as a subject has forgotten to pay. In inferior misdemeanors also, we may remark another exception; that wife may be indicted and set in the pillory with her husband, for keeping a brothel: for...
this is an offence touching the domestic economy or government of the house, in which the wife has a principal share; and in also such an offence as the law presumes to be generally conducted by the intrigues of the female sex. And in all cases, where the offends alone, without the company or command of her husband, she is responsible for her offence, as much as any feme-sole.

d cap. 57.
e Stiernhook de jure Sue.n.l.2.c.4.
f 1 Hal. P.C.47.
g 1 Hawk. P.C.2,3.

2. ANOTHER species of compulsion or necessity is what our law calls duress per minas; or threats and menaces, which induce a fear of death or other bodily harm, and which take away for that reason the guilt of many crimes and misdemeanors; at least before the human tribunal. But then that fear, which compels a man to do an unwarrantable action, ought to be just and well grounded; such, qui cadere possit in virum constantem, non timidum et meticulosum, as Bracton expresses it, in the words of the civil law. Therefore, in time of war or rebellion, a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels, which would admit of no excuse in the time of peace. This however seems only, or at least principally, to hold as to positive crimes, so created by the laws of society; and which therefore society may excuse; but not as to natural offences, so declared by the law of God, wherein human magistrates are only the executioners of divine punishment. And therefore though a man be violently assaulted, and hath no other possible means of escaping death, but by killing an innocent person; this fear shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent. But in such a case he is permitted to kill the assailant; for there the law of nature, and self-defence its primary canon, have made him his own protector.

3. THERE is a third species of necessity, which may be distinguished from the actual compulsion of external force or fear; being the result of reason and reflection, which act upon and constrain a man’s will, and oblige him to do an action, which without such obligation would be criminal. And that is, when a man has his choice of two evils set before him, and, being under a necessity of choosing one, he chooses the least
pernicious of the two. Here the will cannot be said freely to exert itself, being rather passive, than active; or, if active, it is rather in rejecting the greater evil than in choosing the less. Of this fort is that necessity, where a man by the commandment of the law is bound to arrest another for any capital offence, or to disperse a riot, and resistance is made to his authority: it is here justifiable and even necessary to beat, to wound, or perhaps to kill the ofenders, rather than permit the murderer to escape, or the riot to continue. for the preservation of the peace of the kingdom, and the apprehending of notorious malafactors, are of the utmost consequence to the public; and therefore excuse felony, which the killing would otherwise amount to n.

4. THERE is yet another case of necessity, which has occasioned great speculation among the writers upon general law; viz. whether a man in extreme want of food or clothing may justify stealing either, to relieve his present necessities. And this both Grotius o and together with many other of the foreign jurists, hold in the affirmative; maintaining by many ingenious, humane, and plausible reasons, that in such cases the community of goods by kind of tacit concession of society is revied. And some even of our own lawyers have held the same q; though it seems to be an unwarranted doctrine, borrowed from the notions of some civilians: at least it is now antiquatd, the law of England admiting no such excuse at present r. And this its doctrine is agreeable not only to the sentiments of many of the wisest ancients, particularly Cicero s, who holds that suum cuique incommodum serendum est, potius quam de alterius commodis detrahendum;? but also to the Jewish law, as certified by king Solomon himself t: if a thief steal to satisfy his soul his when he is hungry, he shall restore sevenfold,

h See Vol.1. pag.131.
i l.2.f.16.
k Ff.4.2.5,& 6.
l 1 Hal. P.C.50.
m Ibid.51.

n 1 Hal. P.C.53.
o de jure b.& p.l.2.c.2.
p L.of Nat. and N.l.2.c.6.
q Briton, c.10. Mirr. c.4.16.
r 1 Hal. P.C.54.
and shall give all the substance of his house: which was the ordinary punishment for theft in that kingdom. And this is founded upon the highest reason: for men's properties would be under a strange insecurity, if liable to be invaded according to the wants of others; of which wants no man can possibly be an adequate judge, but the party himself who pleads them. In this country especially, there would be a peculiar impropriety in admitting so dubious an excuse: for by our laws such sufficient provision is made for the poor by the power of the civil magistrate, that it is impossible the most needy stranger should ever be reduced to the necessity of thieving to support nature. This case of a stranger is, by the way, the strongest instance put by baron Puffendorf, and whereon he builds his principal arguments: which, however they may hold upon the continent, where the parsimonious industry of the natives orders every one to work or starve, yet must lose all their weight and efficacy in England, where charity is reduced to a system, and interwoven in our very constitution. Therefore our laws ought by no means to be taxed with being unmerciful, for denying this privilege to the necessitous; especially when we consider, that the king, on the representation of his ministers of justice, hath a power to soften the law, and to extend mercy in cases of peculiar hardship. An advantage which is wanting in many states, particularly those which are democratical: and these have in its stead introduced and adopted, in the body of the law itself, a multitude of circumstances tending to alleviate its rigor. But the founders of our constitution thought it better to vest in the crown power of pardoning particular objects of compassion, than to countenance and establish theft by one general undistinguishing law.

VII. IN the several cases before-mentioned, the incapacity of committing crimes arises from a deficiency of the will. To these we may add one more, in which the law supposes an incapacity of doing wrong from the excellence and perfection of the person; which extend as well to the will as to the other qualities of his mind. I mean the case of the king: who, by virtue of his royal prerogative, is not under the coercive power of the law; which will not suppose him capable of committing a folly, much less crime. We are therefore, out of reverence and decency, to forbear any idle enquiries, of what would be the
consequence if the king were to act thus and thus: since the law deems so highly of his wisdom and virtue, as not even to presume it possible for him to do any thing inconsistent with his station and dignity; and therefore has made no provision to remedy such a grievance. But of this sufficient was said in a former volume w, to which I must refer the reader.

u 1 Hal. P.C.44.
w Book. I. ch.7. pag.244.

CHAPTER THE THIRD
OF PRINCIPALS AND ACCESSORIES

IT having been shewn in the preceding chapter what persons are, or not, upon account of their situation and circumstances, capable of committing crimes, we are next to make a few remarks on the different degrees of guilt among persons that are capable of offending; viz. as principal, and as accessory.

1. A MAN may be principal in an offence in two degrees. a principal, in the first degree, is he that is the actor, or absolute perpetrator of the crime; and, in the second degree, he who is present, aiding, and abetting the fact to be done a. Which presence need not always be an actual immediate standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance b. And this rule hath also other exceptions: for, in case of murder by poisoning, a man may be a principal felon, by preparing and laying the poison, or giving it to another (who is ignorant of its poisonous quality c) for that purpose; and yet not administer it himself, nor be present when the very deed of poisoning is committed d. And the same reasoning will hold,

a 1 Hal. P.C.615.
b Fotter.350.
c Ibid.349.
d 3 Inst.138.
with regard to other murders committed in the absence of the murderer, by means which he had prepared before-hand, and which probably could not fail of their mischievous effect. As by laying a trap or pitfall for another, whereby he is killed; letting out a wild beast, with an intent to do mischief, or exciting a madman to commit murder, so that death thereupon ensues; in every of these cases the party offending is guilty of murder as a principal, in the first degree. For he cannot be called an accessory, that necessarily pre-supposing a principal; and the poison, the pitfall, the beast, or the madman cannot be held principals, being only the instruments of death. As therefore he must be certainly guilty, either as principal or accessory, and cannot be so as accessory, it follows that he must be guilty as principal: and if principal, then in the first degree; for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or assist.

II. AN accessory is he who is not the chief actor in the offence, nor present at its performance, but is someway concerned therein, either before or after the fact committed. In considering the nature of which degree of guilt, we will, first, examine what offences admit of accessories, and what not: secondly, who may be an accessory before the fact: thirdly, who may be an accessory after it: and, lastly, how accessories, considered merely as such, and distinct from principal, are to be treated.

1. AND, first, as to what offences admit of accessories, and what not. In high treason there are no accessories, but all are principals: the same acts, that make a man accessory in felony, making him a principal in high treason, upon account of the heinousness of the crime. Besides it is to be considered, that the bare intent to commit treason is many times actual treason; as imagining the death of the king, or conspiring to take away his crown. And, as no one can advise and abet such a crime without an intention to have it done, there can be no accessories before the fact; since the very advice and abetment amount to principal treason. But this will not hold in the inferior species of high treason, which do not amount to the legal idea of compassing the death of the king, queen, or prince. For in those no advice to commit them, unless the thing be actually performed, will make a man a principal traitor. In petit
treason, murder, and felonies of all kinds, there may be accessories: except only in those offences, which by judgment of law are sudden and unpromeditated, as manslaughter and the like; which therefore cannot have any accessories before the fact h. But in petit larceny, or minute thefts, and all other crimes under the degree of felony, there are no accessories; but all persons concerned therein, if guilty at all, are principals i: the same rule holding with regard to the highest and lowest offences; though upon different reasons. In treason all are principals, propter odium delicti; in trespass all are principals, because the law, quae de minimis non curat, does not descend to distinguish the different shades of guilt in petty misdemeanors. It is a maxim, that accessorius sequitur naaturam sui principalis k: and therefore an accessory cannot be guilty of a higher crime than his principal; being only punished, as a partaker of his guilt. So that if a servant instigates 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 and assisting, he would have been guilty as principal of petty treason, and the stranger of murder l.

2. As to the second point, who may be an accessory before the fact; sir Matthew Hale m defines him to be one, who being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime. Herein absence is necessary to make him an accessory; for such procurence is necessary to make him an accessory; for if such procurer, or the like, be present, he is guilty of the crime as principal. If a then advises B to kill another, and B does it in the absence of A, now B is principal, and A is accessory in the murder. And this hold, even though the party killed be not in rerum natura at the time of the advice given. As if A, the reputed father, advice B the mother of a bastard child, unborn, to strangle it when born, and she does so; A is accessory to this murder n. And it is also settled o, that whoever procureth a felony to be committed, though it be by the intervention of a third person, is an

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h 1Hal. P.C.615.  i Ibid.613.  k 3Inst.139.  l 2Hawk. P.C.315.  m 1Hal. P.C.615,616.  n 342.
accessory before the fact. It is likewise a rule; that he who in any wise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act; but is not accessory to any act distinct from the other. As if A commands B to beat C, and B beats him so that he dies; B is guilty of murder as principal, and A as accessory. But if A commands B to burn C’s house; and he, in so doing, commits a robbery; now A, though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and unconsequential nature p. But if the felony committed be the same in substance with that which is commanded, and only varying in some circumstantial matters; as if, upon a command to poison Titius, he is stabbed or shot, that he dies; the commander is still accessory to the murder, for the substance of the thing commanded was the death of Titius, and the manner of its execution is a mere collateral circumstance q.

3. AN accessory after the fact may be, where a person, knowing a felony to have been committed, receives, relieves, consorts, or assists the felon r. Therefore, to make an accessory ex post facto, it is in the first place requisite that he knows of the felony committed s. In the next place, he must receive, relieve, comfort, or assist him. And, generally, any assistance whatever given to a felon, to hinder his being apprehended,

n Dyer.186.
o Foster.125.
p 1Hal. P.C.617.
q 2Hawk. P.C.316.
r 1Hal. P.C.618.
s 2Hawk. P.C.319.

tried, or suffering punishment, makes the assistor an accessory. As furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him t. So likewise to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man an accessory to the felony. But to relieve a felon in gaol with clothes or other necessaries, is no offence: for the crime imputable to species of accessory is the hindrance of public justice, by assisting the felon to escape the vengeance of the law u. To buy or receive stolen goods, knowing them to be stolen, falls under none of these descriptions: it was therefore at common law, a mere misdemeanor, and not the receiver.
accessory to the theft, because he received the goods only, and not the
felon w: but now by the statutes 5 Ann. c.31. and 4 Geo. I.c.11. all such
receivers are made accessories, and may be transported for fourteen years.
In France this is punished with death: and the Gothic constitutions
distinguished also three sorts of thieves, unum qui consilium daret,
alterum qui contrectaret, tertium qui receptaret et occuleret; pari poenae
singulos obnoxios x.

THE felony must be complete at the time of the assistance given: else it
makes not the assistant an accessory. As if one wounds another mortally,
and after the wound given, but before death ensues, a person assists or
receives the delinquent: this does not make him accessory to the
homicide, for till death ensues there is no felony committed y. But so strict
is the law where a felony is actually complete, in order to do effectual
justice, that the nearest relations are not suffered to aid or receive one
another. If the parent assists his child, or the child his parent, if the
brother receives his brother, the master his servant, or the servant his
master, or even if the husband relieves

his wife, who have any of them committed a felony, the receivers become
accessories ex post facto z. But a feme covert cannot become an accessory
be the receipt and concealment of her husband; for she is presumed to act
under his coercion, and therefore she is not bound, neither ought she, to
disconcer her lord a.

4. THE last point of enquiry is, how accessories are to be treated,
considered distinct from principals. And the general rule of the ancient law
(borrowed from the Gothic constitutions b) is this, that accessories shall
suffer the same punishment as their principals: if one be liable to death,
the other is also liable c: as, by the law of Athens, delinquents and their
abettors were to receive the same punishment d. Why then, it may be
asked, are such elaborate distinctions made between accessories and
principals, if both are to suffer the same punishment For these reasons. 1.
To distinguish the nature and denomination of crimes, that the accused
may know how to defend himself when indicted: the commission of an actual robbery being quite a different accusation, from that of harbouring the robber. 2. Because, though by the ancient common law the rule is as before laid down, that both shall be punished alike, yet now by the statutes relating to the benefit of clergy a distinction is made between them: accessories after the fact being still allowed the benefit of clergy in all cases; which denied to the principals, and accessories before the fact, in many cases; as in petit treason, murder, robbery, and wilful burning c. And perhaps if a distinction were constantly to be made between the punishment of principals and accessories, even before the fact, the latter to be created with a little less severity than the former, it might prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself; as his danger would be greater than that of his accomplices, by

z 3 Inst. 10 2Hawk. P.C.320.  
a 1Ibid. P.C.621.  
b See. Stiernhock. Ibid.  
c Inst.188.  
d Pott. antia. b.1.c.20. 1Hal. P.C.615.

reason of the difference of his punishment f. 3. because formerly no man could be tried as accessory, till after the principal was convicted, or at least at the same time with him: though that law is now much altered, as will be shewn more fully in its proper place. 4. Because, though a man be indicted as accessory and acquitted, he may afterwards be indicted as principal; for an acquittal of receiving or counselling a felon is no acquittal of the felony itself: but it is matter of some doubt, whether, if a man be acquitted as principal, he can be afterwards indicted as accessory before the fact; since those offences are frequently very near allied, and therefore an acquittal of the guilt of one may be an acquittal of the other also g. But it is clearly held, that one acquitted as principal may be indicted as an accessory after the fact; since that is always an offence of a different species of guilt, principally tending to evade the public justice, and is subsequent in its commencement to the other. Upon these reasons the distinction of principal and accessory will appear to be highly necessary; though the punishment is still much the same with regard to principals, and such accessories as offend a priori.

f Beccar.c.37.
CHAPTER THE FOURTH.
OF OFFENCES AGAINST GOD AND RELIGION.

IN the present chapter we are to enter upon the detail of the several species of crimes and misdemeanors, with the punishment annexed to each by the law of England. It was observed, in the beginning of this book a, that crimes and misdemeanors are a breach and violation of the public rights and duties, owing to the whole community, considered as a community, in its social aggregate capacity. And in the very entrance of these commentaries bit was shewn, that human laws can have no concern with any but social and relative duties ; being intended only to regulate the conduct of man, considered under various relations, as a member of civil society. All crimes ought therefore to be estimated merely according to the mischiefs which they produce in civil society c: and, of consequence, private vices, or the breach of mere absolute duties, which man is bound to perform considered only as an individual, are not, cannot be, the object of any municipal law; any farther than as by their evil example, or other pernicious effects, they may prejudice the community, and thereby become a species of public crimes. Thus the vice of drunkenness, if committed privately and alone, is beyond the knowledge and of course beyond the reach of human tribunals: but if committed publicly, in the face of the world, its evil example makes it liable to temporal censures. The vice of lying, which consists (abstractedly taken) in a criminal violation of truth, and therefore in any shape derogatory from sound morality, is not however taken notice of by our law, unless it carries with it some public inconvenience, as spreading false news; or some social injury, as slander and malicious prosecution, for which a private recompense is given. And yet drunkenness and lying are in foro conscientiae as thoroughly criminal when they are not, as when they are, attended with public inconvenience. The only difference is, that both public and private vices are subject to the vengeance of eternal justice;
and public vices are besides liable to the temporal punishments of human tribunals.

ON the other hand, there are some misdemesnors, which are punished by the municipal law, that are in themselves nothing criminal, but are made so by the positive constitutions of the state for public convenience. Such as poaching, exportation of wool, and the like. These are naturally no offences at all; but their whole criminality consists in their disobedience to the supreme power, which has an undoubted right for the wellbeing and peace of the community to make some things unlawful which were in themselves indifferent. Upon the whole therefore, though part of the offences to be enumerated in the following sheets are against the revealed law of God, others against the law of nature, and some are offences against neither; yet in a treatise of municipal law we must consider them all as deriving their particular guilt, here punishable, from the law of man.

HAVING premised this caution, I shall next proceed to distribute the several offences, which are either directly or by consequence injurious to civil society, and therefore punishable by the laws of England, under the following general heads: first, those which are more immediately injurious to God and his holy religion; secondly, such as violate and transgress the law of nations; thirdly, such as more especially affect the sovereign executive power of the state, or the king and his government; fourthly, such as more directly infringe the rights of the public or common wealth; and, lastly, such as derogate from those rights and duties, which are owing to particular individuals, and in the preservation and vindication of which community is deeply interested.

FIRST then, such crimes and misdemesnors, as more immediately offend Almighty God, by openly transgressing the precepts of religion either natural or revealed; and mediately, by their bad example and consequence, the law of society also; which constitutes that guilt in the action, which human tribunals are to censure.

1. OF this species the first is that of apostacy, or a total renunciation of christianity, by embracing either a false religion, or no religion at all. This offence can only take place in such as have once professed the true religion. The perversion of a christian to judaism, paganism, to other false
religion, was punished by the emperors Constantius and Julian with confiscation of goods; to which the emperors Theodosius and Valennian added capital punishment, in case the apostate endeavoured to pervert others to the same iniquity. A punishment too severe for any temporal laws inflict; and yet the zeal of our ancestors imported it into this country; for we find by Bracton, that in his time apostates were to be burnt to death. Doubtless the preservation of Christianity, as a nation religion, is, abstracted from its own intrinsic truth, of the utmost consequence to the civil state: which a single instance will sufficiently demonstrate. The belief of a future state of rewards and punishments, the entertaining just ideas of the moral attributes of the supreme being, and a firm persuasion that he superintends and will finally compensate every action in human life (all which are clearly revealed in the doctrines, and forcibly inculcated by the precepts, of our saviour Christ) these are the grand founda-

d Cod. 1.7.1.
e Ibid. 6.
f l.3.c.9.

tion of all judicial oaths; which call to witness the truth of those, which perhaps may be only know to him and the party attesting: all moral evidence therefore, all confidence in human veracity, must be weakened by irreligion, and overthrown by infidelity. Wherefore all affronts to Christianity, or endeavours to depreciate its efficacy, are highly deserving of human punishment. But yet the loss of life is a heavier penalty than the offence, taken in a civil light, deserves: and, taken in a spiritual light, our laws have no jurisdiction over it. This punishment therefore has long ago become obsolete; and the offence of apostacy was for a long time the object only of the ecclesiastical courts, which corrected the offender pro salute animae. But about the close of the last century, the civil liberties to which we were then restored being used as a cloak of maliciousness, and the most horrid doctrine subversive of all religion being publicly avowed both in discourse and writings, it was found necessary again for the civil power to interpose, by not admitting those miscreants to the privileges of society, who maintained such principle as destroyed all moral obligation. To this end it enacted by statute 9&10 W. III. c.32. that if any person educated in, or having made profession of, the Christian religion, shall writing, printing, teaching, or advised speaking, deny the Christian religion to be true, or the holy scriptures to be of divine authority, he shall upon the first offence be rendered incapable to hold any office of trust; and, for
the second, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and shall suffer three years imprisonment without bail. To give room however for repentance; if, within four months after the first conviction, the delinquent will in open court publicly renounce his error, he is discharged for that once from all disabilities.

II. A SECOND offence is that of heresy which consists not in a total of christianity, but of some of its essential
g Meferayantz in our ancient law-books is the name of unbelievers.
doctrines, publicly and obstinately avowed: being defined, sententia rerum divinarum humano sensu excogitata, palam docta, et pertinaciter defensa. And here it must also be acknowledged that particular modes of belief or unbelief, not tending to overturn christianity itself, or to sap the foundations of morality, are by no means the object of coercion by the civil magistrate. What doctrines shall therefore be adjudged heresy, was left by our old constitution to the determination of the ecclesiastical judge; who had herein a most arbitrary latitude allowed him. For the general definition of an heretic given Lyndewode i, extends to the smallest deviations from the doctrines of holy church: haereticus est qui dubitat de side catholica, et qui negligit servare ea, quae Romana ecclesia statuit, seu servare decreverat. Or, as the statute 2 Hen. IV. C.15. expresses it in English, teachers of erroneous opinions, contrary to the faith and blessed determination of the holy church. Very contrary this to the usage of the first general councils, which defined all heretical doctrines with the utmost precision and exactness. And what ought to have alleviated the punishment, the uncertainty of the crime, seems to have enhanced it in those days of blind zeal and pious cruelty. It is true, that the sactimonious hypocrisy of the canonists went first no farther than enjoining penance, excommunication, and ecclesiastical deprivation, for heresy; though afterwards they proceeded boldly to imprisonment by the ordinary, and confiscation of goods in pios usus. But in the mean time they had prevailed upon weakness of bigotted princes to make the civil power subservient to their purposes, by making heresy not only a temporal, but even a capital offence: the Romish ecclesiastics determining, without appeal, whatever they pleased to be heresy, and shIsting off to the secular arm the odium and drudgery of executions; with which they themselves were too tender and delicate to intermeddle. Nay they pretended to intercede and pray, on
behalf of the convicted heretic, ut citra mortis periculum sententia circa eum moderetur k: well

h 1Hal. P.C.384.
i cap.de haereticis.
k Decretal.l.5.t.40.c.27.

knowing at the same time that they were delivering the unhappy victim to certain death. Hence the capital punishments inflicted on the ancient Donatists and Manichaens by the emperors Theodosius and Justinian l: hence also the constitution of the emperor Frederic mentioned by Lyndewode m, adjudging all persons without distinction to be burnt fire, who were convicted of heresy by the ecclesiastical judge. The same emperor, in another constitution n, ordained that if any temporal lord, when admonished by the church, should neglect to clear his territories of heretics within a year, it should be lawful for good catholics to seise and occupy the lands, and utterly to exterminate the heretical possessors. And upon this foundation was built that arbitrary power, so long claimed and so fatally exerted by the pope, of disposing even of the kingdoms of refractory princes more dutiful sons of the church. The immediate event of this constitution was something singular, and may serve to illustrate at once the gratitude of the holy fee, and the just punishment of the royal bigot: for upon the authority of this very constitution, the pope afterwards expelled this very emperor Frederic from his kingdom of Sicily, and gave it to Charles of Anjou o.

CHRISTIANITY being thus deformed by daemon of persecution upon the continent, we cannot expect that our own island should be entirely free from the same scourge. And therefore we find among our ancient precedents p a writ de haeretico comburendo, which is thought by some to be as ancient as the common law itself. However it appears from thence, that the conviction of heresy by the common law was not in any petty ecclesiastical court, but before the archbishop himself in a provincial synod; and that the delinquent was delivered over to the king to do as he should please with him: so that the crown had a control over the spiritual power, and might pardon the convict by issuing

l Cod. l.1.tit.5.
m c. de haereticis.
n Cod.1.5.4.
o Baldus in Cod.1.5.4.
p P.N.B.269.

no process against him; the writ de haeretico comburendo being not a writ of course, but issuing only by the special direction of the king in council q.

BUT in the reign of Henry the fourth, when eyes of the christian world began to open, and the seeds of the protestant religion (though under the opprobrious name of lollardy r) took root in this kingdom; the clergy, taking advantage from the king's dubious title to demand an increase of their own power, obtained an act of parliament, which sharpened the edge of persecution to its utmost keennees. For, by that aynod, might convict of heretical tenets; and unless the convict abjured his opinions, or if after abjuration he relapsed, the sheriff was bound ex officio, if required by the bishop, to commit the unhappy victim to the flames, without waiting for the consent of the crown. By the statute 2Hen. V.c.7. lollardy was also made a temporal offence, and indictable in the king's courts; which did not thereby gain an exclusive, but only a concurrent jurisdiction with the bishop's consistory.

AFTERWARDS, when final reformation of religion began to advance, the power of the ecclesiastics was somewhat moderated: for thought what heresy is, was not then precisely defined, yet we are told in some points what it is not: the statute 25 Hen.VIII.c.14. declaring, that offences against the see of Rome are not heresy; and the ordinary being thereby restrained from proceeding in any case upon mere suspicion; that is, unless the party be accused by two credible witnesses, or an indictment of heresy be first previously found in the king's courts of common law. And yet the spirit of persecution was not then abated, but only diverted into a lay channel. For in six years afterwards, by statute 31.Hen.VIII.c.14. the bloody law of the six articles was made, which established the six most contested points popery, tran-

q Hal. P.C.395.
s So called not from lolium, or tares, (which was afterwards devised, in order to justify the burning of them from Matth. xiii.30.) but from one Walter Lolhard, a German reformer. Mod.Un.Hast.xxvi.13.Spelm. Gloff.371.
s Hen.IV. c.15.
substantiation, communion in one kind, the celibacy of the clergy, monastic vows, the sacrifice of the mass, and auricular confession; which points were determined and resolved by the most godly study, pain, and travail of his majesty: for which his most humble and obedient subjects, the lords spiritual and temporal and the commons, in parliament assembled, did not only render and give unto his highness their most high and hearty thanks, but did also enact and declare all oppugners of the first to be heretics, and to be burnt with fire; and of the five last to felons, and to suffer death. The same statute established a new and mixed jurisdiction of clergy and laity for the trial and conviction of heretics; the reigning prince being then equally intent on destroying the supremacy of the bishops of Rome, and establishing all other their corruptions of the Christian religion.

1. SHALL not perplex this detail with the various repeals and revivals these sanguinary laws in the two succeeding reigns; but shall proceed directly to the reign of Queen Elizabeth; when the reformation was finally established with temper and decency, unsullied with party rancour, or personal caprice and resentment. By statute 1 Eliz. c.1. all former statutes relating to heresy are repealed, which leaves the jurisdiction of heresy as it stood at common law; viz. as to the infliction of common censures, in the ecclesiastical courts; and, in case of burning the heretic, in the provincial synod only. Sir Matthew Hale is indeed of a different opinion, and holds that such power resided in the diocesan also; though he agrees, that in either case the writ de haeretico comburendo was not demandable of common right, but grantable or otherwise merely at king's discretion. But the principal point now gained, was, that by this statute a boundary is for the first time set to what shall be accounted heresy; nothing for the future being to be so determined, but only such tenets, which have been heretofore so declared, 1. By the words of the canonical scriptures; 2. By the first four general councils, or such others

as have only used the words of the holy scriptures; or, 3. Which shall hereafter be so declared by the parliament, with the assent of the clergy in convocation. Thus was heresy reduced to a greater certainty than before; though it might not have been the worse to have defined it in terms still more precise and particular: as a man continued still liable to be burnt,
for what perhaps he did not understand to be heresy, till the ecclesiastical judge so interpreted the words the canonical scriptures.

FOR the writ de haeretico comburendo remained still force; and we have instances of its being put in execution upon two anabaptists in the seventeenth of Elizabeth, and two Arians in the ninth of James the first. But it was totally abolished, and heresy again subjected only to ecclesiastical correction, pro salute animae, by virtue of the statute 29. Car. II. c.9. For in one and the same reign, our lands were delivered from the slavery of military tenures; our bodies from arbitrary imprisonment by the habeas corpus act; and our minds from the tyranny of superstitious bigotry, by demolishing this last badge of persecution in the English law.

IN what I have now said I would not be understood to derogate from the just right of the national church, or to favour a loose latitude of propagating any crude undigested sentiments in religious matters. Of propagating, I say; for the bare entertaining them, without an endeavour to diffuse them, seems hardly cognizable by any human authority. I only mean to illustrate the excellence of our present establishment, by looking back to former times. Every thing is now as it should be: unless perhaps that heresy ought to be more strictly defined, and no prosecution permitted, even in the ecclesiastical courts, till the tenets in question are by proper authority previously declared to be heretical. Under these restrictions, it seems necessary for the support of the national religion, that the officers of the church should have power to censure heretics, but not to exterminate or destroy them. It has also been thought proper for the civil magistrate again to interpose, with regard to one species of heresy, very prevalent in modern times: for by statute 9&10 W.III.c.32. if any person educated in the christian religion, or professing the same, shall by writing, printing, teaching, or advised speaking, deny any one of the persons in the holy trinity to be God, or maintain that there are more Gods than one, he shall undergo the same penalties and incapacities, which were just now mentioned to be inflicted on apostacy by the same statute. And thus much for the crime of heresy.

III. ANOTHER species of offences against religion are those which affect the established church. And these are either positive, or negative. Positive, as by reviling its ordinances: or negative, by non-conformity to its worship. Of both of these in their order.
AND, first, of the offence of reviling the ordinances of the church. This is a crime of much grosser nature than the other of mere non-conformity: since it carries with it the utmost indecency, arrogance, and ingratitude: indecency, by setting up private judgment in opposition to public; arrogance, by treating with contempt and rudeness what has least a better chance to be right, than the singular notions of any particular man; and ingratitude, by denying that indulgence and liberty of conscience to the members of the national church, which the retainers to every petty conventicle enjoy. However it is provided by statutes 1 Edw. VI. c.1. and 1 Eliz. c.1. that whoever reviles the sacrament of the lord’s supper shall be punished by fine and imprisonment: and by statute 1 Eliz. c.2. if any minister shall speak any thing in derogation of the book of common prayer, he shall be imprisoned six months, and forfeit a year's value of his benefice; and for the second offence he shall be deprived. And if any person whatsoever shall in plays, songs, or other open words, speak any thing 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 shall forfeit all his goods chattels, and suffer imprisonment for life. These penalties were framed in the infancy of our present establishment; when the disciples of Rome and of Geneva united in inveighing with the utmost bitterness against the English liturgy: and the terror of these laws (for they seldom, if ever, were fully executed) proved a principal means, under providence, of preserving the purity as well as decency of our national worship. Nor can their continuance to this time be thought too severe and intolerant; when we consider, that they are levelled at an offence, to which men cannot now be prompted by any laudable motive; not even by a mistaken zeal for reformation: since from political reasons, sufficiently hinted at in a former volume v, would now be extremely unadvisable to make any alterations in the service of the church; unless it could be shewn that some manifest impiety or shocking absurdity would follow from continuing it in its present form. And therefore the virulent declamations of peevish or opinionated men on topics so often refuted, and of which the preface to the liturgy is itself a perpetual refutation, can be calculated for no other purpose, than merely to disturb the consciences, and poison the minds of the people.
2. NON-CONFORMITY to the worship of the church is the other, or negative branch of this offence. And for this there is much more to be bleeded than for the former; being a matter of private conscience, to the scruples of which our present laws have shewn a very just and christian indulgence. For undoubtedly all persecution and oppression of weak consciences, on the score of religious persuasions, are highly unjustifiable upon every principle of natural reason, civil liberty, or found religion. But care must be taken not to carry this indulgence into such extremes, as may endanger the national church: there is always a difference to be made between toleration and establishment.

NON-CONFORMISTS are of two sorts: first, such as absent themselves from the divine worship in the established church,

through total irreligion, and attend the service of no other persuasion. These by the statutes of 1 Eliz. c.2. 23Eliz. c.1. and 3 Jac.I.c.4. forfeit one shilling to the poor every lord's day they so absent themselves, and 20 l. to the king if they continue such default for a month together. And they keep any inmate, thus irreligiously disposed, in their house, they forfeit 10 l. per month.

THE second species of non-conformists are those who offend through a mistaken or pervaerse zeal. Such were esteemed by our laws, enacted since the time of the reformation, to be papists and protestant dissenters: both of which were supposed to be equally schismatics in departing from the national church; with this difference, that the papists divide from us upon material, though erroneous, reasons; but many of the dissenters upon matters of indifference, of, in other words, upon no reason at all. However the laws against the former are much more severe than against the principles of the papists being deservedly looked upon to be subversive of the civil government, but not those of the protestant dissenters. As to the papists, their tenets are undoubtedly calculated for the introduction of all slavery, both civil and religious: but it may with justice be questioned, whether the spirit, the doctrines, and the practice of the sectaries are better calculated to make men good subjects. One thing obvious to observe, that these have once within the compass of the last century, effected the ruin of our church and monarchy; which the papists have attempted indeed, but have never yet been able to execute. Yet certainly
our ancestors were mistaken in their plans of compulsion and intolerance. The sin of schism, as such, is by no means the object of temporal coercion and punishment. If through weakness of intellect, through misdirected piety, through perverseness and ascerbity of temper, or (which is often the case) through a prospect of secular advantage in herding with a party, men quarrel with the ecclesiastical establishment, the civil magistrate has nothing to do with it; unless their tenets and practice are such as threaten ruin or dis-

turbance to the state. He is bound indeed to protect the established church, by admitting none but its genuine members to offices of trust emolument: for, if every sect was to be indulged in a free communion of civil employments, the idea of a national establishment would at once be destroyed, and the episcopal church would be no longer the church of England. But, this being once secured, all persecution for diversity of opinions, however ridiculous or absurd they may be, is contrary to every principle of sound policy and civil freedom. The names and subordination of the clergy, the posture of devotion, the materials and colour of the minister's garment, the joining in a known or an unknown form of prayer, and other matters of the same kind, must be left to the option of every man's private judgment.

WITH regard therefore to protestant dissenters, although the experience of their turbulent disposition in former times occasioned several disabilities and restrictions (which I shall not undertake to justify) to be laid them by abundance of statutes, yet at length the legislature, with spirit of true magnanimity, extended that indulgence to these sectaries, which they themselves, when in power, had held to be countenancing schism, and denied to the church of England. The penalties are all of them suspended by the statute 1 W.&m.ft.2.c.18. commonly called the toleration act; which exempts all dissenters (except papists, and such as deny the trinity) from all penal laws relating to religion, provided they take the oaths of allegiance and supremacy, and subscribe the declaration against popery, and repair to some congregation registered in the bishop's court or at the sessions, the doors whereof must be always open: and dissenting teachers are also to subscribe the thirty nine articles, except those relating to church government and infant baptism. Thus are all persons, who will approve themselves no papists or oppugners of the trinity, left at full
liberty to act as their conscience shall direct them, in the matter of religious worship. But by statute

w 31 Eliz. c.1. 17car. II.c.2. 22car. II.c.1.

5 Geo. 1. c.4. no mayor, or principal magistrate, must appear at any dissenting meeting with the ensigns of his office x, on pain of disability to hold that any other office: the legislature judging it a matter of propriety, that a mode of worship, set up in opposition to the national, when allowed to be exercised in peace, should be exercised also with decency, gratitude, gratitude, and humility.

AS to papists, what has been said of the protestant dissenters would hold equally strong for a general toleration of them; provided their separation was founded only upon difference of opinion in religion, and their principles did not also extend to a subversion of the civil government. If once they could be brought to renounce the supremacy of the pope, they might quietly enjoy their seven sacraments, their purgatory, and auricular confession; their worship of reliques and images; nay even their transubstantiation. But while they acknowledge a foreign power, superior to the sovereignty of the kingdom, they cannot complain if the laws of that kingdom will not treat them upon the footing of good subjects.

LET us therefore now take a view of the laws in force against the papists; who may be divided into three classes, persons professing popery, popish recusants convict, and popish priests. 1. Persons professing the popish religion, besides the former penalties for not frequenting their parish church, are by several statutes, too numerous to be here recited y, disabled from taking any lands either by descent or purchase, after eighteen years of age, until they renounce their errors; they must at the age of twenty one register their estates before acquired, and all future conveyances and wills relating to them; they are incapable of presenting to any advowson, or granting to any other person any

x Sir Humphrey Edwin, a lord mayor of London, had the imprudence soon after the toleration-act to go to a presbyterian meeting-house in his formalities: which is alluded to by dean Swift, in his tale of a tub, under the allegory of tack getting on a great hourse, and eating custard.
y See Hawkins's pleas of the crown, and Burn's justice.
avoidance to the same, in prejudice of the two universities; they may not
keep or teach any school under pain of perpetual imprisonment; they are
liable also in some instances to pay double taxes; and, if they willingly say
or hear mass, they forfeit the one two hundred, the other one hundred
marks, and each shall suffer a year's imprisonment. Thus much for
persons, who from the misfortune of family prejudices or otherwise, have
conceived an unhappy attachment to the Romish church from their
infancy, and publicly profess its errors. But if any evil industry is used to
rivet these errors upon them, if any person sends another abroad to be
educated in the popish religion, or to reside in any religious house abroad
for that purpose, or contributes any thing to their maintenance when there;
both the sender, the sent, and the contributor, are disabled to sue in law
or equity, to be executor or administrator to any person, to take any legacy
or deed of gift, and to bear any office in the realm, and shall forfeit all their
goods and chattels, and likewise all their real estate for life. And where
errors are also aggravated by apostacy, or perversion, where a person is
reconciled to the see of Rome or procures others to be reconciled, the
offence amounts to high treason. 2. popish recusants, convicted in a court
of law of not attending the service of the church of England, are subject to
the following disabilities, penalties, and forfeitures, over and above those
before-mentioned. They can hold no office or employment; they must not
keep arms in their houses, but the same may be seised by the justices of
the peace; they may not come within ten miles of London, on pain of 100 l;
they can bring no action at law, or suit in equity; they are not permitted
to travel above five miles from home, unless by licence, upon pain of
forfeiting all their goods; and they may not come to court, under pain of
100 l. No marriage or burial of such recusant, or baptism of his child, shall
be had otherwise than by the ministers of the church of England, under
other severe penalties. A married woman, when recusant, shall forfeit two
thirds of her dower or jointure, may not be executrix or administratrix to
her husband, nor any part of his goods; and during the
coverture may be kept in prison, unless her husband redeems her at the
rate of 10 l. a month, or the third part of all his lands. And, lastly, as a
feme-covert recusant may be imprisoned, so all others must, within three
months after conviction, either submit and renounce their errors, or, if
required so to do by four justices, must abjure and renounce the realm:
and if they do not depart, or if they return without the king's licence, they
shall be guilty of felony, and suffer death as felons. There is also an inferior
species of recusancy, (refusing to make the declaration against popery
enjoined by statute 30 Car.II.ft.2. when tendered by the proper magistrate which, if the party resides within ten miles of London, makes him an absolute recusant convict; or, if at a greater distance, suspends him from having any seat in parliament, keeping arms in his house, or any horse above the value of five pounds. This is the state, by the laws now in being, of a lay papist. But, 3. The remaining species or degree, viz. popish priests, are in a still more dangerous condition. By statute 11&12 W. III. c.4. popish priests or bishops, celebrating mass or exercising any parts of their functions in England, except in the houses of ambassadors, are to perpetual imprisonment. And by the statute 27 Eliz. c.2. any popish priest, born in the dominious of the crown of England, who shall come over hither from beyond sea, or shall be in England three days without conforming and taking the oaths, is guilty of high treason: and all persons harbouring him are guilty of felony without the benefit of clergy.

THIS is a short summary of the laws against the papists, under their three several classes, of persons professing the popish religion, popish recusants convict, and popish priests. Of which the president Montesquieu observes z, that they do all the hurt that can possibly be done in cold blood. But in answer to this it may be observed, (what foreigners who only judge from our statute book are not fully apprized of) that these laws

z Sp. L.b.19. c.27.

are seldom exerted to their utmost rigor: and indeed, if they were, it would be very difficult to excuse them. For they are rather to be accounted for from their history, and the urgency of the times which produced them, than to be approved (upon a cool review) as a standing system of law. The restless machinations of the jesuits during the reign of Elizabeth, the turbulence and uneasiness of the papists under the new religious establishment, and the boldness of their hopes and wishes for the succession of the queen of Scots, obliged the parliament to counteract of dangerous a spirit by laws of a great, and perhaps necessary, severity. The powder-treason, in the succeeding reign, struck a panic a into James I, which operated in different ways: it occasioned the enacting of new laws against the papists; but deterred him from putting them in execution. The intrigues of queen Henrietta in reign of Charles I, the prospect of a popish successor in that of Charles II, the assassination-plot in the reign of king William, and the avowed claim of a popish pretender to the crown, will account for the extension of these penalties at those several periods of our
history. But if a time should ever arrive, and perhaps it is not very distant, when all fears of a pretender shall have vanished, and the power and influence of the pope shall become feeble, ridiculous, and despicable, not only in England but in every kingdom of Europe; it probably would not then be amiss to review and soften these rigorous edicts; at least till the civil principles of the roman catholics called again upon the legislature to renew them: for it ought not to be left in the breast of every merciless bigot, to drag down the vengeance of these occasional law upon inoffensive, though mistaken, subject; in opposition to the lenient inclinations of the civil magistrate, and to the destruction of every principle of toleration and religious liberty.

IN order the better to secure the established church against perils from no-conformists of all denominations, infidels, turks, jews, heretics, papists, and sectaries, there are however two bulwarks erected; called the corporation and test acts: by the former of which a no person can be legally elected to any office relating to the government of any city or corporation, unless, within a twelvemonth before, he has received the sacrament of the lord's supper according to the rites of church of England: and he is also enjoined to take the oaths of allegiance and supremacy at the same time that he takes the oath office: or, in default of either of these requisites, such election shall be void. The other, called the test act b, all officer civil and military to take the oaths and make the declaration against transubstantiation, in the court of king's bench or chancery, the next term, or at the next quarter sessions, or (by subsequent statutes) within six months, after their admission; and also within the same time to receive the sacrament of the lord's supper, according to the use of the church of England, in some public church immediately after divine service and sermon, and to deliver into court a certificate thereof signed by the minister and church-warden, and also to prove the same by two credible witnesses; upon forfeiture of 500 l, and disability to hold the said office. And of much the same nature with these is the statute 7 Jac. I.c.2. which permits no persons to be naturalized or restored in blood, but such as undergo a like test: which test having been removed in 1753, in favour of the jews, was the next session of parliament restored again with again with some precipitation.

THUS much for offence, which strike at our national religion, or the doctrine and discipline of the church of England in particular. I proceed
now to consider some gross impieties and general immoralities, which are
taken notice of and punished by our municipal law ; frequently in
concurrence with the ecclesiastical, to which the censure of many of them
does also of right appertain ; though with a view somewhat different : the
spiritual court punishing all sinful enormities for the sake of reforming the
private sinner, pro salute animae ; while the temporal courts refer the
public affront to religion and morality, on

a Star. 13 Car.II.ft.2.c.1.
b Stat.25 car. II.c.2.

which all government must depend for support, and correct more for the
sake of example than private amendment.

IV. THE fourth species of offences therefore, more immediately against
God and religion, is that of blasphemy against the Almighty, by denying
his being or providence ; or by contumelious reproaches of our Saviour
Christ. Whither also may be referred all profane scoffing at the holy
scripture, or exposing it to contempt and ridicule. These are offences
punishable at common law by fine and imprisonment, or other infamous
corporal punishment c : christianity is part of the laws of England d.

V. SOMEWHAT allied to this, though in an inferior degree, is the offence
of profane and common swearing and cursing. By the last statute against
which, 19 Geo. II. c.21. which repeals all former ones, every labourer,
sailor, or soldier shall forfeit 1 s. for every profane oath or curse, every
other person under the degree of a gentleman 2 s. and every gentleman or
person of superior rank 5 s. to the poor of the parish ; and, on a second
conviction, double ; and, for every subsequent conviction, treble the sum
first forfeited ; with all charges of conviction : and in default of payment
shall be sent to the house of correction for ten days. Any constable or
peace officer may convict upon his own hearing, or the testimony of one
witness ; and any constable or peace officer, upon his own hearing, may
secure any offender and carry him before a justice, and there convict him.
If the justice omits his duty, he forfeits 5 l, and the constable 40 s. And the
act is to be read in all parish churches, and public chapels, the sunday after
every quarter day, on pain of 5 l. to be levied by warrant from any justice.
Besides this punishment for taking God's name in vain in common
discourse, it is enacted by statute 3 Jac. I. c.21. that if in any stage play,
interlude, or shew, the name of the holy trinity, or any of the persons therein,

c 1Hawk. P.C.7.
d 1Ventr.293. 2Strange, 834.

be jestingly or profanely used, the offender shall forfeit 10 l, one moiety to the king, and the informer.

VI. A SIXTH species of offences against God and religion, of which our ancient books are full, is a crime of which one knows not well what account to give. I mean the offence of witchcraft, conjuration, enchantment, or sorcery. To deny the possibility, nay, actual existence, of witchcraft and sorcery, is at once flatly to contradict the revealed word of God, in various passages both of the old and new testament: and the thing itself is a truth to which every nation in the world hath in its turn borne testimony, by either examples seemingly well attested, or prohibitory laws, which at least suppose the possibility of a commerce with evil spirits. The civil law punishes with death not only the sorcerers themselves, but also those who consult them e; imitating in the former the express law of God f, thou shalt not suffer a witch to live. And our own laws, both before and since the conquest, have been equally penal; ranking this crime in the same class with heresy, and condemning both to the flames g. The president Montesquieu h ranks them also both together, but with a very different view: laying it down as an important maxim, that we ought to be very circumspect in the prosecution of magic and heresy; because the most unexceptionable conduct, the purest morals and the constant practice of every duty in life, are not a sufficient security against the suspicion of crimes like these. And indeed the ridiculous stories that are generally told, and the many impostures and delusions that have been discovered in all ages, are enough to demolish all faith in such a dubious crime; if the contrary evidence were not also extremely strong. Wherefore it seems to be the most eligible way to conclude, with an ingenious writer of our own i though one cannot give credit to any particular modern instance of it.

e Cod.l.9.t.18.
f exod.xxii. 18.
g 3Inst.44.
h Sp.L.b.12.c.5.
OUR forefathers stronger believers, when they enacted by statute 33 Hen.VIII.c.8. all witchcraft and sorcery to be felony without benefit of clergy; and again by statute 1Jac.I.c.12. that all persons invoking any evil spirit, or consulting, covenanting with, entertaining, employing, feeding, or rewarding any evil spirit; or taking up dead bodies from their graves to be used in any witchcraft, sorcery, charm, or enchantment; or killing or otherwise hurting any person by such infernal arts; should be guilty of felony without benefit of clergy, and suffer death. And, if any person should attempt by sorcery to discover hidden treasure, or to restore stolen goods, or to provoke unlawful love, or to hurt man or beast, though the same were not effected, he or she should suffer imprisonment and pillory for the first offence, and death for the second. These acts continued in force till lately, to the terror of all ancient females in the kingdom: and many poor wretches were sacrificed thereby to the prejudice of their neighbours, and their own illusions; not a few having, by some means or other, confessed the fact at the gallows. But all executions for this dubious crime are now at an end; our legislature having at length followed the wise example of Louis XIV in France, who thought proper by an edict to restrain the tribunals of justice from receiving informations of witchcraft. And accordingly it is with us enacted by statute 9 Geo.II. c.5. that no prosecution shall for the future be carried on against any person for conjuration, witchcraft, sorcery, or enchantment. But the misdemeanors of persons pretending to use witchcraft, tell fortunes, or discover stolen goods by skill in the occult sciences, is still deservedly punished with a year's imprisonment, and standing four times in the pillory.

VII. A SEVENTH species of offenders in this class are all religious impostors: such as falsely pretend an extraordinary commission from heaven; or terrify and abuse the people with false denunciations of judgments. These, as tending to subvert all religion, by bringing it into ridicule and contempt, are punishable by the temporal courts with fine, imprisonment, and infamous corporal punishment.
VIII. SIMONY, or the corrupt presentation of any one to an ecclesiastical benefice for gift or reward, is also to be considered as an offence against religion; as well by reason of the sacredness of the charge which is thus profanely bought and sold, as because it is always attended with perjury in the person presented m. The statute 31 Eliz. c.6. (which, so far as it relates to the forfeiture of the right of presentation, was considered in a former book n) enacts, that if any patron, for money or any other corrupt consideration or promise, directly or indirectly given, shall present, admit, institute, induct, install, or collate any person to an ecclesiastical benefice or dignity, both the giver and taker shall forfeit two value of the benefice or dignity; one moiety to the king, and the other to any one who will sue for the same. If persons also corruptly resign or exchange their benefices, both the giver and taker shall in like manner forfeit double the value of the money or other corrupt consideration. And persons who shall corruptly ordain or licence any minister, or procure him to be ordained or licenced, (which is the true idea of simony) shall incur a like forfeiture of forty pounds; and the minister himself of ten pounds, besides an incapacity to hold any ecclesiastical preferment for seven years afterwards. Corrupt elections and resignations in colleges, hospitals, and other eleemosynary corporations, are also punished by the same statute with forfeiture of the double value, vacating the place or office, and a devolution of the right of election for that turn to the crown.

l 1Hawk. P.C.7.
m 3Inst.156.
n See Vol.II. pag.279.
CH. 4.

IX. PROFANATION of the lord's day, or sabbath-breaking, is a ninth offence against God and religion, punished by the municipal laws of England. For, besides the notorious indecency and scandal, of permitting any secular business to be publicly transacted on that day, in a country professing christianity, and the corruption of morals which usually follows its profanation, the keeping one day in seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state, considered merely as a civil institution. It humanizes by the help of conversation and society the manners of the lower classes; which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit: it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness: it imprints on the minds of
the people that sense of their duty to God, so necessary to make them good citizens; but which yet would be worn out and defaced by an unremitting continuance of labour, without any stated times of recalling them to worship of their maker. And therefore the laws of king Athelstan forbade all merchandizing on the lord's day, under very severe penalties. And by the statute 27 Hen. VI. c. 5. no fair or market shall be held on the principal festivals, good friday, or any sunday (except the four sundays in harvest) on pain of forfeiting the goods exposed to sale. And, since, by the statute 1 Car. I. c. 1. no persons shall assemble, out of their own parishes, for any sport whatsoever upon this day; nor, in their parishes, shall use any bull or bear baiting, interludes, plays, or other unlawful services, or pastimes; on pain that every offender shall pay 3s. 4d. to the poor. This statute does not prohibit, but rather implies, any innocent recreation or amusement, within their respective parishes, even on the lord's day, after divine service is over. But by statute 29 Car. II. c. 7. no person is allowed to work on the lord's day, or use any boat or barge, or expose any goods to sale; except meat in public houses, milk at certain hours, and works of necessity or charity, on forfeit of 5s. Nor shall any drover, carrier, or the like, travel upon that day, under pain of twenty shillings.

X. DRUNKENNESS is also punished by statute 4 Jac. I. c. 5. with the forfeiture of 5s.; or the sitting six hours in the stocks: by which time the statute presumes the offender will have regained his senses, and not be liable to do mischief to his neighbours. And there are many wholesome statutes, by way of prevention, chiefly passed in the same reign of king James I, which regulate the licencing of ale-houses, and punish persons found tippling therein; or the masters of such houses permitting them.

XI. THE last offence which I shall mention, more immediately against religion and morality and cognizable by the temporal courts, is that of open and notorious lewdness: either by frequenting houses of ill fame, which is an indictable offence; or by some grossly scandalous and public indecency, for which the punishment is by fine and imprisonment. In the year 1650, when the ruling powers found it for their interest to put on the semblance of a very extraordinary strictness and purity of morals, not only incest and adultery were made capital crimes; but also the repeated act of
keeping a brothel, or committing fornication, were (upon a second conviction) made felony without benefit of clergy r. But at the restoration, when men from an abhorrence of the hypocrisy of the late times fell into a contrary extreme, of licentiousness, it was not thought proper to renew a law of such unfashionable rigor. And these offences have been ever since left to the feeble coercion of the spiritual court, according to the rules of the canon law; a law which has treated the offence of incontinence, nay even adultery itself, with a great degree of tenderness and lenity; owing perhaps to the celibacy of its first compilers. The temporal

courts therefore take no cognizance of the crime of adultery, otherwise than as a private injury s.

BUT, before we quit this subject, we must take notice of the temporal punishment for having bastard children, considered in a criminal light; for with regard to the maintenance of such illegitimate offspring, which is a civil concern, we have formerly spoken at large t. By the statute 18 Eliz. c.3. two justices may take order for the punishment of the mother and reputed father; but what that punishment shall be, is not therein ascertained: though the contemporary exposition was, that a corporal punishment was intended u. By statute 7 Jac. I. c.4. a specific punishment (viz. commitment to the house of correction) is inflicted on the woman only. But in both cases, it seems that the penalty can only be inflicted, if the bastard becomes chargeable to the parish: for otherwise the very maintenance of the child is considered as a degree of punishment. By the last mentioned statute the justices may commit the mother to the house of correction, there to be punished and set on work for one year; and, in case of a second offence, till she find sureties never to offend again.

s See Vol.III. pag.139.
t See Vol. pag.458.
u Daft. just. ch.11.

CHAPTER THE FIFTH.
OF OFFENCES AGAINST THE LAW OF NATIONS.
ACCORDING to the method marked out in the preceding chapter, we are next to consider the offences more immediately repugnant to that universal law of society, which regulates the mutual intercourse between one state and another; those, I mean, which are particularly animadverted on, as such, by the English law.

THE law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world a; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance frequently occur between two or more independent states, and the individuals belonging to each b. This general law is founded upon this principle, that different nations ought in time of peace to do one another all the good they can; and, in time of war, as little harm as possible, without prejudice to their own real interests c. And, as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those principles of natural justice, in which all the learned of every nation agree: or they depend upon mutual compacts or treaties 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 equally subject.

IN arbitrary states this law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power: but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those acts parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as

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a Ff.1.1.9.
b See Vol.L. pag.43.
c Sp.L.b.1.c.3.
declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world. Thus in mercantile questions, such as bills of exchange and the like; in all marine causes, relating to freight, averafe, demurrage, insurances, bottomry, and others of a similar nature; the lawmerchant, which is a branch of the law of nations, is regularly and constantly adhered to. So too in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, there is no other rule of decision but this great universal law, collected from history and usage and such writers of all nations and languages as are generally approved and allowed of.

BUT, though in civil transactions and questions of property between the subjects of different states, the law of nations has much scope and extent, as adopted by the law of England; yet the present branch of our enquiries will fall within a narrow compass, as offences against the law of nations can rarely be the object of the criminal law of any particular state. For offences against this law are principally incident to whole states or nations: which case recourse can only be had to war; which is an appeal to the god of hosts, to punish such infraction of public faith, as are committed by one independent people against another: neither state having any superior jurisdiction to resort to upon earth for justice. But where the individuals of any state violate this general law, it is then the interest as well as duty of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained. For in vain would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two states in a war. It is therefore incumbent upon the nation injured, hrf to satisfaction and justice to be done on the offender, by the state to which he belongs; and, if that be refused or neglected, the sovereign them avows himself an accomplice or abettor of his subject's crime, and draws upon his community the calamities of forcing war.

THE principal offence against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy.
1. AS to the first, violation of safe-conducts or passports, expressly granted by the king or his ambassadors e to the subjects of a foreign power in time of mutual war; or, committing acts of hostility against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct; the are breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another: and such offences may, according to the writers upon the law of nations, be a just ground e See Vol.1. pag.260.

of a national war; since it is not in the power of the foreign prince to cause justice to be done to his subjects by the very individual delinquent, but he must require it of the whole community. And as during the continuance of any safe-conduct, either express or implied, the foreigner is under the protection of the king and the law; and, more especially, as it is one of the articles of magna carta f, that foreign merchants shall be intitled to safe-conduct and security throughout the kingdom; there is no question but that any violation of either the person or property of such foreigner may be punished by indictment in the name of the king, whose honour is more particularly engaged in supporting his own safe-conduct. And, hen this malicious rapacity was not confined to private individuals, but broke out into general hostilities, by the statute 2Hen.V.ft.1.c.6. breaking of truce and safe-conduct, or abetting and receiving the trucebreakers, was (in affirmance and support of the law of nations) declared to be high treason against the crown and dignity of the king; and conservators of truce and safe-conducts were appointed in every port, and impowered to hear and determine such treasons (when committed at sea) according to the ancient marine law then practised in the admiral's court: and, together with two men learned in the law of the land, to hear and determine according to that law the same treasons, when committed within the body of any county. Which statute, so far as it made these offences amount to treason, was suspended by 14 Hen.VI. c.8. and repealed by 20 Hen. VI. c.11. but revived by 29 Hen. VI. c.2. which gave the same powers to the lord chancellor, associated with either of the chief justices, as belonged to the conservators of truce and their assessors; and enacted that, notwithstanding the party be convected of treason, the injured stranger should have restitution out of his effects, prior to any claim of the crown. And it is farther enacted enacted by the statute 31 Hen.VI. c.4. that if any of the king's subjets attempt or offend, upon the
fea, or in port within the king's obeysance, against any stranger in amity, league, or under safe-conduct; and


especially by attaching his person, or spoiling him, or robbing him of his goods; the lord chancellor, with any of the justices of either the king's bench or common pleas, may cause full restitution and amends to be made to the injured.

IT is to be observed, that the suspending and repealing acts of 14 & 20 Hen. VI, and also the reviving act of 29 Hen. VI, were only temporary; so that it should seem that, after the expiration of them all, the statute 2 Hen. V continued in full force: but yet it is considered as extinct by the statute 14 Edw. IV. c.4. which revives and confirm's all statutes and ordinances made before the accession of the house of York against breakers of amities, truces, leagues, and safe-conducts, with an express exception to the statutes of 2 Hen. V. But (however that may be) I apprehend it was finally repealed by the general statutes of Edward VI and queen Mary, for abolishing new-created treasons; though sir Matthew Hale seems to question it as to treasons committed on the sea g. But certainly the statute of 31 Hen. VI remains in full force to this day.

II. AS to the rights of ambassadors, which are also established by the law of nations, and are therefore matter of universal concern, they have formerly been treated of at large h. It may here be sufficient to remark, that the common law of England recognizes them in their full extent, by immediately stopping all legal process, sued out through the ignorance or rashness of individuals, which may intrench upon the immunities of a foreign minister or any of his train. And, the more effectually to enforce the law of nations in this respect, when violated through wantonness or insolence, it is declared by the statute 7 Ann. c.12. that all process whereby the person of any ambassador, or of his domestic or domestic servant, may be arrested, or his goods distreined or seised, shall be utterly null and void; and that all persons prosecuting, soliciting, or executing such process, being convicted by confession or the oath of one

g 1 Hal. P.C. 262.
witness, before the lord chancellor and the chief justices, or any two of
them, shall be deemed violaters of the laws of nations, and disturbers of
the public repose; and shall suffer such penalties and corporal
punishment as the said judges, of any two of them, shall think fit i. Thus,
in cases of extraordinary outrage, for which the law hath provided no
special penalty, the legislature hath intrusted to the three principal judges
of the kingdom an unlimited power of proportioning the punishment to
the crime.

III. LASTLY, the crime of piracy, or robbery and depredation upon the
high seas, is an offence against the universal law of society; a pirate being,
according to sir Edward Coke k, bostis humani generis. As therefore he has
renounced all the benefits of society and government, and has reduced
himself afresh to the savage state of nature, by declaring war against all
mankind, all mankind must declare war against him: so that every
community hath a right, by the rule of self-defence, to inflict that
punishment upon him, which every individual would in a state of nature
have been otherwise entitled to do, any invasion of his person or personal
property.

BY the ancient common law, piracy, if committed by a subject, was held to
be a species of treason, being contrary to his natural allegiance; and by an
alien to be felony only: but now, since the statute of treasons, 25 Edw. III.
c.2. it is held to be only felony in a subject l. Formerly it was only
cognizable by the admiralty courts, which proceed by the rule of the civil
law m. But, it being inconsistent with the liberties of the nation, that any
man's life should be taken away, unless by the judgment of his peers, or
the common law of the land, the statute 28 Hen.VIII. c.15. established a
new jurisdiction for this purpose; which proceeds according to the course
of the common law, and of which we shall say more hereafter.

l See the occasion of making this statute; Vol.I. pag.255.
k 3Inst.113. 1 Ibid.
m 1 Hawk. P.C.98.

THE offence of piracy, by common law, consists in committing those act of
robbery and depredation upon the high seas, which, if committed upon
land, would have amounted to felony there n. as, by statute 11&12
W.III.c.7. if any natural born subject commits any act of hostility upon the
high seas, against others of his majesty'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 up voluntarily to a pirate; or conspiring to do these acts; or any person confining the commander of a vessel, to hinder him from fighting in defence his ship, or to cause 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 accessory. By the statute 8 Geo. I. 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 seising or carrying her off, and destroying or throwing any of the goods overboard; shall be deemed piracy: and all accessories to piracy, are declared to be principal pirates, and felons without benefit of clergy. By the same statutes also, (to encourage the defence of merchant vessels against pirates) the commanders or seamen qounded, 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 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,

1 Hawk. P.C.100.

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.

THESE are the principal case, in which are the statute law of England interposes, to aid and enforce the law of nations, as a part of the common law; inflicting an adequate punishment upon offences against that universal law, committed by private persons. We shall proceed in the next chapter to consider offences, which more immediately affect the sovereign executive power of our own particular state, or the king and government; which species of crimes branches itself into a much larger extent, than either of those of which we have already treated.
CHAPTER THE SIXTH.
OF HIGH TREASON.

THE third general division of crimes consists of such, as more especially affect the supreme executive power, or the king and his government; which amount either to a total renunciation of that allegiance, or at the least to a criminal neglect of that duty, which is due from every subject to his sovereign. In a former part of these commentaries we had occasion to mention the nature of allegiance, as the tie or ligamen which binds every subject to be true and faithful to his sovereign liege lord the king, in return for that protection which is afforded him; and truth and faith to bear of life and limb, and earthly honour; and not to know or hear of any ill intended him, without defending him therefrom. And this allegiance, we may remember, was distinguished in two sorts or species: the one natural and perpetual, which is inherent only in natives of the king's dominions; the other local and temporary, which is incident to aliens also. Every offence therefore more immediately affecting the royal person, his crown, or dignity, is in some degree a breach of this duty of allegiance, whether natural and innate, or local and acquired by residence: and these may be distinguished into four kinds; 1. Treason. 2. Felonies injurious to the king's prerogative. 3. Praemunire. 4. Other misprisions and contempts. Of which crimes the first and principal is that of treason.

TREASON, proditio, in its very name (which is borrowed from the French) imports a betraying, treachery, or breach of faith. It therefore happens only between allies, faith the mirror b: for treason is indeed a general appellation, made use of by the law, to denote not only offences against the king and government, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior, between whom and himself there subsists a natural, a civil, or even a spiritual relation; and inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such his superior or lord. This is looked upon as proceeding from the same principle of treachery in private life, as would have urged him who harbours it to have conspired in public against his liege lord and sovereign: and therefore for a wife to kill her lord or husband, a servant his lord or
master, and an ecclesiastic his lord or ordinary; these being breaches of
the lower allegiance, of private and domestic faith, are denominated petit
treasons. But when disloyalty so rears its crest, as to attack even majesty
itself, it is called by way of eminent distinction high treason, alta proditio;
being equivalent to the crimen laesae majestatis of the Romans, as Glanvil
c denominates it also in our English law.

As this is the highest civil crime, which (considered as a member of the
community) any man can possibly commit, it ought therefore to be the
most precisely ascertained. For if the crime of high treason be
indeterminate, this alone (says the president Montesquieu) is sufficient to
make any government degenerate into arbitrary power d. And yet, by the
ancient common law, there was a great latitude left in the breast of the
judges, to determine what was treason, or not so: whereby the creatures of
tyrranical princes had opportunity to create abundance of constructive
treasons; that is, to raise, by forced and arbitrary

b c.1.7.
c l.1.c.2.
d Sp.L.b.12.c.7.

constructions, offences into the crime and punishment of treason, which
never were suspected to be such. Thus the accroaching, or attempting to
exercise, royal power (a very uncertain charge) was in the 21 Edw. III. held
to be treason in a knight of Hertfordshire who forcibly assaulted and
detained one of the king's subjects till he paid him 90 l.e: a crime, it must
be owned, well deserving of punish-
ment; but which seems to be of a
complexion very different from that of treason. Killing the king's father, or
brother, or even his messenger, has also fallen under the same
denomination f. The latter of which is almost as tyrannical a doctrine as
that of the imperial constitution of Arcadius and Honorius, which
determines that any attempts or designs against the ministers of the
prince shall be treason g. But however, to prevent the inconveniences
which began to arise in England from this multitude of constructive
treasons, the statute 25 Edw. III. c. 2. was made; which defines what
offences only for the future should be held to be treason: in like manner as
the lex Tullia majestatis among the Romans, promulgated by Augustus
Caesar, comprehended all the ancient laws, that had before been enacted
to punish transgressors against the state. This statute must therefore be
our text and guide, in order to examine into the several species of high
And we shall find that it comprehends all kinds of high treason under seven distinct branches.

1. WHEN a man doth compass or imagine the death of our lord the king, of our lady his queen, or of their eldest son and heir. Under this description it is held that a queen regnant (such as queen Elizabeth and queen Anne) is within the words of the act, being invested with royal power and entitled to the allegiance of her subjects i: but the husband of such a

e 1 Hal. P. C. 80.
f Britt. c. 22. 1 Hawk. P. C. 34.
g Qui de nece virorum illustrium, qui consiliis et consistorio nostro intersunt, senatorum etiam (nam et ipsi pars corporis nostri sunt) vel cujuslibet postremo, qui militat nobiscum, cogitaverit: (eadem enim severitate voluntatem sceleris, qua effectum, puniri jura voluerunt) ipse quidem, utpote majestatis reus, gladiio feriatur, bonis ejus omnibus fife nostro addictis. (Cod. 9. 8. 5.)
h Gravin. Orig. 1. 34.
I 1 Hal. P. C. 101.

queen is not comprized within these words, and therefore no treason can be committed against him k. 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, or in other words an usurper that hath got possession of the throne, is a king within the meaning of the statute; as there is a temporary allegiance due to him, for his administration of the government, and temporary protection of the public: and therefore treasons committed against Henry VI were punished under Edward IV, though all the line of Lancaster had been previously declared usurpers by act of parliament. But the most rightful heir of the crown, or king de jure and not de facto, who hath never had plenary possession of the throne, as was the case of the house of York during the three reigns of the line of Lancaster, is not a king within this statute, against whom treasons may be committed l. And a very sensible writer on the crown-law carries the point of possession so far, that he holds m, that a king out of possession is so far from having any right to our allegiance, by any other title which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him. A doctrine which he grounds upon the statute 11 Hen. VII. c. 1. which is declaratory of the common law, and pronounces all subjects excused from any penalty or forfeiture, which do assist and obey a
king de facto. But, in truth, this seems to be confounding all notions of right and wrong; and the consequence would be, that when Cromwell had murdered the elder Charles, and usurped the power (though not the name) of king, the people were bound in duty to hinder the son's restoration: and were the king of Poland or Morocco to invade this kingdom, and by any means to get possession of the crown (a term, by the way, of very loose and indistinct signification) the subject would be bound the his allegiance to fight for his natural prince to-day, and by the same duty of allegiance to fight against him to-morrow. The true distinction seems to be,

k 3 Inst. 7. 1 Hal. P. C. 106.
l 3 Inst. 7. 1 Hal. P. C. 104.
l 1 Hawk. P. C. 36.

that the statute of Henry the seventh does by no means command any opposition to a king de jure; but excuses the obedience paid to a king de facto. When therefore a usurper is in possession, the subject is excused and justified in obeying and giving him assistance: otherwise, under a usurpation, no man could be safe; if the lawful prince had a right to hang him for obedience to the powers in being, as the usurper would certainly do for disobedience. Nay farther, as the mass of people are imperfect judges of title, of which in all cases possession is prima facie evidence, the law compels no man to yield obedience to that prince, whose right is by want of possession rendered uncertain and disputable, till providence shall think fit to interpose in his favour, and decide the ambiguous claim: and therefore, till he is entitled to such allegiance by possession, no treason can be committed against him. Lastly, a king who has resigned his crown, such resignation being admitted and ratified in parliament, is according to sir Matthew Hale no longer the object of treason. And the same reason holds, in case a king abdicates the government; or, by actions subversive of the constitution, virtually renounces the authority which he claims by that very constitution: since, as was formerly observed o, when the fact of abdication is once established, and determined by the proper judges, the consequence necessarily follows, that the throne is thereby vacant, and he is no longer king.

LET us next fee, what is a compassing or imagining the death of the king, &c. These are synonymous terms; the word compass signifying the purpose or design of the mind or will p, and not, as in common speech, the carrying such design to effect q. And therefore an accidental stroke, which
may mortally would the sovereign, per infortunium, without any traitorous
intent, is no treason: as was the case of sir Walter Tyrrel, who, by the

n 1 Hal. P. C. 104.
0 Vol. 1. pag. 212.
p By the ancient law compassing or intending the death of any man,
demonstrated by some evident fact, was equally penal as homicide itself.
(3 Inst. 5.)
q 1 Hal. P. C. 107.

command of king William Rufus, shooting at a hart, the arrow glanced
against a tree, and killed the king upon the spot t. But, as this compassing
or imagination is an act of the mind, it cannot possibly fall under any
judicial cognizance, unless it be demonstrated by some open, or overt, act.
And yet the tyrant Dionysius is recorded s to have executed a subject,
barely for dreaming that he had killed him; which was held for a sufficient
proof, that he had thought thereof in his waking hours. But such is not the
temper of the English law; and therefore in this, and the three next species
of treason, it is necessary that there appear an open or overt act of a more
full and explicit nature, to convict the traitor upon. The statute expressly
requires, that the accused be thereof upon sufficient proof attainted of
some open act by men of his own condition. Thus, to provide weapons or
ammunition for the purpose of killing the king, is held to be a palpable
overt act of treason in imagining his death t. To conspire to imprison the
king by force, and move towards it by assembling company, is an overt act
of compassing the king's death u; for all force, used to the person of the
king, in its consequence may tend to his death, and is a strong
presumption of something worse intended than the present force, by such
as have so far thrown off their bounden duty to their sovereign: it being an
old observation, that there is generally but a short interval between the
prisons and the graves of princes. There is no question also, but that
taking any measures to render such treasonable purposes effectual, as
assembling and consulting on the means to kill the king, is a sufficient
overt act of high treason w.

HOW far mere words, spoken by an individual, and not relative to any
treasonable act or design then in agitation, shall amount to treason, has
been formerly matter of doubt. We have two instances, in the reign of
Edward the fourth, of per-
sons executed for treasonable words: the one a citizen of London, who said he would make his son heir of the crown, being the sign of the house in which he lived; the other a gentleman, whose favourite buck the king killed in hunting, whereupon he wished it, horns and all, in the king's belly. These were esteemed hard cases: and the chief justice Markham rather chose to leave his place than assent to the latter judgment x. But now it seems clearly to be agreed, that, by the common law and the statute of Edward III, words spoken amount only to a high misdemesnor, and no treason. For they may be spoken in heat, without any intention, or be mistaken, perverted, or mis-remembered by the hearers; their meaning depends always on their connexion with other words, and things; they may signify differently even according to the tone of voice, with which they are delivered; and sometimes silence itself is more expressive than any discourse. As therefore there can be nothing more equivocal and ambiguous than words, it would indeed by unreasonable to make them amount to high treason. And accordingly in 4 Car. I. on a reference to all the judges, concerning some very atrocious words spoken by one Pyne, they certified to the king, that though the words were as wicked as might be, yet they were no treason: for, unless it be by some particular statute, no words will be treason y. If the words be set down in writing, it argues more deliberate intention; and it has been held that writing is an overt act of treason; for scribere est agree. But even in this case the bare words are not the treason, but the deliberate act of writing them. And such writing, though unpublished, has in some arbitrary reigns convicted its author of treason: particularly in the cases of one Peacham a clergyman, for treasonable passages in a sermon never preached z; and of Algernon Sidney, for some papers found in his closet: which, had they been plainly relative to any previous formed design of dethroning or murdering the king, might doubtless have been properly read in evidence as overt

x 1 Hal. P. C. 115.
y Cro. Car. 125.
z Ibid.
acts of that treason, which was specially laid in the indictment a. But, being merely speculative, without any intention (so far as appeared) of making any public use of them, the convicting the authors of treason upon such an insufficient foundation has been universally disapproved. Peacham was therefore pardoned: and, though Sidney indeed was executed, yet it was to the general discontent of the nation; and his attainder was afterwards reversed by parliament. There was then no manner of doubt, but that the publication of such a treasonable writing was a sufficient overt act of treason at the common law b; though of late even that has been questioned.

2. THE second species of treason is, if a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir. By the king's companion is meant his wife; and by violation is understood carnal knowledge, as well without force, as with it: and this is high treason in both parties, if both be consenting; as some of the wives of Henry the eighth by fatal experience evinced. The plain intention of this law is to guard the blood royal from any suspicion of bastardy, whereby the succession to the crown might be rendered dubious: and therefore, when this reason ceases, the law ceases with it; for to violate a queen or prince's dowager is held to be no treason c: in like manner as, by the feodal law, it was a felony and attended with a forfeiture of the fief, if the vasal vitiated the wife or daughter of his lord d; but no so if he only vitiated his widow e.

3. THE third species of treason is, if a man do levy war against our lord the king in his realm. And this may be done by taking arms, not only to dethrone the king, but under pretence to reform religion, or the laws or to remove evil counsellors, or other grievances whether real or pretended f. For the

a Foster. 198.
b 1 Hal. P. C. 118. 1 Hawk. P. C. 38.
c 3 Inst. 9.
d Feud. l. 1. t. 5.
e Ibid. t. 21.
f 1 Hawk. P. C. 37.

law does not, neither can it, permit any private man, or set of men, to interfere forcibly in matters of such high importance; especially as it has
established a sufficient power, for these purposes, in the high court of parliament: neither does the constitution justify any private or particular resistance for private or particular grievances; though in cases of national oppression the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the king and his people. To resist the king's forces by defending a castle against them, is a levying of war: and so is an insurrection with an avowed design to pull down all inclosures, all brothels, and the like; the universality of the design making it a rebellion against the state, an usurpation of the powers of government, and an insolent invasion of the king's authority. But a tumult with a view to pull down a particular house, or lay open a particular enclosure, amounts at most to a riot; this being no general defiance of public government. So, if two subjects quarrel and levy war against each other, it is only a great riot and contempt, and no treason. Thus it happened between the earls of Hereford and Glocester in 20 Edw. I. who raised each a little army, and committed outrages upon each others lands, burning houses, attended with the loss of many lives: yet this was held to be no high treason, but only a great misdemeanour. A bare conspiracy to levy war does not amount to this species of treason; but (if particularly pointed at the person of the king or his government) it falls within the first, of compassing or imagining the king's death.

4. IF a man be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere, he is also declared guilty of high treason. This must likewise be proved by some overt act, as by giving them intelligence, by fending them provisions, by felling them arms, by treacherously surrendering a fortress, or the like. By enemies

are here understood the subjects of foreign powers with whom we are at open war. As to foreign pirates or robbers, who may happen to invade our coasts, without any open hostilities between their nation and our own, and without any commission from any prince or state at enmity with the crown of Great Britain, the giving the many assistance is also clearly treason; either in the light of adhering to the public enemies of the king and kingdom, or else in that of levying war against his majesty. And, most

g 1 Hal. P. C. 132.
h Ibid. 136.
i 3 Inst. 9. Foster. 211. 213.
k 3 Inst. 10.
indisputably, the same acts of adherence or aid, which (when applied to foreign enemies) will constitute treason under this branch of the statute, will (when afforded to our own fellow-subjects in actual rebellion at home) amount to high treason under the description of levying war against the king m. But to relieve a rebel, fled out of the kingdom, is no treason: for the statute is taken strictly, and a rebel is not an enemy; an enemy being always the subject of some foreign prince, and one who owes no allegiance to the crown of England n. And if a person be under circumstances of actual force and constraint, through a well-grounded apprehension of injury to his life or person, this fear or compulsion will excuse his even joining with either rebels or enemies in the kingdom, provided he leaves them whenever he hath a safe opportunity o.

5. IF a man counterfeit the king's great or privy seal,? this is also high treason. But if a man takes wax bearing the impression of the great seal off from one patent, and fixes it to another, this is held to be only an abuse of the seal, and not a counterfeiting of it; as was the case of a certain chaplain, who in such manner framed a dispensation for non-residence. But the knavish artifice of a lawyer much exceeded this of the divine. One of the clerks in chancery glued together two pieces of parchment; on the uppermost of which he wrote a patent, to which he regularly obtained the great seal, the label going through both the skins. He then dissolved the cement; and

l Foster. 219.
m Ibid. 216.
n 1 Hawk. P. C. 38.
o Foster. 216.

taking off the written patent, on the blank skin wrote a fresh patent, of a different import from the former, and published it as true. This was held no counterfeiting of the great seal, but only a great misprision; and sir Edward Coke p mentions it with some indignation, that the party was living at that day.

6. THE sixth species of treason under this statute, is if a man counterfeit the king's money; and if a man bring false money into the realm counterfeit to the money of England, knowing the money to be false. As to the first branch, counterfeiting the king's money; this is treason, whether the false money be uttered in payment or not. Also if the king's own minters alter
the standard or alloy established by law, it is treason. But gold and silver money only are held to be within this statute. With regard likewise to the second branch, importing foreign counterfeit money, in order to utter it here; it is held that uttering it, without importing it, is not within the treason. But of this we shall presently say more.

7. THE last species of treason, ascertained by this statute, is if a man slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices. These high magistrates, as they represent the king's majesty during the execution of their officers, are therefore for the time equally regarded by the law. But this statute extends only to the actual killing of them, and not to wounding, or a bare attempt to kill them. It extends also only to the officers therein specified; and therefore the barons of the exchequer, as such, are not within the protection of this act.

THUS careful was the legislature, in the reign of Edward the third, to specify and reduce to a certainty the vague notions of treason, that had formerly prevailed in our courts. But the act does not stop here, but goes on. Because other like cases of treason may happen in time to come, which cannot be thought of nor declared at present, it is accorded, that if any other case supposed to be treason, which is not above specified, doth happen before any judge; the judge shall tarry without going to judgment of the treason, till the cause be shewed and declared before the king and his parliament, whether it ought to be judged treason, or other felony. Sir Matthew Hale is very high in his encomiums on the great wisdom and care of the parliament, in thus keeping judges within the proper bounds and limits of this act, by not suffering them to run out (upon their own opinions) into constructive treasons, though in cases that seem to them to have a like parity of reason; but reserving them to the decision of parliament. This is a great security to the public, the judges, and even this sacred act itself; and leaves a weighty memento to judges to be careful, and not overhasty in letting in treasons by construction or
interpretation, especially in new cases that have not been resolved and settled. 2. He observes, that as the authoritative decision of these casus omissi is reserved to the king and parliament, the most regular way to do it is by a new declarative act: and therefore the opinion of any one or of both houses, though of very respectable weight, is not that solemn declaration referred to by this act, as the only criterion for judging of future treasons.

IN consequence of this power, not indeed originally granted by the statute of Edward III, but constitutionally inherent in every subsequent parliament, (which cannot be abridged of any rights by the act of a precedent one) the legislature was extremely liberal in declaring new treasons in the unfortunate reign of king Richard the second: as, particularly, the killing of an ambassador was made so; which seems to be founded upon better reason than the multitude of other points, that were then strained up to this high offence: the most arbitrary and absurd of all

1 Hal. P. C. 259.

which was by the statute 21 Ric. II. c. 3. which made the bare purpose and intent of killing or deposing the king, without any overt act to demonstrate it, high treason. And yet so little effect have over-violent laws to prevent any crime, that within two years afterwards this very prince was both deposed and murdered. And, in the first year of his successor's reign, an act was passed u, reciting that no man knew how he ought to behave himself, to do, speak, or say, for doubt of such pains of treason: and therefore it was accorded that in no time to come any treason bejudged, otherwise than was ordained by theft of king Edward the third. This at once swept away the whole load of extravagant treasons introduced in the time of Richard the second.

BUT afterwards, between the reign of Henry the fourth and queen Mary, and particularly in the bloody reign of Henry the eighth, the spirit of inventing new and strange treasons was revived; among which we may reckon the offences of clipping money; breaking prison or rescue, when the prisoner is committed for treason; burning houses to extort money; stealing cattle by Welchmen; counterfeiting foreign coin; willful poisoning; execrations against the king; calling him opprobrious names by public writing; counterfeiting the sign manual or signet; refusing to adjure the pope; deflowering, or marrying without the royal licence, any of the kings children, sisters, aunts, nephews, or nieces; bare solicitation of the chastity
of the queen or princess, or advances made by themselves; marrying with
the king, by a woman not a virgin, without previously discovering to him
such her unchaste life; judging or believing (manifested by any overt act)
the king to have been lawfully married to Anne of Cleve; derogating from
the king’s royal style and title; impugning his supremacy; and assembling
riotously to the number of twelve, and not dispersing upon proclamation:
all which new-fangled treasons were totally abrogated by the statute 1 Mar.
c. 1. which once more reduced all

u Stat. 1 Hen. IV. c. 10.

treasons to the standard of the statute 25 Edw. III. Since which time,
though the legislature has been more cautious in creating new offences of
this kind, yet the number is very considerably encreased, as we shall find
upon a short review.

THESE new treasons, created since the statute 1 Mar. c. 1. and not
comprehended under the description statute 25 Edw. III, I shall comprise
under three heads. 1. Such as relate to papists. 2. Such as relate to
falsifying the coin or other royal signatures. 3. Such as are created for the
security of the protestant succession in the house of Hanover.

1. THE first species, relating to papists, was considered in the preceding
chapter, among the penalties incurred by that branch of non-conformists
to the national church; wherein we have only to remember that by statute
5 Eliz. c. 1. to defend the pope’s jurisdiction in this realm is, for the first
time, a heavy misdesnor; and, if the offence be repeated, it is high
treason. Also by statute 27 Eliz. c. 2. if any popish priest, born in the
dominions of the crown of England, shall come over hither from beyond
the seas; or shall tarry her three days without conforming to
the church; he
is guilty of high treason. And by statute 3 Jac. I. c. 4. if any natural born
subject be withdrawn from his allegiance, and reconciled to the pope or
see of Rome, or any other prince or state, both he and all such as procure
such reconciliation shall incur the guilt of high treason. These were
mentioned under the division before referred to, as spiritual offences, and
I now repeat them as temporal ones also: the reason of distinguishing
these overt acts of popery from all others, by setting the mark of high
treason upon them, being certainly on a civil, and not on a religious,
account. For every popish priest of course renounces his allegiance to his
temporal sovereign upon taking orders; that being inconsistent with his
new engagements of canonical obedience to the pope: and the same may be said of an obstinate defence of his authority here, or a formal reconciliation to the see of Rome, which the statute construes to be a withdrawing from one's natural allegiance; and therefore, besides being reconciled to the pope, it also adds to any other prince or state.

2. WITH regard to treasons relative to the coin or other royal signatures, we may recollect that the only two offences respecting the coinage, which are made treason by the statute 25 Edw. III. are the actual counterfeiting the gold and silver coin of this kingdom; or the importing such counterfeit money with intent to utter it, knowing it to be false. But these not being found sufficient to restrain the evil practices of coiners and false moneymers, other statutes have been since made for that purpose. The crime itself is made a species of high treason; as being a breach of allegiance, by infringing the king's prerogative, and assuming one of the attributes of the sovereign, to whom alone it belongs to set the value and determinations of coin made at home, or to fix the currency of foreign money: and besides, as all money which bears the stamp of the kingdom is sent into the world upon the public faith, as containing metal of a particular weight and standard, whoever falsifies, this is an offender against the state, by contributing to render that public faith suspected. And upon the same reasons, by a law of the emperor Constantine w, false coiners were declared guilty of high treason, and were condemned to be burned alive: as, by the laws of Athens x, all counterfeiters, debasers, and diminishers of the current coin were subjected to capital punishment. However, it must be owned, that this method of reasoning is a little overstrained: counterfeiting or debasing the coin being usually practiced, rather for the sake of private and unlawful lacre, than out of any disaffection to the sovereign. And therefore both this and its kindred species of treason, that of counterfeiting the seals of the crown or other royal signatures, seem better denominated by the later civilians a branch of the crimen falsi or forgery (in which they are followed by Glanvil y, Bracton z, and Fleta a) than by

w C. 9. 24. 2. Cod. Theod. de falsa moneta, l. 9.
x Pott. Ant. l. 1. c. 26.
y l. 14. c. 7.
z l. 3. c. 3. 1 & 2.
Constantine and our Edward the third, a species of the crimen laesae majestatis or high treason. For this confounds the distinction and proportion of offences; and, by affixing the same ideas of guilt upon the man who coins a leaden groat and him who assassinates his sovereign, takes off from that horror which ought to attend the very mention of the crime of high treason, and makes it more familiar to the subject. Before the statute 25 Edw. III. the offence of counterfeiting the coin was held to be only a species of petit treason: but subsequent acts in their new extensions of the offence have followed the example of that, and have made it equally high treason as an endeavour to subvert the government, though not quite equal in its punishment.

IN consequence of the principle thus adopted, the statute 1 Mar. c. 1. having at one blow repealed all intermediate treasons created since the 25 Edw. III. it was thought expedient by statute 1 Mar. ft. 2. c. 6. to revive two species thereof; viz. 1. That if any person falsely forge or counterfeit any such kind of coin of gold or silver, as is not the proper coin of this realm, but shall be current within this realm by consent of the crown; or, 2. shall falsely forge or counterfeit the sign manual, privy signet, or privy seal; such offences shall be deemed high treason. And by statute 1 & 2 P. & M. c. 11. if any persons do bring into this realm such false or counterfeit foreign money, being current here, knowing the same to be false, an shall utter the same in payment, they shall be deemed offenders in high treason. The money referred to in these statutes must be such as is absolutely current here, in all payments, by the king’s proclamation; of which there is none at present, Portugal money being only taken by consent, as approaching the nearest to our standard, and falling in well enough with our divisions of money into pounds and shillings: therefore to counterfeit it is no high treason, but another inferior offence. Clipping or defacing the genuine coin was not hitherto included in these statutes: though an offence equally pernicious to trade, and an equal insult upon the prerogative, as well as personal affront to the sovereign; whose very image ought to be had in reverence by all loyal subject. And therefore, among the Romans defacing or even melting down the emperor's statues was made treason by the Julian law; together with other offences of the
like fort, according to that vague appendix, alivdue quid simile si admiserint. And now, in England, by statute 5 Eliz. c. 11. clipping, washing, rounding, or filing, for wicked gain’s sake, any of the money of this realm, or other money suffered to be current here, shall be adjudged high treason; and by statute 18 Eliz. c. 1. the same offence is described in other more general words; viz. impairing, diminishing, falsifying, scaling, and lightening; and made liable to the same penalties. By statute 8 & 9 W. III. c. 26. made perpetual by 7 Ann. c. 25. whoever shall knowingly make or mend, or assist in so doing, or shall buy or sell, or have in his possession, any instruments proper only for the coinage of money; or shall convey such instruments out of the king's mint; shall be guilty of high treason: which is by much the severest branch of the coinage law. The statute goes on farther, and enacts, that to mark any coin on the edges with letters, or otherwise, in imitation of those used in the mint; or to colour, gild, or case over any coin resembling the current coin, or even round blanks of base metal; shall be construed high treason. And, lastly, by statute 15 & 16 Geo. II. c. 28. if any person colours or alters any silver current coin of this kingdom, to make it resemble a silver one; this is also high treason: but the offender shall be pardoned, in case he discovers and convicts two other offenders of the same kind.

3. THE other new species of high treason is such as is created for the security of the protestant succession, over and above such treasons against the king and government as were comprized under the statute 25 Edw. III. For this purpose, after the act of settlement was made, for transferring the crown to the illustrious house of Hanover, it was enacted by statute 13 & 14 W. III. c. 3. that the pretended prince of Wales, who was then thirteen years of age, and had assumed the title of king James III, should be attainted of high treason; and it was made high treason for any of the king's subjects by letters, messages, or otherwise, to hold correspondence with him, or any person employed by him, or to remit any money for his use, knowing the same to be for his service. And by statute 17 Geo. II. c. 39. it is enacted, that 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, he shall be judged attainted of high treason, and suffer the pains thereof. And to correspond with them, or remit money for
their use, is made high treason in the same manner as it was to correspond with the father. By the statute 1 Ann. ft. 2.c. 17. if any person shall endeavour to deprive or hinder any person, being the next in succession to the crown according to the limitations of the act of settlement, from succeeding to the crown, and shall maliciously and directly attempt the same by any overt act, such offence shall be high treason. And by statute 6 Ann. c. 7. if any person shall maliciously, advisedly, and directly, by writing or printing, maintain and affirm, that any other person hath any right or title to the crown of this realm, otherwise than according to the act of settlement; or that the kings of this realm with the authority of parliament are not able to make laws and statutes, to bind the crown and the descent thereof; such person shall be guilty of high treason. This offence (or indeed maintaining this doctrine in any wise, that the king and parliament cannot limit the crown) was once before made high treason, by statute 13 Eliz. c. 1. during the life of that princess. And after her decease it continued a high misdemeanour, punishable with forfeiture of goods and chattels, even in the most flourishing era of indefeasible hereditary right and jure divino succession. But it was again raised into high treason, by the statute of Anne before-mentioned, at the time of a projected invasion in favour of the then pretender; and

upon this statute one Matthews, a printer, was convicted and executed in 1719, for printing a treasonable pamphlet intitled uox populi uox Dei d.

THUS much for the crime of treason, or laesae majestatis, in all its branches; which consists, we may observe, originally, in grossly counteracting that allegiance, which is due from the subject by either birth or residence: though, in some instances, the zeal of our legislators to stop the progress of some highly pernicious practices has occasioned them a little to depart from this its primitive idea. But of this enough has been hinted already: it is now time to pass on from defining the crime to describing its punishment.

THE punishment of high treason in general is very solemn and terrible. 1. That the offender be drawn to the gallows, and not be carried or walk; though usually a sledge or hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement e. 2. That he be hanged by the neck, and then cut down alive. 3. That his entrails be taken out, and burned, while he is yet alive. 4. That his head be
cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the king's disposal

THE king may, and often doth, discharge all the punishment, except beheading, especially where any of noble blood are attainted. For, beheading being part of the judgment, that may be executed, though all the rest be omitted by the king's command. But where beheading is no part of the judgment, as in murder or other felonies, it hath been said that the king cannot change the judgment, although at the request of the party,

d State Tr. IX. 680.
e 1 Hal. P. C. 382.
f This punishment for treason sir Edward Coke tells us, is warranted by divers examples in scripture; for Joab was drawn, Bithan was hanged, Judas was embowelled, and so of the rest. (3 Inst. 211.)
g 1 Hal. P. C. 351.

from one species of death to another. But of this we shall say more hereafter.

IN the case of coining, which is a treason of a different complexion from the rest, the punishment is milder for male offenders; being only to be drawn, and hanged by the neck till dead. But in treasons of every kind the punishment of women is the same, and different form that of men. For, as the natural modesty of the sex forbids the exposing and publicly mangling their bodies, their sentence (which is to the full as terrible to sense as the other) is to be drawn to the gallows, and there to be burned alive.

THE consequence of this judgment, (attainder, forfeiture, and corruption of blood) must be referred to the latter end of this book, when we shall treat of them all together, as well in treason as in other offences.

h 3 Inst. 52.
i 1 Hal. P. C. 351.
j 1 Hal. P. C. 399.

CHAPTER THE SEVENTH.
OF FELONIES, INJURIOUS TO THE KINGS PREROGATIVE.
AS, according to the method I have adopted, we are next to consider such felonies as are more immediately injurious to the king's prerogative, it will not be amiss here, at our first entrance upon this crime, to enquire briefly into the nature and meaning of felony; before we proceed upon any of the particular branches, into which it is divided.

FELONY, in the general acceptation of our English law, comprizes every species of crime, which occasioned at common law the forfeiture of lands or goods. This most frequently happens in those crimes, for which a capital punishment either is or was liable to be inflicted: for those felonies, which are called clergyable, or to which the benefit of clergy extends, were ancienly punished with death in all lay, or unlearned, offenders; though now by the statute-law that punishment is for the first offence universally remitted. Treason itself, says sir Edward Coke a, was ancienly comprized under the name of felony: and in confirmation of this we may observe, that the statute of treasons, 25 Edw. III. c. 2. speaking of some dubious crimes, directs a

a 3 Inst. 15.

Reference to parliament; that it may be there adjudged, whether they be treason, or other felony. All treasons therefore, strictly speaking, are felonies; though all felonies are not treason. And to this also we may add, that all offences, now capital, are in some degree or other felony: and this is likewise the case with some other offences, which are not punished with death; as suicide, where the party is already dead; homicide by chancemely, or in self-defence; and petit larceny, or pilfering; all which are (strictly speaking) felonies, as they subject the committers of them to forfeitures. So that upon the whole the only adequate definition of felony seems to be that which is before laid down; viz. an offence which occasions a total forfeiture of either lands, or goods, or both, at the common law; and to which capital or other punishment may be superadded, according to the degree of guilt.

To explain this matter a little farther: the word felony, or felonia, is of undoubted feodal original, being frequently to be met with in the books of feuds, &c; but the derivation of it has much puzzled the juridical lexicographers, Prateus, Calvinus, and the rest: some deriving it from the Greek, an impostor or deceiver; others from the Latin, fallo, fcfelli, to ward Coke, as his manner is, has given us a still stranger etymology b; that it is
crimen animo felleo perpetratum, with a bitter or gallish inclination. But all of them agree in the description, that it is such a crime as works a forfeiture of all the offender's lands, or goods. And this gives great probability to sir Henry Spelman's Teutonic or German derivation of it c: in which language indeed, as the word is clearly of feodal original, we ought rather to look for its signification, than among the Greeks and Romans. Fe-lon then, according to him, is derived from two northern words; fee, which signifies (we well know) the fief, feud, or beneficiary estate; and lon, which signifies price or value. Felony is therefore the same as pretium feudi, the consi-

b 1 Inst. 391.
c Gloffar. tit. Felon.

deration for which a man gives up his fief; as we say in common speech, such an act is as much as your life, or estate, is worth. In this sense it will clearly signify the feodal forfeiture, or act by which an estate is forfeited, or escheats, to the lord.

To confirm this we may observe, that it is in this sense, of forfeiture to the lord, that the feodal writers constantly use it. For all those acts, whether of a criminal nature or not, which at this day are generally forfeitures of copyhold estates d, are styled feloniae in the feodal law: scilicet, per quas feudum amittitur e. As, si domino deservire noluerit f; si per annum et diem cessaverit in petenda investitura g; si dominum ejuravit, i. e. negavit se adominio feudum habere h; si a dorrino, in jus eum vocante, ter citatus non comparuerit i; all these, with many others, are still causes of forfeiture in our copyhold estates, and were denominated felonies by the feodal constitutions. So likewise injuries of a more substantial or criminal nature were denominated felonies, that is, forfeitures: as assaulting or beating the lord k; vitiating his wife or daughter, si dominum cucurbitaverit, i. e. cum uxore ejus concubuerit l; all these are esteemed felonies, and the latter is expressly so denominated, si secerit feloniam, domini forte cucurbitando m. And as these contempts, or smaller offence, were felonies or acts of forfeiture, of course greater crimes, as murder and robbery, fell under the same denomination. On the other hand the lord might be guilty of felony, or forfeit his seignory to the vassal, by the same acts as the vassal would have forfeited his feud to the lord. Si dominus commisit feloniam, per quam vasallus amitteret feudum si eam commiserit in dominum, feudi proprietatem etiamdominus perdere debet
n. One instance given of this sort of felony in the lord is beating the servant of his vasal, so as that he loses his service; which seems merely in the nature of a civil

d See Vol. II. pag. 284.
e Feud. l. 2. t. 26. in calc.
f Feud. l. 1. t. 21.
g Feud. l. 2. t. 24.
h Feud. l. 2. t. 34. l. 2. t. 26. 3.
i Feud. l. 2. t. 22.
j Feud. l. 2. t. 24. 2.
k Feud. l. 1. t. 5.
l Feud. l. 1. t. 5.
m Feud. l. 2. t. 38. Britton. l. 1. c. 22.
n Feud. l. 2. t. 26 & 47.

injury, so far as it respects the vasal. And all these felonies were to be determined per laudamentum five judicium parium fuorum? in the lord's court; as with us forfeitures of copyhold lands are presentable by the homage in the court-baron.

FELONY, and the act of forfeiture to the lord, being thus synonymous terms in the feodal law, we may easily trace the reason why, upon the introduction of that law into England, those crimes which induced such forfeiture or escheat of lands (and, by a small deflexion from the original sense, such as induced the forfeiture of goods also) were denominated felonies. Thus it was said, that suicide, robbery, and rape, were felonies; that is, the consequence of such crimes was forfeiture; till by long use we began to signify by the term of felony the actual crime committed, and not the penal consequence. And upon this system only can we account for the cause, why treason in ancient times was held to be a species of felony: viz. because it induced a forfeiture.

HENCE it follows, that capital punishment does by no means enter into the true idea and definition of felony. Felony may be without inflicting capital punishment, as in the cases instanced of self-murder, excusable homicide, and petit larceny: and it is possible that capital punishments may be inflicted, and yet the offence be no felony; as in the case of heresy by the common law, which, though capital, never worked any forfeiture of lands or goods o, an inseparable incident to felony. And of the same nature is the punishment of standing mute, without pleading to an indictment;
which is capital, but without any forfeiture, and therefore such standing mute is no felony. In short the true criterion of felony is forfeiture: for, as sir Edward Coke justly observes p, in all felonies which are punishable with death, the offender loses all his lands in fee-simple, and also his goods and chattels; in such as are not so punishable his goods and chattels only.

o 3 Inst. 43.
p 1 Inst. 391.

THE idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do do now conform. And therefore if a statute makes any new offence felony, the law q implies that it shall be punished with death, viz. by hanging, as well as with forfeiture: unless the offender prays the benefit of clergy; which all felons are entitled once to have unless the same is expressly taken away by statute. And, in compliance herewith, I shall for the future consider it also in the same light, as gerenerical term, including all capital crimes below treason; having premised thus much concerning the true nature and original meaning of felony, in order to account for the reason of those instances I have mentioned, of felonies that are not capital, and capital offences that are not felonies: which seem at first view repugnant to the general idea which we now entertain of felony, as a crime to be punished by death; whereas properly it is a crime to be punished by forfeiture, and to which death may, or may not be, though it generally is, superadded.

I PROCEED now to consider such felonies, as are more immediately injurious to the king's prerogative. These are, 1. Offences relating to the coin, not amounting to treason. 2. Offences against the king's council. 3. The offence of serving a foreign prince. 4. The offence of embezzling the king's armour or stores of war. To which may be added a fifth, 5. Desertion from the king's armies in time of war.

1. OFFENCES relating to the coin, under which may be ranked some inferior misdemeanors not amounting to felony, are thus declared by a series of statutes, which I shall recite in the order of time. And, first, by statute 27 Edw. I. 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. By statute 9 Edw. III. ft. 2. no fterling money shall be melted
down, upon pain of forfeiture thereof. By statute 14 Eliz. c. 3. such as forge any foreign coin, although it be not made current here by proclamation, shall (with their aiders and abettors) be guilty of misprison of treason: a crime which we shall hereafter consider. By statute 13 & 14 Car. II. c. 31. the offence of melting down any current silver money shall be punished with forfeiture of the same, and also the double value: and the offender, if a freeman of any town, shall be disfranchised; if not, shall suffer six months imprisonment. By statute 6 & 7 W. III. c. 17. if any person buys or sells, or knowingly has in his custody, any clippings or filings of the coin, he shall forfeit the same and 500 l; one moiety to the king, and the other to the informer; and be branded in the cheek with the letter R. By statute 8 & 9 W. III. c. 26. if any person shall blanch, or whiten, copper for sale; (which makes it resemble silver) or buy or sell or offer to sale any malleable composition, which shall be heavier than silver, and look, tough, and wear like gold, but be beneath the standard: or if any person shall receive or pay any counterfeit or diminished money of this kingdom, not being cut in pieces, (an operation which every man is thereby empowered to perform) at a less rate than it shall import to be of: (which demonstrates a consciousness of its baseness, and a fraudulent design) all such persons shall be guilty of felony. But these precautions not being found sufficient to prevent the uttering of false or diminished money, which was only a misdemeanor at common law, it is enacted by statute 15 & 16 Geo. II. c. 28. that if any person shall tender in payment any counterfeit coin, knowing it so to be, he shall for the first offence by imprisoned six months; and find sureties for his good behaviour for six months more: for the second offence, shall be imprisoned and find sureties for two years: and, for the third offence, shall be guilty of felony without benefit of clergy. Also if a person knowingly tenders in payment any counterfeit money, and at the same time has more in his custody; or shall, within ten days after, knowingly tender other false money; he shall for the first offence be imprisoned one year, and find sureties for his good behaviour for two
years longer; and for the second, be guilty of felony without benefit of clergy. By the same statute it is also enacted, that, if any person counterfeits the copper coin, he shall suffer two years imprisonment, and find sureties for two years more. Thus much for offences relating to the coin, as well misdemeanors as felonies, which I thought it most convenient to consider in one and the same view.

2. FELONIES, against the king's council r, are; first, by statute 3 Hen. VII. c. 14. if any sworn servant of the king's household conspires or confederates to kill any lord of this realm, or other person, sworn of the king's council, he shall be guilty of felony. Secondly, by statute 9 Ann. c. 16. to assault, strike, wound, or attempt to kill, any privy counsellor in the execution of his office, is made felony without benefit of clergy.

3. FELONIES in serving foreign states, which service is generally inconsistent with allegiance to one's natural prince, are restrained and punished by statute 3 Jac. I. c. 4. which makes it felony for any person whatever to go out of the realm, to serve any foreign prince, without having first taken the oath of allegiance before his departure. And it is felony also for any gentleman, or person of higher degree, or who hath borne any office in the army, to go out of the realm to serve such foreign prince or state, without previously entering into a bond with two sureties, not to be reconciled to the see of Rome, or enter into any conspiracy against his natural sovereign. And farther, by statute 9 Geo. II. c. 30. enforced by statute 29 Geo. II. c. 17. if any subject of Great Britain shall enlist himself, or if any person shall procure him to be enlisted, in any foreign service, or detain or embark him for that purpose, without licence under the king's sign manual, he shall be guilty of felony without benefit of clergy: but if the person, so enlisted or enticed, shall discover his seducer within fifteen days, so as he may by apprehended and convicted of the same, he shall himself be indem-

r See Vol. I. pag. 332.

nified. By statute 29 Geo. II. c. 27. it is moreover enacted, that to serve under the French king, as a military officer, shall be felony without benefit of clergy; and to enter into the Scotch brigade, in the Dutch service, without previously taking the oaths of allegiance and abjuration, shall be a forfeiture of 500 l.
4. FELONY, by embezzling the king's armour or warlike stores, is so declared to be by statute 31 Eliz. c. 4. which enacts, that if any person having the charge or custody of the king's armour, ordnance, ammunition, or habiliments of war; or of any victual provided for victualling the king's soldiers or mariners; shall, either for gain, or to impede his majesty's service, embezzle the same to the value of twenty shillings, such offence shall be felony. And the statute 22 Car. II. c. 5. takes away the benefit of clergy from this offence, so far as it relates to naval stores. Other inferior embezzlements and misdemeanors, that fall under this denomination, are punished by statute 1 Geo. I. c. 25. with fine and imprisonment.

5. DESERTION from the king's armies in time of war, whether by land or sea, in England or in parts beyond the seas, is by the standing laws of the land (exclusive of the annual acts of parliament to punish mutiny and desertion) and particularly by statute 18 Hen. VI. c. 19. and 5 Eliz. c. 5. made felony, but not without benefit of clergy. But by the statute 2 & 3 Edw. VI. c. 2. clergy is taken away from such deserters, and the offence is made triable by the justices of every shire. The same statutes punish other inferior military offences fines, imprisonment, and other penalties.

CHAPTER THE EIGHTH.
OF PRAEMUNIRE.

A THIRD species of offence more immediately affecting the king and his government, though not subject to capital punishment, is that of praemunire: so called from the words of the writ preparatory to the prosecution thereof; praemunire afacias A. B. forewarn A. B. that he appear before us to answer the contempt wherewith he stands charged; which contempt is particularly recited in the preamble to the writ b. It took its original from the exorbitant power claimed and exercised in England by the pope, which even in the days of blind zeal was too heavy for our ancestors to bear.

IT may justly be observed, that religious principles, which (when genuine and pure) have an evident tendency to make their professors better citizens as well as better men, have (when perverted and erroneous) been usually subversive of civil government, and been made both the cloak and
the instrument of every pernicious design that can be harboured in the heart of man. The unbounded authority that was exercised by the Druids in the west, under the influence of pagan superstition, and the terrible ravages committed by the Saracens in the east, to propagate the religion of Mahomet, both witness to the truth of

a A barbarous word for praemonere. 

that ancient universal observation; that, in all ages and in all countries, civil and ecclesiastical tyranny are mutually productive of each other. And it is the glory of the church of England, as well as a strong presumptive argument in favour of the purity of her faith, that she hath been (as her prelates on a trying occasion once expressed it c) in her principles and practice ever most unquestionably loyal. The clergy of her persuasion, holy in their also moderate in their ambition, and entertain just notions of the ties of society and the rights of civil government. As in matters of faith and morality they acknowledge no guide but the scriptures, so, in matters of external polity and of private right, they derive all their title from the civil magistrate; they look up to the king as their head, to the parliament as their lawgiver, and pride themselves in nothing so justly, as in being true members of the church, emphatically by law established. Whereas the principles of those who differ from them, as well in one extreme as the other, are equally and totally destructive of those ties and obligations by which all society is kept together; equally encroaching on those rights, which reason and the original contract of every free state in the universe have vested in the sovereign power; and equally aiming at a distinct independent supremacy of their own, where spiritual men and spiritual causes are concerned. The dreadful effects of such a religious bigotry, when actuated by erroneous principles, even of the protestant kind, are sufficiently evident from the history of the anabaptists in Germany, the covenanters in Scotland, and that deluge of sectaries in England, who murdered their sovereign, overturned the church and monarchy, shook every pillar of law, justice, and private property, and most devoutly established a kingdom of the saints in their stead. But these horrid devastations, the effects of mere madness or of zeal that was nearly allied to it, though violent and tumultuous, were but of a short duration. Whereas the progress of the papal policy, long actuated by the steady counsels of successive pontiffs,
took deeper root, and was at length in some places with difficulty, in
others never yet, extirpated. For this we might call to witness the black
intrigues of the Jesuits, so lately triumphant over Christendom, but now
universally abandoned by even the Roman catholic powers: but the subject
of our present chapter rather leads us to consider the vast strides, which
were formerly made in this kingdom by the popish clergy; how nearly they
arrived to effecting their grand design; some few of the means they made
use of for establishing their plan; and how almost all of them have been
defeated or converted to better purposes, by the vigor of our free
constitution, and the wisdom of successive parliaments.

THE ancient British church, by whomsoever planted, was a stranger to the
bishop of Rome, and all his pretended authority. But, the pagan Saxon
invaders having driven the professors of christianity to the remotest
corners of our island, their own conversion was afterwards effected by
Augustin the monk, and other missionaries from the court of Rome. This
naturally introduced some few of the papal corruptions in point of faith
and doctrine; but we read of no civil authority claimed by the pope in these
kingdoms, till the era of the Norman conquest: when the then reigning
pontiff having favoured duke William in his projected invasion, by bluffing
his host and consecrating his banners, he took that opportunity also of
estabishing his spiritual encroachments; and was even permitted so to do
by the policy of the conqueror, in order more effectually to humble the
Saxon clergy and aggrandize his Norman prelates: prelates, who, being
bred abroad in the doctrine and practice of slavery, had contracted a
reverence and regard for it, and took a pleasure in rivetting the chains of a
free-born people.

THE most stable foundation of legal and rational government is a due
subordination of rank, and a gradual scale of authority; and tyranny also
itself is most surely supported by a regular increase of despotism, rising
from the slave to the sultan: with

this difference however, that the measure of obedience in the one is
grounded on the principles of society, and is extended no farther than
reason and necessity will warrant; in the other it is limited only by
absolute will and pleasure, without permitting the inferior to examine the
title upon which it is founded. More effectually therefore to enslave the consciences and minds of the people, the Romish clergy themselves paid the most implicit obedience to their own superiors or prelates; and they, in their turns, were as blindly devoted to the will of the sovereign pontiff, whose decisions they held to be infallible, and his authority co-extensive with the christian world. Hence his legates a latere were introduced into every kingdom of Europe, his bulles and decretal epistles became the rule both of faith and discipline, his judgment was the final resort in all cases of doubt or difficulty, his decrees were enforced by anathemas and spiritual censures, he dethroned even kings that were refractory, and denied to whole kingdoms (when undutiful) the exercise of christian ordinances, and the benefits of the gospel of God.

BUT, though the being spiritual head of the church was a thing of great sound, and of greater authority, among men of conscience and piety, yet the court of Rome was fully apprized that (among the bulk of mankind) power cannot be maintained without property; and therefore its attention began very early to be rivetted upon every method that promised pecuniary advantage. The doctrine of purgatory was introduced, and if the purchase of masses to redeem the souls of the deceased. New-fangled offences were created, and indulgences were sold to the wealthy, for liberty to sin without danger. The canon law took cognizance of crimes, enjoined penance pro salute animae, and commuted that penance for money. Non-residence and pluralities among the clergy, and marriages among the laity related within the seventh degree, were strictly prohibited by canon; but dispensations were seldom denied to those who could afford to buy them. In short, all the wealth of christendom was gradually drained, by a thousand channels, into the coffers of the holy see.

THE establishment also of the feodal system in most of the governments of Europe, whereby the lands of all private proprietors were declared to be holden of the prince, gave a hint to the court of Rome for usurping a similar authority over all the preferments of the church; which began first in Italy, and gradually spread itself to England. The pope became a feodal lord; and all ordinary patrons were to hold their right of patronage under this universal superior. Estates held by feodal tenure, being originally gratuitous donations, were at that time denominated beneficia: their very name as well as constitution was borrowed, and the care of the souls of a
parish thence came to be denominated a benefice. Lay fees were conferred by investiture or delivery of corporal possession; and spiritual benefices, which at first were universally donatives, now received in like manner a spiritual investiture, by institution from the bishop, and induction under his authority. As lands escheated to the lord, in defect of a legal tenant, so benefices lapsed to the bishop upon non-presentation by the patron, in the nature of a spiritual escheat. The annual tenths collected from the clergy were equivalent to the feodal render, or rent reserved upon a grant; the oath of canonical obedience was copied from the oath of fealty required from the vasal by his superior; and the primer seisins of our military tenures, whereby the first profits of an heir's estate were cruelly extorted by his lord, gave birth to as cruel an exaction of first-fruits from the beneficed clergy. And the occasional aids and talliages, levied by the prince on his vasals, gave a handle to the pope to levy, by the means of his legates, a latere, pter-pence and other taxations.

AT length the holy father went a step beyond any example of either emperor or feodal lord. He reserved to himself, by his own apostolical authority d, the presentation to all benefices which became vacant while the incumbent was attending the court of Rome upon any occasion, or on his journey thither, or back again; and moreover such also as became vacant by his promotion to a bishoprick or abbey: etiamfis ad illa personae consueverint et debuerint per electionem aut quemvis alium modum assumi. And this last, the canonists declared, was no detriment at all to by the lord. Dispensations to avoid these vacancies begat the doctrine of commendams: and papal provisions were the previous nomination too such benefices, by a kind of anticipation, before they became actually void; though afterwards indiscriminately applied to any right of patronage exerted or usurped by the pope. in consequence of which the best livings were filled by Italian and other foreign clergy, equally unskilled in and averse to the laws and constitution of England. The very nomination to bishopricks, that ancient prerogative of the crown, was wrested from king Henry the first, and afterwards from his successor king John; and seemingly indeed conferred on the chapters belonging to each see: but by means of the frequent appeals to Rome, through the intricacy of the laws which regulated canonical elections, was eventually
vested in the pope. and, to sum up this head with a transaction most unparalleled and astonishing in its kind, pope Innocent III had at length the effrontery to demand, and king John had the meanness to consent to, a resignation of his crown to the pope, whereby England was to become for ever St. Peter's patrimony; and the dastardly monarch re-accepted his sceptre from the hands of the papal legate, to hold as the vasal of the holy fee, at the annual rent of a thousand marks.

ANOTHER engine set on foot, or at least greatly improved, by the court of Rome, was a masterpiece of papal policy. Not content with the ample provision of tithes, which the law of the land had given to the parochial clergy, they endeavoured to grasp at the lands and inheritances of the kingdom, and (had not the legislature withstood them) would by this time have probably been masters of every foot of ground in the kingdom. To this end they introduced the monks of the Benedictine and other rules, men of sour and austere religion, separated from the world and its concerns by a vow of perpetual celibacy, yet fascinating the minds of the people by pretences to extraordinary sanctity, while all their aim was to aggrandize the power and extend the influence of their grand superior the pope. and as, in those times of civil tumult, great rapines and violence were daily committed by overgrown lords and their adherents, they were taught to believe, that founding a monastery a little before their deaths would atone for a life of incontinence, disorder, and bloodshed. Hence innumerable abbeys and religious houses were built within a century after the conquest, and endowed, not only with the tithes of parishes which were ravished from the secular clergy, but also with lands, manors, lordships, and extensive baronies. And the doctrine inculcated was, that whatever was so given to, or purchased by, the monks and friers, was consecrated to God himself; and that to alienate or take it away was no less than the sin of sacrilege.

I MIGHT here have enlarged upon other contrivances, which will occur to the recollection of the reader, set on foot by the court of Rome, for effecting an entire exemption of its clergy from any intercourse with the civil magistrate: such as the separation of the ecclesiastical court from the temporal; the appointment of its judges by merely spiritual authority, without any interposition from the crown; the exclusive jurisdiction it claimed over all ecclesiastical persons and causes; and the privilegium clericale, or benefit of clergy, which delivered all clerks from any trial or
punishment except before their own tribunal. But the history and progress of ecclesiastical courts e, as well as of purchases in mortmain f, have already been fully discussed in the preceding volumes: and we shall have an opportunity of examining at large the nature of the privilegium clericale in the progress of the present book. And therefore I shall only observe

e See Vol. III. pag. 61.
f See Vol. II. pag. 268.

at present, that notwithstanding this plan of pontifical power was f deeply laid, and so indefatigably pursued by the unwearied politics of the court of Rome through a long succession of ages; notwithstanding it was polished and improved by the united endeavours of a body of men, who engrossed all the learning of Europe for centuries together; notwithstanding it was firmly and resolutely executed by persons the best calculated for establishing tyranny and despotism, being fired with a bigoted enthusiasm, (which prevailed not only among the weak and simple, but even among those of the best natural and acquired endowments) unconnected with their fellow-subjects, and totally indifferent what might befall that posterity to which they bore no endearing relation; --- yet it vanished into nothing, when the eyes of the people were a little enlightened, and they set themselves with vigor to oppose it. So vain and ridiculous is the attempt to live in society, without acknowledging the obligations which it lays us under; and to affect an entire independence of that civil state, which protects us in all our rights, and gives us every other liberty, that only excepted of despising the laws of the community.

HAVING thus in some degree endeavoured to trace out the original and subsequent progress of the papal usurpations in England, let us now return to the statutes of praemunire, which were framed to encounter this overgrown yet encreasing evil. King Edward I, a wise and magnanimous prince, set himself in earnest to shake off this servile yoke g. He would not suffer his bishops to attend a general council, till they had sworn not to receive the papal benediction. He made light of all papal bulles and processes: attacking Scotland in defiance of one; and seising the temporalities of his clergy, who under pretence of another refused to pay a tax imposed by parliament. He strengthened the statutes of mortmain; thereby closing the great gulph, in which all the lands of the kingdom were in danger of being swallowed.
And, one of his subjects having obtained a bulle of excommunication against another, he ordered him to be executed as a traitor, according to the ancient law. And in the thirty fifth year of his reign was made the first statute against papal provisions, which, according to sir Edward Coke I, is the foundation of all the subsequent statutes of praemunire; which we rank as an offence immediately against the king, because every encouragement of the papal power is a diminution of the authority of the crown.

IN the weak reign of Edward the second the pope again endeavoured to encroach, but the parliament manfully withstood him; and it was one of the principal articles charged against that unhappy prince, that he had given allowance to the bulles of the see of Rome. But Edward the third was of a temper extremely different; and, to remedy these inconveniences first by gentle means, he and his nobility wrote an expostulation to the pope: but receiving a menacing and contemptuous answer, withal acquainting him, that the emperor, (who a few years before at the diet of Nuremberg, A. D. 1323, had established a law against provisions k) and also the king of France, had lately submitted to the holy see; the king replied, that if both the emperor and the French king should take the pope's part, he was ready to give battle to them both, in defence of the liberties of his crown. Hereupon more sharp and penal laws were enacted against provisors l, which enact severally, that the court of Rome shall present or collate to no bishoprick or living in England; and that whoever disturbs any patron in the presentation to a living by virtue of a papal provision, such provisor shall pay fine and ransom to the king at his will; and be imprisoned till he renounces such provision: and the same punishment is inflicted on such as cite the king, or any of his subjects,

I 2 Inst. 583.
k Mod. Univ. Hist. xxix. 293.
l Stat. 25 Edw. III. ft. 6. 27 Edw. III. ft. 1. c. 1. 38 Edw. III. ft. 1. c. 4. & ft. 2. c. 1, 2, 3, 4.

to answer in the court of Rome. And when the holy see resented these proceedings, and pope Urban V attempted to revive the vasalage and annual rent to which king John had subjected his kingdom, it was
unanimously agreed by all the estates of the realm in parliament assembled, 40 Edw. III. that king John's donation was null and void, being without the concurrence of parliament, and contrary to his coronation oath: and all the temporal nobility and commons engaged, that if the pope should endeavour by process or otherwise to maintain these usurpations, they would resist and withstand him with all their power m.

IN the reign of Richard the second, it was found necessary to sharpen and strengthen these laws, and therefore it was enacted by statutes 3 Ric. II. c. 3. and 7 Ric. II. c. 12. first, that no alien should be capable of letting his benefice to farm; in order to compel such, as had crept in, at least to reside on their preferments: and, afterwards, that no alien should be capable to be presented to any ecclesiastical preferment, under the penalty of the statutes of provisors. By the statute 12 Ric. II. c. 15. all liegemen of the king, accepting of a living by any foreign provision, are put out of the king's protection, and the benefice made void. To which the statute 13 Ric. II. ft. 2. c. 2. adds banishment and forfeiture of lands and goods: and by c. 3. of the same statute, any person bringing over any citation or excommunication from beyond sea, on account of the execution of the foregoing statutes of provisors, shall be imprisoned, forfeit his goods and lands, and moreover suffer pain of life and member.

IN the writ for the execution of all these statutes the words praemunire facias, being (as was said) used to command a citation of the party, have denominated in common speech, not only the writ, but the offence itself of maintaining the papal power, by the name of praemunire. And accordingly the next statute I shall mention, which is generally too by all subsequent:

m Seld. in Flet. 10. 4.

statutes, is usually called the statute of praemunire. It is the statute 16 Ric. II. c. 5. which enacts, that whoever procures at Rome, or elsewhere, any translations, processes, excommunications, bulles, instruments, or other things which tough the king, against him, his crown, and realm, and all persons aiding and assisting therein, shall be put out of the king's protection, their lands and goods forfeited to the king's use, and they shall be attached by their bodies to answer to the king and his council; or process of praemunire facias shall be made out against them, as in other cases of provisors.
BY the statute 2 Hen. IV. c. 3. all persons who accept any provision from the pope, to be exempt from canonical obedience to their proper ordinary, are also subjected to the penalties of praemunire. And this is the last of our ancient statutes touching this offence; the usurped civil power of the bishop of Rome being pretty well broken down by these statutes, as his usurped religious power was in about a century afterwards: the spirit of the nation being so much raised against foreigners, that about this time, in the reign of Henry the fifth, the alien priories, or abbies for foreign monks, were suppresed, and their lands given to the crown. And no farther attempts were afterwards made in support of these foreign jurisdictions.

A LEARNED writer, before referred to, is therefore greatly mistaken, when he says n, that in Henry the sixth's time the archbishop of Canterbury and other bishops offered to the king a large supply, if he would consent that all laws against provisors, and especially the statute 16 Ric. II. might be repealed; but that this motion was rejected. This account is incorrect in all its branches. For, first, the application, which he probably means was made not by the bishops only, but by the unanimous consent of a provincial synod, assembled in 1439, 18 Hen. VI. that very synod which at the same time refused to confirm and allow a papal bulle, which then was laid before them. Next, the

n Dav. 96.

purport of it was not to procure a repeal of the statutes against provisors, or that of Richard II in particular; but to request that the penalties thereof, which by a forced construction were applied to all that sued in the spiritual, and even in many temporal, courts of this realm, might be turned against the proper objects only; those who appealed to Rome or to any foreign jurisdictions: the tenor of the petition being, that those penalties should be taken to extend only to those that commenced any suits or procured any writs or public instruments at Rome, or elsewhere out of England; and that no one should be prosecuted upon that statute for any suit in the spiritual courts or lay jurisdictions of this kingdom. Lastly, the motion was so far from being rejected, that the king promised to recommend it to the next parliament, and in the mean time that no one should be molested upon this account. And the clergy were so satisfied with their success, that they granted to the king a whole tenth upon this occasion o.
AND indeed so far was the archbishop, who presided in this synod, from countenancing the usurped power of the pope in this realm, that he was ever a firm opposer of it. And, particularly, in the reign of Henry the fifth, he prevented the king's brother from being then made a cardinal, and legate a latere from the pope; upon the mere principle of its being within the mischief of papal provisions, and derogatory from the liberties of the English church and nation. For, as he expressed himself to the king in his letter upon that subject, he was bound to oppose it by his ligeance, and also to quit himself to God, and the church of this land, of which God and the king had made him governor. This was not the language of a prelate addicted to the slavery of the see of Rome; but of one, who was indeed of principles so very opposite to the papal usurpations, that in the year preceding this synod, 17 Hen. VI. he refused to consecrate a bishop of Ely, that was nominated by pope Eugenius IV. A conduct quite consonant to his former

 behaviour, in 6 Hen. VI, when he refused to obey the commands of pope Martin V, who had required him to exert his endeavours to repeal the statute of praemunire; (execrable illud statutum? as the holy father phrases it) which refusal so far exasperated the court of Rome against him, that at length the pope issued a bulle to suspend him from his office and authority, which the archbishop disregarded, and appealed to a general council. And so sensible were the nation of their primate's merit, that the lords spiritual, and temporal, and also the university of Oxford, wrote letters to the pope in his defence; and the house of commons addressed the king, to send an ambassador forthwith to his holiness, on behalf of the archbishop, who had incurred the displeasure of the pope for opposing the excessive power of the court of Rome p.

THIS then is the original meaning of the offence, which we call praemunire; viz. introducing a foreign power into this land, and creating imperium in imperio, by paying that obedience to papal process, which constitutionally belonged to the king alone, long before the reformation in the reign of Henry the eighth: at which time the penalties of praemunire were indeed extended to more papal abuses than before; as the kingdom then entirely renounced the authority of the see of Rome, though not all the corrupted doctrines of the Roman church. and therefore by the several statutes of 24 Hen. VIII. c. 12. and 25 Hen. VIII. c. 19 & 21. to appeal to
Rome from any of the king's courts, which (though illegal before) had at times been connived at; to sue to Rome for any licence or dispensation; or to obey any process from thence; are made liable to the pains of praemunire. And, in order to restore to the king in effect the nomination of vacant bishopricks, and yet keep up the established forms, it is enacted by treason 25 Hen. VIII. c. 20. that if the dean and chapter refuse to elect the person named by the king, or any archbishop or bishop to confirm or consecrate him, they shall fall within the penalties of the statutes of praemunire. Also by statute 5 Eliz. c. 1. to refuse the oath of supremacy will incur the pains of praemunire; and to defend the pope's jurisdiction in this realm, is a praemunire for the first offence, and high treason for the second. So too, by statute 13 Eliz. c. 2. to import any agnus Dei, crosses, beads, or other superstitious things pretended to be hallowed by the bishop of Rome, and tender the same to be used; or to receive the same with such intent, and not discover the offender; or if a justice of the peace, knowing thereof, shall not within fourteen days declare it to a privy counsellor; they all incur a praemunire. But importing, or selling mafs books or other popish books, is by statute 3 Jac. I. c. 5. 25. only a penalty of forty shillings. Lastly, to contribute to the maintenance of a jesuits college, or any popish seminary whatever, beyond sea; or any person in the same; or to contribute to the maintenance of any jesuit or popish priest in England, is by statute 27 Eliz. c. 2. made liable to the penalties of praemunire.

THUS far the penalties of praemunire seem to have kept within the proper bounds of their original institution, the depressing the power of the pope: but, they being pains of no inconsiderable consequence, it has been thought fit to apply the same to other heinous offences; some of which bear more, and some less relation to this original offence, and some no relation at all.

p See Wilk. Concil. Mag. Br. Vol. III. passim. And Dr. Duck's life of archbishop Chichele, who was the prelate here spoken of, and the munificent founder of All Souls college in Oxford: in vindication of whose memory the author hopes to be excused this digression; if indeed it be a digression, to shew how contrary to the sentiments of so learned and pious a prelate, even in the days of popery, those usurpations were, which the statutes of praemunire and provisors were made to restrain.
Thus, 1. By the statute 1 & 2 Ph. & Mar. c. 8. to molest the possessions of abbey lands granted by parliament to Henry the eighth, and Edward the sixth, is a praemunire. 2. So likewise is the offence of acting as a broker or agent in any usurious contract, where above ten per cent. interest is taken, by statute 13 Eliz. c. 10. 3. To obtain any stay of proceedings, other than by arrest of judgment or writ of error, in any suit for a monopoly, is likewise a praemunire, by statute 21 Jac. I. c. 3.

4. To obtain an exclusive patent for the sole making or importation of gunpowder or arms, or to hinder others from importing them, is also a praemunire by two statutes; the one 16 Car. I. c. 21. the other 1 Jac. II. c. 8. 5. On the abolition, by statute 12 Car. II. c. 24. of purveyance q, and the prerogative of preemption, or taking any victual, beasts, or goods for the king's use, at a stated price, without consent of the proprietor, the exertion of any such power for the future was declared to incur the penalties of praemunire. 6. To assert, maliciously and advisedly, by speaking or writing, that both or either house of pee have a legislative authority without the king, is declared a praemunire by statute 13 Car. II. c. 1. 7. By the habeas corpus act also, 31 Car. II. c. 2. it is a praemunire, and incapable of the kings' pardon, besides other heavy penalties r, to send any subject of this realm a prisoner into parts beyond the seas. 8. By the statute 1 W. & M. ft. 1. c. 8. persons of eighteen years of age, refusing to take the new oaths of allegiance, as well as supremacy, upon tender by the proper magistrate, are subject to the penalties of a praemunire; and by statute 7 & 8 W. III. c. 24. serjeants, counsellors, proctors, attorneys, and all officers of courts, practising without having taken the oaths of allegiance and supremacy, and subscribing the declaration against popery, are guilty of a praemunire, whether the oaths be tendered or no. 9. By the statute 6 Ann. c. 7. to affert maliciously and directly, by preaching, teaching, or advised speaking, that the then pretended prince of Wales, or any person other than according to the acts of settlement and union, hath any right to the throne of these kingdoms; or that the king and parliament cannot make laws to limit the descent of the crown; such preaching, teaching, or advised speaking is a praemunire: as writing, printing, or publishing the same doctrines amounted, we may remember, to high treason. 10. By statute 6 Ann. c. 23. if the assembly of peers of Scotland, convened to elect their sixteen representatives in the British parliament, shall presume to treat

q See Vol. I. pag. 287.
of any other matter save only the election, they incur the penalties of a praemunire. The last offence that has been made a praemunire, was by statute 6 Geo. I. c. 18. the year after the infamous south sea project had beggared half the nation. This therefore makes all unwarrantable undertakings by unlawful subscriptions, then commonly known by the name of bubbles, subject to the penalties of a praemunire.

HAVING thus enquired into the nature and several species of praemunire, its punishment may be gathered from the foregoing statutes, which are thus shortly summed up by sir Edward Coke: that, from the conviction, the defendant shall be out of the king's protection, and his lands and tenements, goods and chattels forfeited to the king: and that his body shall remain in prison at the king's pleasure; or (as other authorities have it) during life; both which amount to the same thing; as the king by his prerogative may any time remit the whole, or any part of the punishment, except in the case of transgressing the statute of habeas corpus. These forfeitures, here inflicted, do not (by the way) bring this offence within our former definition of felony; being inflicted by particular statutes, and not by the common law. But so odious, sir Edward Coke adds, was this offence of praemunire, that a man that was attainted of the same might have been slain by any other man without danger of law: because it was provided by law u, that any man might do to him as to the king's enemy; and any man may lawfully kill an enemy. However, the position itself, that it is at any time lawful to kill an enemy, is by no means tenable: it is only lawful, by the law of nature and nations, to kill him in the heat of battle, or for necessary self-defence. And, to obviate such savage and mistaken notions, the statute 5 Eliz. c. 1. provides, that it shall not be lawful to kill any person attainted in a praemunire, any law, statute, opinion, or exposition of law to the contrary notwithstanding. But still such delinquent, though protected as a part of the public from public wrongs, can bring no action for any private injury, how atrocious soever; being so far out of the protection of the law, that it will not guard his civil rights, nor remedy any
grievance which he as an individual may suffer. And no man, knowing him to be guilty, can with safety give him comfort, aid, or relief w.

w 1 Hawk. P. C. 55.

CHAPTER THE NINTH.
OF misprisons AND CONTEMPTS, AFFECTING THE KING AND GOVERNMENT.

THE fourth species of offences, more immediately against the king and government, are intitled misprisons and contempts.

misprisons (a term derived from the old French, meSpris, a neglect or contempt) are, in the acceptation of our law, generally understood to be all such high offences as are under the degree of capital, but nearly bordering thereon: and it is said, that a misprison is contained in every treason and felony whatsoever; and that, if the king so please, the offender may be proceeded against for the misprison only a. And upon the same principle, while the jurisdiction of the star-chamber subsisted, it was held that the king might remit a prosecution for treason, and cause the delinquent to be censured in that court, merely for a high misdemesnor: as happened in the case of Roger earl of Rutland, in 43 Eliz. who was concerned in the earl of Essex's rebellion b. misprisons are generally divided into two sorts; negative, which consist in the concealment of something which ought to be revealed; and positive, which consist in the commission of something which ought to be done.


I. OF the first, or negative kind, is what is called misprison of treason; consisting in the bare knowledge and concealment of treason, without any degree of assent thereto: for any assent makes the party a principal traitor; as indeed the concealment, which was construed aiding and abetting, did at the common law: in like manner as the knowledge of a plot against the state, and not revealing it, was a capital crime at Florence, and other states of Italy c. But it is now enacted by the statute 1 & 2 Ph. & Mar. c. 10. that a bare concealment of treason shall be only held a misprison. This
concealment becomes criminal, if the party apprized of the treason does not, as soon as conveniently may be, reveal it to some judge of assise or justice of the peaced. But if there be any probable circumstances of assent, as if one goes to a treasonable meeting, knowing beforehand that a conspiracy is intended against the king; or, being in such company once by accident, and having heard such treasonable conspiracy, meets the same company again, and hears more of it, but conceals it; this is an implied assent in law, and makes the concealer guilty of principal high treason e.

THERE is also one positive misprison of treason, created so by act of parliament. The statute 13 Eliz. c. 2. enacts, that those who forge foreign coin, not current in this kingdom, their aiders, abettors, and procurers, shall all be guilty of misprison of treason. For, though the law would not put foreign coin upon quite the same footing as our own; yet, if the circumstances of trade concur, the falsifying it may be attended with consequence almost equally pernicious to the public; as the counterfeiting of Portugal money would be at present: and therefore the law has made it an offence just below capital, and that is all. For the punishment of misprison of treason is loss of the profits of lands during life, forfeiture of goods, and imprisonment during life f. Which total forfeiture of the goods was originally inflicted while the offence amounted to principal treason, and of course included in it a felony, by the common law; and therefore is no exception to the general rule laid down in a former chapter g, that wherever an offence is punished by such total forfeiture it is felony at the common law.

misprison of felony is also the concealment of a felony which a man knows, but never assented to; for, if he assented, this makes him either principal, or accessory. And the punishment of this, in a public officer, by the statute Westm. 1. 3. Edw. I. c. 9. is imprisonment for a less discretionary time; and, in both, fine and ranson at the king's pleasure: which pleasure of the king must be observed, once for all, not to signify any extrajudicial will of the sovereign, but such as is declared by his representatives, the judges in his courts of justice;voluntas regis in curia, non in camera h.
THERE is also another species of negative misprisons; namely, the concealing of treasure-trove, which belongs to the king or him grantees, by prerogative royal: the concealment of which was formerly punishable by death j; but now only by fine and imprisonment i.

II. misprisonS, which are merely positive, are generally denominated contempts or high misdemesnors; of which

1. THE first and principal is the mal-administration of such high officers, as are in public trust and employment. This is usually punished by the method of parliamentary impeachment: wherein such penalties, short of death, are inflicted, as to the wisdom of the house of peers shall seem proper; consisting usually of banishment, imprisonment, fines, or perpetual disability. Hitherto also may be referred the offence of embezzling the public money, called among the Romans peculatus, which the Julian law punished with death in a magistrate, and with deportation, or banishment, in a private person k. With us it is not a capital crime, but subjects the committer of it to a discretionary fine and imprisonment. Other misprisons are, in general, such contempts of the executive magistrate, as demonstrate themselves by some arrogant and undutiful behaviour towards the king and government. These are

2. CONTEMPTS against the king's prerogative. As, by refusing to assist him for the good of the public; either in his councils, by advice, if called upon; or in his wars, by personal service for defence of the realm, against a rebellion or invasion l. Under which calls may be ranked the neglecting to join the posse comitatus, or power of the county, being thereunto required by the sheriff or justices, according to the statute 2 Hen. V. c. 8. which is a duty incumbent upon all that are fifteen years of age, under the degree of nobility, and able to travel m. Contempts against the prerogative may also be, by preferring the interests of a foreign potentate to those of our own, or doing or receiving any thing that may create an undue influence in favour
of such extrinsic power; as, by taking a pension from any foreign prince without the consent of the king n. Or, by disobeying the king's lawful commands; whether by writs issuing out of his courts of justice, or by a summons to attend his privy council, or by letters from the king to a subject commanding him to return from beyond the seas, (for disobedience to which his lands shall be seised till he does return, and himself afterwards punished) or by his writ of ne exeat regnum, or proclamation, commanding the subject to stay at home o. Disobedience to any of these commands is a high misprison and contempt: and so, lastly, is disobedience to any act of parliament, where no particular penalty is assigned; for then it is punishable, like the rest of

k Inst. 4. 18. 9.
l 1 Hawk. P. C. 59.
m Lamb. Eir. 315.
n 3 Inst. 144.
o See Vol. I. pag. 266.

these contempts, by fine and imprisonment, at the discretion of the king's courts of justicep.

3. CONTEMPTS and misprisons against the king's person and government, may be by speaking or writing against them, cursing or wishing him ill, giving out scandalous stories concerning him, or doing any thing that may tend to lessen him in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people. It has been also held an offence of this species to drink to the pious memory of a traitor; or for a clergyman to absolve persons at the gallows, who there persist in the treasons for which they die: these being acts which impliedly encourage rebellion. And for this species of contempt a man may not only be fined and imprisoned, but suffer the pillory or other infamous corporal punishment q: in like manner as, in the ancient German empire, such persons as endeavoured to sow sedition, and disturb the public tranquillity, were condemned to become the objects of public notoriety and derision, by carrying a dog upon their shoulders from one great town to another. The emperors Otho I. and Frederic Barbarossa inflicted this punishment on noblemen of the highest rank r.

4. CONTEMPTS against the king's title, not amounting to treason or praemunire, are the denial of his right to the crown in common and
unadvised discourse; for, if it be by advisedly speaking, we have seen s that it amounts to a praemunire. This heedless species of contempt is however punished by our law with fine and imprisonment. Likewise if any person shall in any wise hold, affirm, or maintain, that the common laws of this realm, not altered by parliament, ought not to direct the right of the crown of England; this is a misdemeanor, by statute 13 Eliz. c. 1. and punishable with forfeiture of goods and chattels. A contempt may also arise from refusing or neglecting to take the oaths, appointed by statute for the better securing the

p 1 Hawk. P. C. 60.
q Ibid.
r Mod. Un. Hist. xxix. 28. 119.
s See pag. 91.

government; and yet acting in a public office, place of trust, or other capacity, for which the said oaths are required to be taken; viz. those of allegiance, Supremacy, and abjuration: which must be taken within six calendar months after admission. The penalties for this contempt, inflicted by statute 1 Geo. I. ft. 2. c. 13. are very little, if any thing, short of those of a praemunire: being an incapacity to hold the said offices, or any other; to prosecute any suit; to be guardian or executor; to take any legacy or deed of gift; and to vote at any election for members of parliament: and after conviction the offender shall also forfeit 500 l. to him or them that will sue for the same. Members on the foundation of any college in the two universities, who by this statute are bound to take the oaths, must also register a certificate thereof in the college register, within one month after; otherwise, if the electors do not remove him, and elect another within twelve months, or after, the king may nominate a person to succeed him by his great seal or sign manual. Besides thus taking the oaths for offices, any two justices of the peace may by the same statute summon, and tender the oaths to, any person whom they shall suspect to be disaffected; and every person refusing the same, who is properly called a non-juror, shall be adjudged a popish recusant convict, and subjected to the same penalties that were mentioned in a former chapter t; which in the end may amount to the alternative of abjuring the realm, or suffering death as a felon.

5. CONTEMPTS against the king’s palaces or courts of justice have always been looked upon as high misprisons: and by the a law, before the conquest, fighting in the king’s palace, or before the king’s judges, was
punished with death. So too, in the old Gothic constitution, there were many places privileged by law, quibus major reverential et securitas debetur, ut tempula et judicia, quae sancta habebantur, --- arces et aula regis, --- denique locus quilibet praefente aut adventante rege u. And at present, with us, by the statute 33 Hen. VIII. c. 12. malicious striking in the king's palace, wherein his royal person resides, whereby blood is drawn, is punishable by perpetual imprisonment, and fine at the king's pleasure; and also with loss of the offender's right hand, the solemn execution of which sentence is prescribed in the statute at length.

BUT striking in the king's superior courts of justice, in Westminster-hall, or at the assises, is made still more penal than even in the king's palace. The reason seems to be, that those courts being anciently held in the king's palace, and before the king himself, striking there included the former contempt against the king's palace, and something more; viz. the disturbance of public justice. For this reason, by the ancient common law before the conquest w, striking in the king's courts of justice, or drawing a sword therein, was a capital felony; and our modern law retains so much of the ancient severity, as only to exchange the loss of life for the loss of the offending limb. Therefore a stroke or a blow in such court of justice, whether blood be drawn or not, or even assaulting a judge, fitting in the court, by drawing a weapon, without any blow struck, is punishable with the loss of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of his lands during life x. A rescue also of a prisoner from any of the said courts, without striking a blow, is punished with perpetual imprisonment, and forfeiture of goods, and of the profits of lands during life y: being looked upon as an offence of the same nature with the last; but only, as no blow is actually given, the amputation of the hand is excused. For the like reason an affray, or riot, near the said courts, but out of their actual view, is punished only with fine and imprisonment z.

w LL. Inac. c. 6. LL. Canut. c. 56. LL. Alurred. c. 7.
x Staundf. P. C. 38. 3 Inst. 140, 141.
y 1 Hawk. P. C. 57.
NOT only such as are guilty of an actual violence, but of threatening or reproachful words to any judge fitting in the courts, are guilty of a high misprison, and have been punished with large fines, imprisonment, and corporal punishment a. And, even in the inferior courts of the king, an affray, or contemptuous behaviour, is punishable with a fine by the judges there fitting; as by the steward in a court-leet, or the like b.

LIKEWISE all such, as are guilty of any injurious treatment to those who are immediately under the protection of a court of justice, are punishable by fine and imprisonment: as if a man assaults or threatens his adversary for suing him, a counsellor or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer for keeping him in custody, and properly executing his duty: which offences, when they proceeded farther than bare threats, were punished in the Gothic constitutions with exile and forfeiture of goods d.

LASTLY, to endeavour to dissuade a witness from giving evidence; to disclose an examination before the privy council; or, to advise a prisoner to stand mute; (all of which are impediments of justice) are high misprisons, and contempts of the king's courts, and punishable by fine and imprisonment. And anciently it was held, that if one of the grand jury disclosed to any person indicted the evidence that appeared against him, he was thereby made accessory to the offence, if felony; and in treason a principal. And at this day it is agreed, that he is guilty of a high misprison e, and liable to be fined and imprisoned f.

a Cro. Car. 503.
b 1 Hawk. P. C. 58.
c 3 Inst. 141, 142.
d Stiernh. de jure Goth. l. 3. t. 3.
e See Barr. 212. 27. Afterwards. pl. 44. 5. fol. 138.
f 1 Hawk. P. C. 59.

CHAPTER THE TENTH.
OF OFFENCES AGAINST PUBLIC JUSTICE.
THE order of our distribution will next lead us to take into consideration such crimes and misdemeanors as more especially affect the commonwealth, or public polity of the kingdom: which however, as well as those which are peculiarly pointed against the lives and security of private subjects, are also offences against the king, as the pater-familias of the nation; to whom it appertains by his regal office to protect the community, and each individual therein, from every degree of injurious violence, by executing those laws, which the people themselves in conjunction with him have enacted; or at least have consented to, by an agreement either expressly made in the persons of their representatives, or by a tacit and implied consent presumed and proved by immemorial usage.

THE species of crimes, which we have now before us, is subdivided into such a number of inferior and subordinate classes, that it would much exceed the bounds of an elementary treatise, and be insupportably tedious to the reader, were I to examine them all minutely, or with any degree of critical accuracy. I shall therefore confine myself principally to general definitions or descriptions of this great variety of offences, and to the punishments inflicted by law for each particular offence; with now and then a few incidental observations: referring the student for more particulars to other voluminous authors; who have treated of these subjects with greater precision and more in detail, than is consistent with the plan of these commentaries.

THE crimes and misdemeanors, that more especially affect the commonwealth, may be divided into five species; viz. offences against public justice, against the public peace, against public trade, against the public health, and against the public police or economy: of each of which we will take a cursory view in their order.

FIRST then, of offences against public justice: some of which are felonious, whose punishment may extend to death; others only misdemeanors. I shall begin with those that are most penal, and descend gradually to such as are of less malignity.

1. embezzling or vacating records, or falsifying certain other proceedings in a court of judicature, is a felonious offence against public justice. It is enacted by statute 8 Hen. VI. c. 12. that if any clerk, or other person, shall willfully take away, withdraw, or avoid any record, or process in the
superior courts of justice in Westminster-hall, by reason whereof the judgment shall be reversed or not take effect; it is felony not only in the principal actors, but also in their procurers, and abettors. Likewise by statute 21 Jac. I. c. 26. to acknowledge any fine, recovery, deed enrolled, statute, recognizance, bail, or judgment, in the name of another person not privy to the same, is felony without benefit of clergy. Which law extends only to proceedings in the courts themselves: but by statute 4 W. & M. c. 4. to personate any other person before any commissioner authorized to take bail in the country is also felony. For no man's property would be safe, if records might be suppressed or falsified, or persons' names be falsely usurped in courts, or before their public officers.

2. To prevent abuses by the extensive power, which the law is obliged to repose in gaolers, it is enacted by statute 14 Edw. III. c. 10. that if any gaoler by too great duress of imprisonment makes any prisoner that he hath in ward, become an approver or an appellor against his will; that is, as we shall see hereafter, to accuse and turn evidence against some other person; it is felony in the gaoler. For, as sir Edward Coke a observes, it is not lawful to induce or excite any man even to a just accusation of another; much less to do it by duress of imprisonment; and least of all by a gaoler, to whom the prisoner is committed for safe custody.

3. A THIRD offence against public justice is obstructing the execution of lawful process. This is at all times an offence of a very high and presumptuous nature; but more particularly so, when it is an obstruction of an arrest upon criminal process. And it hath been holden, that the party opposing such arrest becomes thereby particeps criminis; that is, an accessory in felony, and a principal in high treason b. Formerly one of the greatest obstructions to public justice, both of the civil and criminal kind, was the multitude of pretended privileged places, where indigent persons assembled together to shelter themselves from justice, (especially in London and Southwark) under the pretext of their having been ancient palaces of the crown, or the like c: all of which sanctuaries for iniquity are now demolished, and the opposing of any process therein is made highly penal, by the statutes 8 & 9 W. III. c. 27. 9 Geo. I. c. 28. and 11 Geo. I. c.22. which enact, that persons opposing the execution of any process in such pretended privileged places within the bills of mortality, or abusing any officer in his endeavours to execute his duty therein, so that he receives bodily hurt, shall be guilty of felony, and transported for seven years.
4. AN escape of a person arrested upon criminal process, by eluding the vigilance of his keepers before he is put in hold, is also an offence against public justice, and the party himself is punishable by fine or imprisonment. But the officer permitting such escape, either by negligence or connivance, is much more culpable than the prisoner; the natural desire of liberty pleading strongly in his behalf, though he ought in strictness of law to submit himself quietly to custody, till cleared by the due course of justice. Officers therefore who, after arrest, negligently permit a felon to escape, are also punishable by fine; but voluntary escapes, by consent and connivance of the officer, are a much more serious offence: for it is generally agreed that such escapes amount to the same kind of offence, and are punishable in the same degree, as the offence of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or trespass. And this, whether he were actually committed to gaol, or only under a bare arrest. But the officer cannot be thus punished, till the original delinquent is actually found guilty or convicted, by verdict, confession, or outlawry, of the crime for which he was so committed or arrested: otherwise it might happen, that the officer might be punished for treason or felony, and the person arrested and escaping might turn out to be an innocent man. But, before the conviction of the principal party, the officer thus neglecting his duty may be fined and imprisoned for a misdemeanour.

5. BREACH of prison by the offender himself, when committed for any cause, was felony at the common law: or even conspiring to break it. But this severity is mitigated by the statute de frangentibus prisonam, 1 Edw. II. which enacts, that no person shall have judgment of life or member, for breaking pri-
son, unless committed for some capital offence. So that to break prison, when lawfully committed for any treason or felony, remains still felony as at the common law; and to break prison, when lawfully confined upon any other inferior charge, is still punishable as a high misdemesnor by fine and imprisonment. For the statute, which ordains that such offence shall be no longer capital, never meant to exempt it entirely from every degree of punishment k.

6. RESCUE is the forcibly freeing another from an arrest or imprisonment; and is always the same offence in the stranger so rescuing, as it would have been in the party himself to have broken prison l. A rescue therefore of one apprehended for felony, is felony; for treason, treason; and for a misdemesnor, a misdemesnor also. But here, as upon voluntary escapes, the principal must first be attainted before the rescuer can be punished: and for the same reason; because perhaps in fact it may turn out that there has been no offence committed m. By the statute, 16 Geo. II. c. 31. to assist a prisoner in custody for treason or felony with any arms, instruments of escape, or disguise, without the knowledge of the gaoler; or any way to assist such prisoner to attempt an escape, though no escape be actually made, is felony, and subjects the offender to transportation for seven years. And by the statutes 25 Geo. II. c. 37. and 27 Geo. II. c. 15. to rescue, or attempt to rescue, any person committed for murder, or for any of the offences enumerated in that act, or in the black act 9 Geo. I. c. 22. is felony without benefit of clergy.

7. ANOTHER capital offence against public justice is the returning from transportation, or being seen at large in Great Britain before the expiration of the term for which the offender was sentenced to be transported. This is made felony without benefit of clergy by statutes 4. Geo. I. c. 11. 6 Geo. I. c. 23. and 8 Geo. III. c. 15.

8. AN eighth is that of taking a reward, under pretence of helping the owner to his stolen goods. This was a contrivance carried to a great length
of villainy in the beginning of the reign of George the first: the confederates of the felons thus disposing of stolen goods, at a cheap rate, to the owners themselves, and thereby stifling all farther enquiry. The famous Jonathan Wild had under him a well disciplined corps of thieves, who brought in all their spoils to him; and he kept a fort of public office for restoring them to the owners at half price. To prevent which audacious practice, to the ruin and in defiance of public justice, it was enacted by statute 4 Geo. I. c. 11. that whoever shall take a reward under the pretence of helping anyone to stolen goods, shall suffer 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. Wild, upon this statute, (still continuing in his old practice) was at last convicted and executed.

9. RECEIVING of stolen goods, knowing them to be stolen, is also a high misdemeanour and affront to public justice. We have seen in a former chapter n, that this offence, which is only a misdemeanour at common law, by the statutes 3 & 4 W. & M. c. 9. and 5 Ann. c. 31. makes the offender accessory to the these and felony. But because the accessory cannot in general be tried, unless with the principal, or after the principal is convicted, the receivers by that means frequently eluded justice. To remedy which, it is enacted by statute 1 Ann. c. 9. and 5 Ann. c. 31. that such receivers may still be prosecuted for a misdemeanour, and punished by fine and imprisonment, though the principal felon be not before taken, so as to be prosecuted and convicted. And, in case of receiving stolen lead, iron, and certain other metals, such offence is by statute 29 Geo. II. c. 30. punishable by transportation for fourteen years o. So that now the prosecutor has two methods in his choice: either to punish the receivers for the misdemeanour immediately, before the thief is taken p; or to wait till the felon is convicted, and then punish them as accessories to the felony. But it is provided by the same statutes, that he shall only make use of one, and not both o these methods of punishment. By the same statute also 29 Geo. II. c. 30. persons having lead, iron, and other metals in their custody, and not giving a satisfactory account how they came by the same, are guilty of a misdemeanour and punishable by fine or imprisonment.

10. OF a nature somewhat similar to the two last is the offence of theft-bote, 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. This is frequently called compounding of felony, and formerly was held to make a man an accessory; but is now punished only with fine and imprisonment q. This perversion of justice, in the old Gothic constitutions, was liable to the most severe and infamous punishment. And the Salic lawlawlatroni eum fimilem habuit, qui furtum celarevellet, et occulte fine judice compositionem ejus admittere r. By statute 25 Geo. II. c. 36. even to advertise a reward for the return of things stolen, with no questions asked, or words to the same purport, subjects the advertiser and the printer to a forfeiture of 50 l. each.

11. COMMON barrety is the offence of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise s. The punishment for this offence, in a common person, is by fine and imprisonment: but if the offender (as is too frequently the case) belongs to the profession of the law, a barretor, who is thus able as well as willing to do mischief, ought also to be disabled from practising for the future t. Hereunto maybe referred an offence of equal malignity and audaciousness; that of suing another in the name of a fictitious plaintiff; either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the king's superior courts, is left, as a high contempt, to be punished at their discretion. But in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges no equally extensive, it is directed by statute 8 Eliz. c. 2. to be punished by six months imprisonment, and treble damages to the party injured.

12. MAINTENANCE is an offence, that bears a near relation to the former; being an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it u: a practice, that was greatly encouraged by the first introduction of uses w. This is an offence against public justice, as it
keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. And therefore, by the Roman law, it was a species of the crimen falsi to enter into any confederacy, or do any act to support another's lawsuit, by money, witnesses, or patronage x. A man may however maintain the suit of his near kinsman, servant, or poor neighbour, out of charity and compassion, with impunity. Otherwise the punishment by common law is fine and imprisonment y; and, by the statute 32 Hen. VIII. c. 9. a. forfeiture of ten pounds.

13. CHAMPERTY, campi-partitio, is a species of maintenance, and punished in the same manner z: being a bargain with a plaintiff of defendant campun partire, to divide the land or other matter sued for between them, if they prevail at law;

t 1 Hawk. P. C. 244.
u Ibid. 249.
w Dr. & St. 203.
x Ff. 48. 10. 20.
y 1 Hawk. P. C. 255.
z Ibid. 257.

whereupon the champertor is to carry on the party's suit at his own expense a. Thus champart, in the French law, signifies a similar division of profits, being a part of the crop annually due to the landlord by bargain or custom. In our sense of the word, it signifies the purchasing of a suit, or right of suing: a practice so much abhorred by our law, that it is one main reason why a chose in action, or thing of which one hath the right but no the possession, is not assignable at common law; because no man should purchase any pretence to sue in another's right. These pests of civil society. That are perpetually endeavouring to disturb the repose of their neighbours, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted on by the Roman law:qui improbe coeuntin alienam litem, ut quicquid ex communicacione in rem ipsius redactum suerit, inter eos communicaretur, loge Tulia de vi privatatenentur b;? and they were punished by the forfeiture of a third part of their goods, and perpetual infamy. Hitherto also must be referred the provision of the statute 32 Hen. VIII. c. 9. that no one shall fell or purchase any pretended right or title to land, unless the vendor hath received the profits thereof for one whole year before such grant, or hath been in actual possession purchaser and vendor shall each
forfeit the value of such land to the king and the prosecutor. These
offences relate chiefly to the commencement of civil suits: but

14. THE compounding of informations upon penal statutes are an offence
of an equivalent nature in criminal causes; and are, besides, an additional
misdemesnor against public justice, by contributing to make the laws
odious to the people. At once therefore to discourage malicious informers,
and to provide that offences, when once discovered, shall be duly
prosecuted, it is enacted by statute 18 Eliz. c. 5. that if any person,
informing under pretence of any penal law, makes any composition
without leave of the court, or takes any money or promise from the
defendant to excuse him (which demonstrates him intent in commencing
the prosecution to be merely to serve his own ends, and not for the public
good) he shall forfeit 10 /., shall stand two hours on the pillory, and shall
be for ever disabled to sue on any popular or peal statute.

15. A CONSPIRACY also to indict an innocent man of felony falsely and
maliciously, who is accordingly indicted and acquitted, is a farther abuse
and perversion of public justice; for which the party injured may either
have a civil action by writ of conspiracy, (of which we spoke in the
preceding book c) or the conspirators, for there must be at least two to
form a consrpiracy, may be indicted at the suit of the king, and were by the
ancient common law d to receive what is called the villenous judgment;
viz. to lose their liberam legem, whereby they are discredited and disabled
to be jurors or witnesses; to forfeit their goods and chattels, and lands for
life; to have those lands wasted, their houses rased, their trees rooted up,
and their own bodies committed to prison e. But it now is the better
opinion, that the villenous judgment is by long disuse become obsolete; it
not having been pronounced for some ages: but instead thereof the
delinquents are usually sentenced to imprisonment, fine, and pillory. To
this head may be referred the offence of fending letters, threatening to
accuse any person of a crime punishable with death, transportation,
pillory, or other infamous punishment, with a view to extort from him any
money or other valuable chattels. This is punishable by statute 30 Geo. II.
c. 24. at the discretion of the court, with fine, imprisonment, pillory,
whipping, or transportation for seven years.
16. THE next offence against public justice is when the suit is past its commencement, and come to trial. And that is the crime of willful and corrupt perjury; which is defined by sir Edward Coke f, to be a crime committed when a lawful oath is ad-

See Vol. III. pag. 126.
d Bro. Abr. t. conspiracy. 28.
e 1 Hawk. P. C. 193.
f 3 Inst. 164.

ministred, in some judicial proceeding, to a person who swears willfully, absolutely and falsely, in a matter material to the issue or point in question. The law takes no notice of any perjury but such as is committed in some court of justice, having power to administer an oath; or before some magistrate or proper officer, invested with a similar authority, in some proceedings relative to a civil suit or a criminal prosecution: for it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them. For which reason it is much to be questioned how far any magistrate is justifiable in taking a voluntary affidavit in any extrajudicial matter, as is now too frequent upon every petty occasion: since it is more than possible, that by such idle oaths a man may frequently in foro conscientiae incur the guilt, and at the same time evade the temporal penalties, of perjury. The perjury must also be willful, positive, and absolute; not upon surprize, or the like: it also must be in some point material to the question in dispute; for if it only be in some trifling collateral circumstances, to which no regard is paid, it is no more penal than in the voluntary extrajudicial oaths before-mentioned.

Subornation of perjury is the offence of procuring another to take such a false oath, as constitutes perjury in the principal. The punishment of perjury and subornation, at common law, has been various. It was anciently death; afterwards banishment, or cutting out the tongue, then forfeiture of goods; and now it is fine and imprisonment, and never more to be capable of bearing testimony g. But the statute 5 Eliz. c. 9. (if the offender be prosecuted thereon) inflicts the penalty of perpetual infamy, and a fine of 40 /. on the suborner; and, in default of payment, imprisonment for six months, and to stand with both ears nailed to the pillory. Perjury itself is thereby punished with six months imprisonment, perpetual infamy, and a fine of 20 /. Or to have both ears nailed to the pillory. But the prosecution is usually carried on for the offence at
common law; especially as, to the penalties before inflicted, the statute 2 Geo. II. c. 25. super-adds a power, for the court to order the offender to be sent to the
g 3 Inst. 163.

house of correction for seven years, or to be transported for the same period; and makes it felony without benefit of clergy to return or escape within the time. It has sometimes been wished, that perjury, at least upon capital accusations, whereby another's life has been or might have been destroyed, was also rendered capital, upon a principle of retaliation; as it is universally by the laws of Frances h. And certainly the odiousness of the crime pleads strongly in behalf of the French law. But it is to be considered, that there they admit witnesses to be heard only on the side of the prosecution, and use the rack to extort a confession from the accused. In such a constitution therefore it is necessary to throw the dread of capital punishment into the other scale, in order to keep in awe the witnesses for the crown; on whom alone the prisoner's sate depends: so naturally does one cruel law beget another. But corporal and pecuniary punishments, exile and perpetual infamy, are more suited to the genius of the English law, where the fact is openly discussed between witnesses on both sides, and the evidence for the crown may be contradicted and disproved by those of the prisoner. Where indeed the death of an innocent person has actually been the consequence of such willful perjury, it falls within the guilt of deliberate murder, and deserves an equal punishment: which our ancient law in fact inflicted i. But the mere attempt to destroy life by other means not being capital, there is no reason than an attempt by perjury should: much less that this crime should in all judicial cases be punished with death. For to multiply capital punishments lessens their effect, when applied to crimes of the deepest dye; and, detestable as perjury is, it is not by any means to be compared with some other offences, for which only death can be inflicted: and therefore it seems already (except perhaps in the instance of deliberate murder by perjury) very properly punished by our present law; which has adopted the opinion of Cicero k, derived from the law of the twelve tables, perjurii poena divina, exitium; humana, dedecus.

h Montesq. Sp. L. b. 29. ch. 11.
I Britton. c. 5.
k de Leg. 2. 9.
17. BRIBERY is the next species of offence against public justice; which is when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behaviour in his office \( l \). In the east it is the custom never to petition any superior for justice, not excepting their kings, without a present. This is calculated for the genius of despotic countries; where the true principles of government are never understood, and it is imagined that there is no obligation from the superior to the inferior, no relative duty owing from the governor to the governed. The Roman law, though it contained many severe injunctions against bribery, as well for felling a man's vote in the senate or other public assembly, as for the bartering of common justice, yet by a strange indulgence in one instance, it tacitly encouraged this practice; allowing the magistrate to receive small presents, provided they did not in the whole exceed a hundred crowns in the year \( m \): not considering the insinuating nature and gigantic progress of this vice, when once admitted. Plato therefore more wisely, in his ideal republic \( n \), orders those who take presents for doing their duty to be punished in the severest manner: and by the laws of Athens he that offered was also prosecuted, as well as he that received a bribe \( o \). In England this offence of taking bribes is punished, in inferior officers, with fine and imprisonment; and in those who offer a bribe, though not taken, the same \( p \). But in judges, especially the superior ones, it hath been always looked upon as so heinous an offence, that the chief justice Thorpe was hanged for it in the reign of Edward III. By a statute \( q 11 \) Hen. IV, all judges and officers of the king, convicted of bribery, shall forfeit treble the bribe, be punished at the king's will, and be discharged from the king's service for ever. And some notable examples have been made in parliament, of persons in the

\( l \) 1 Hawk. P. C. 168.
\( m \) Ff. 48. 11. 6.
\( n \) de Lig. l. 12.
\( o \) Port. Antiqu. b. 1. c. 23.
\( p \) 3 Inst. 147.
\( q \) Ibid. 146.

highest stations, and otherwise very eminent and able, but contaminated with this sordid vice.
18. EMBRACERY is an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like. The punishment for the person embracing is by fine and imprisonment; and, for the juror so embraced, if it be by taking money, the punishment is (by divers statutes of the reign of Edward III) perpetual infamy, imprisonment for a year, and forfeiture of the tenfold value.

19. THE false verdict of jurors, whether occasioned by embracery or not, was anciently considered as criminal, and therefore exemplarily punished by attaint in the manner formerly mentioned.

20. ANOTHER offence of the same species is the negligence of public officers, entrusted with the administration of justice, as sheriffs, coroners, constables, and the like: which makes the offender liable to be fined; and in very notorious cases will amount to a forfeiture of his office, if it be a beneficial one. Also the omitting to apprehend persons, offering stolen iron, lead, and other metals to sale, is a misdemeanour and punishable by a stated fine, or imprisonment, in pursuance of the statute 29 Geo. II. c. 30.

21. THERE is yet another offence against public justice, which is a crime of deep malignity; and so much the deeper, as there are many opportunities of putting it in practice, and the power and wealth of the offenders may often deter the injured from a legal prosecution. This is the oppression and tyrannical partiality of judges, justices, and other magistrates, in the administration and under the colour of their office. However, when prosecuted, either by impeachment in parliament, or by information in the court of king's bench, (according to the rank of the offenders) it is sure to be severely punished with forfeiture of their offices, fines, imprisonment, or other discretionary censures, regulated by the nature and aggravations of the offence committed.

22. LASTLY, extortion is an abuse of public justice, which consists in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or
before it is due. The punishment is fine and imprisonment, and
sometimes a forfeiture of the office.

u 1 Hawk. P. C. 170.

CHAPTER THE ELEVENTH.
OF OFFENCES AGAINST THE PUBLIC PEACE.

WE are next to consider offences against the public peace; the
conservation of which is intrusted to the king and his officers, in the
manner and for the reasons which were formerly mentioned at large a.
These offences are either such as are an actual breach of the peace; or
constructively so, by tending to make others break it. Both of these species
are also either felonious, or not felonious. The felonious breaches of the
peace are strained up to that degree of malignity by virtue of several
modern statutes: and, particularly,

1. THE riotous assembling of twelve persons, or more, and not dispersing
upon proclamation. This was first made high treason by statute 3 & 4 Edw.
VI. c. 5. when the king was a minor, and a change in religion to be effected:
but that statute was repealed by statute 1 Mar. c. 1. among the other
treasons created since the 25 Edw. III; though the prohibition was in
substance re-enacted, with an inferior degree of punishment, by statute 1
Mar. ft. 2. c. 12. which made the same offence a single


commanded by proclamation to disperse, and they did not, it was by the
statute of Mary made felony, but within the benefit of clergy; and also the
act indemnified the peace officers and their assistants, it they killed any of
the mob in endeavouring to suppress such riot. This was thought a
necessary security in that sanguinary reign, when popery was intended to
be re-established, which was like to produce great discontents: but at first
it was made only for a year, and was afterwards continued for that queen's
life. And, by statute 1 Eliz. c. 16. when a reformation in religion was to be
once more attempted, it was revived and continued during her life also; and then expired. From the accession of James the first to the death of queen Anne, it was never once thought expedient to revive it: but, in the first year of George the first, it was judged necessary, in order to support the execution of the act of settlement, to renew it, and at one stroke to make it perpetual, with large additions. For, whereas the former acts expressly defined and specified what should be accounted a riot, the statute 1 Geo. I. c. 5. enacts, generally, that if any twelve persons are unlawfully assembled to the disturbance of the 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, if they contemn his orders and continue together for one hour afterwards, such contempt shall be felony without benefit of clergy. And farther, if the reading of the proclamation be by force opposed, or the reader be in any manner willfully hindered from the reading of it, such opposers and hinderers are felons, without benefit of clergy: and all persons to whom such proclamation ought to have been made, and knowing of such hindrance, and not dispersing, are felons, without benefit of clergy. There is the like indemnifying clause, in case any of the mob be unfortunately killed in the endeavour to disperse them; being copied from the act of queen Mary. And, by a subsequent clause of the new act, if any persons, so riotously assembled, begin even before proclamation to pull down any church, chapel, meeting-house, dwelling-house, or out-houses, they shall be felons without benefit of clergy.

2. BY statute 1 Hen. VII. c. 7. unlawful hunting in any legal forest, park, or warren, not being the king's property, by night, or with painted faces, was declared to be single felony. But now by the statute 9 Geo. I. c. 22. to appear armed in any open place by day, or night, with faces blacked or otherwise disguised, or (being so disguised) to hunt, wound, kill, or steal any deer, to rob a warren, or to steal fish, is felony without benefit of clergy. I mention this offence in this place, not on account of the damage thereby done to private property, but of the manner in which that damage is committed; namely, with the face blacked or with other disguise, to the breach of the public peace and the terror of his majesty's subjects.

3. ALSO by the same statute 9 Geo. I. c. 22. amende by statute 27 Geo. II. c. 15. knowingly to fend any letter without a name, or with a fictitious name, demanding money, venison, or any other valuable thing, or threatening (without any demand) to kill, or fire the house of, any person,
is made felony, without benefit of clergy. This offence was formerly high treason, by the statute 8 Hen. V. c. 6.

4. To pull down or destroy any turnpike-gate, or fence thereunto belonging, by the statute 1 Geo. II. c. 19. is punished with public whipping, and three months imprisonment; and to destroy the toll-houses, or any sluice or lock on a navigable river, is made felony to be punished with transportation for seven years. By the statute 5 Geo. II. c. 33. the offence of destroying turnpike-gates or fences, is made felony also, with transportation for seven years. And, lastly, by statute 8 Geo. II. c. 20. the offences of destroying both turnpikes upon roads, and sluices upon rivers, are made felony, without benefit of clergy; and may be tried as well in an adjacent county, as that wherein the fact is committed. The remaining offences against the public peace are merely misdemeanors, and no felonies: as,

5. 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 the fighting be in private, it is no affray but an assault. Affrays may be suppressed by any private person present, who is justifiable in endeavouring to part the combatants, whatever consequence may ensue. But more especially the constable, or other similar officer, however denominated, is bound to keep the peace; and to that purpose may break open doors to suppress an affray, or apprehend the affrayers; and may either carry them before a justice, or imprison them by his own authority for a convenient space till the heat is over; and may then perhaps also make them find sureties for the peace. The punishment of common affrays is by fine and imprisonment; the measure of which must be regulated by the circumstances of the case: for, where there is any material aggravation, the punishment proportionably increases. As where two persons coolly and deliberately engage in a duel: this being attended with an apparent intention and danger of murder, and being a high contempt of the justice of the nation, is a strong aggravation of the affray, though no mischief has actually ensued. Another aggravation is, when thereby the officers of justice are disturbed in the due execution of their office: or where a respect to the particular place ought to restrain and regulate men's behaviour, more than in common ones; as in the king's court, and the like. And upon the same account also all affrays in a church or church-yard are esteemed very heinous offences, as being indignities to him to whose service those places are consecrated. Therefore mere quarrelsome
words, which are neither an affray nor an offence in any other place, are penal here. For it is enacted by statute 5 & 6 Edw. VI. c. 4. that 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 ecclesiae; and, if a clerk in orders,

b 1 Hawk. P. C. 134.
c Ibid. 136.
d Ibid. 137.
e Ibid. 138.

from the ministration of his office during pleasure. And, if any person in such church or church-yard proceeds to finite or lay violent hands upon another, he shall be excommunicated ipso facto; or if he strikes him with a weapon, or draws any weapon with intent to strike, he shall besides excommunication (being convicted by a jury) have one of his ears cut off; or, having no ears, be branded with the letter F in his cheek. Two persons may be guilty of an affray: but,

6. RIOTS, routs, and unlawful assemblies must have three persons at least to constitute them. An unlawful assembly is when three, or more, do assemble themselves together to do an unlawful act, as to pull down inclosures, to destroy a warren or the game therein; and part without doing it, or making any motion towards it f. A rout is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common, or of way; and make some advances towards it g. A riot is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel h: as if they beat a man; or hunt and kill game in another's park, chafe, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner. The punishment of unlawful assemblies, if to the number of twelve, we have just now seen may be capital, according to the circumstances that attend it; but, from the number of three to eleven, is by fine and imprisonment only. The same is the case in riots and routs by the common law; to which the pillory in very enormous cases has been sometimes superadded i. And by the statute 13 Hen. IV. c. 7. any two justices, together with the sheriff our under-sheriff of the county, may come with the posse comitatus, if need be, and suppress any such riot,
assembly, or rout, arrest the rioters, and record upon the spot the nature
and circumstances of the whole transaction;

f 3 Inst. 176.
g Bro. Abr. Riot. 4. 5.
h 3 Inst. 176.
i 1 Hawk. P. C. 159.

which record alone shall be a sufficient conviction of the offenders. In the
interpretation of which statute it hath been holden, that all persons,
noblemen and others, except women, clergymen, persons decrepit, and
infants under fifteen, are hound to attend the justices in suppressing a riot,
upon pain of fine and imprisonment; and that any battery, wounding, or
killing the rioters, that may happen in suppressing the riot, is justifiable j.
So that our ancient law, previous to the modern riot act, seems pretty well
to have guarded against any violent breach of the public peace; especially
as any riotous assembly on a public or general account, as to redress
grievances or pull down all inclosures, and also resisting the king's forces if
sent to keep the peace, may amount to overt acts of high treason, by
levying war against the king.

7. NEARLY related to this head of riots is the offence of tumultuous
petitioning; which was carried to an enormous height in the times
preceding the grand rebellion. Wherefore by statute 13 Car. II. ft. 1. c. 5. it
is enacted, that not more than twenty names shall be signed to any petition
to the king or either house of parliament, for any alteration of matters
established by law in church or state; unless the contents thereof be
previously approved, in the country, by three justices, or the majority of
the grand jury at the assises or quarter sessions; and in London, by the
lord mayor, aldermen, and common council k: and that no petition shall
be delivered by a company of more than ten persons: on pain in either case
of incurring a a penalty not exceeding 100 /., and three months
imprisonment.

8. AN eighth offence against the public peace is that of a forcible entry or
detainer; which is committed by violently taking or keeping possession,
with menaces, force, and arms, of lands and tenements, without the
authority of law. This was for-
This may be one reason (among others) why the corporation of London has, since the restoration, usually taken the lead in petitions to parliament for the alteration of any established law.

Merely allowable to every person disseised, or turned out of possession, unless his entry was taken away or barred by his own neglect, or other circumstances; which were explained more at large in a former volume. But this being found very prejudicial to the public peace, it was thought necessary by several statutes to restrain all persons from the use of such violent methods, even of doing themselves justice; and much more if they have no justice in their claim. So that the entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained with force, with violence, and unusual weapons. By the statute 5 Ric. II. ft. 1. c. 8. all forcible entries are punished with imprisonment and ransom at the king's will. And by the several statutes of 15 Ric. II. c. 2. 8 Hen. VI. c. 9. 31 Eliz. c. 11. and 21 Jac. I. c. 15. upon any forcible entry, or forcible detainer after peaceable entry, into any lands, or benefices of the church, one or more justices of the peace, taking sufficient power of the county, may go to the place, and there record the force upon his own view, as in case of riots; and upon such conviction may commit the offender to gaol, till he makes fine and ransom to the king. And moreover the justice or justices have power to summon a jury, to try the forcible entry or detainer complained of: and, if the same be found by that jury, then besides the fine on the offender, the justices shall make restitution by the sheriff of the possession, without inquiring into the merits of the title; for the force is the only thing to be tried, punished, and remedied by them: and the same may be done by indictment at the general sessions. But this provision does not extend to such as endeavour to maintain possession by force, where they themselves, or their ancestors, have been in the peaceable enjoyment of the lands and tenements, for three years immediately preceding.

9. The offence of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited

1 See Vol. III. pag. 174, &c.

m 1 Hawk. P. C. 141.

by the statute of Northampton, 2 Edw. III. c. 3. upon pain of forfeiture of the arms, and imprisonment during the king's pleasure: in like manner as,
by the laws of Solon, every Athenian was finable who walked about the city
in armour n.

10. SPREADING false news, to make discord between the king and
nobility, or concerning any great man of the realm, is punished by
common law owith fine and imprisonment; which is confirmed by statutes
Westm. 1. 3 Edw. I. c. 34. 2 Ric. II. ft. 1. c. 5. and 12 Ric. II. c. 11.

11. FALSE and pretended prophecies, with intent to disturb the peace, are
equally unlawful, and more penal; as they raise enthusiastic jealousies in
the people, and terrify them with imaginary fears. They are therefore
punished by our law, upon the same principle that spreading of public
news of any kind, without communicating it first to the magistrate, was
prohibited by the ancient Gauls p. Such false and pretended prophecies
were punished capitaly by statute 1 Edw. VI. c. 12. which was repealed in
the reign of queen Mary. And now by the statute 5 Eliz. c. 15. the penalty
for the first offence is a fine of 100 /., and one year’s imprisonment; for the
second, forfeiture of all goods and chattels, and imprisonment during life.

12. BESIDES actual breaches of the peace, any thing that tends to provoke
or excite others to break it, is an offence of the same denomination.
Therefore challenges to fight, either by word or letter, or to be the bearer
of such challenge, are punishable by fine and imprisonment, according to
the circumstances of the offence q. If this challenge arises on account of
any mo-

o 2 Inst. 226. 3 Inst. 198.
pHabent legibus fanctum, si quis quid derepublica a finitimis rumore aut
fama acceperit, uti ad magifratum deferat, neve cum aliocommunicet:
quod faepe bones temerariosatque ineritos falsis rumoribus terreri,
etad facinus impelli, et de summis rebus confillium capere, cognitum ef.
Caef. de bell. Gall. lib. 6. cap. 19.
q 1 Hawk. P. C. 135. 138.
ney won at gaming, or if any assault or affray happen upon such account,
the offender, by statute 9 Ann. c. 14. shall forfeit all his goods to the crown,
and suffer two years imprisonment.
13. OF a nature very similar to challenges are libels, libelli famoﬁ, which, taken in their largest and most extensive sense, signify any writings, pictures, or the like, of an immoral or illegal tendency; but, in the sense under which we are now to consider them, are malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule. The direct tendency of these libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed. The communication of a libel to any one person is a publication in the eye of the law; and therefore the sending an abusive private letter to a man is as much a libel as if it were openly printed, for it equally tends to a breach of the peace. For the same reason it is immaterial with respect to the essence of a libel, whether the matter of it be true or false; since the provocation, and not the falsity, is the thing to be punished criminally: though, doubtless, the falsehood of it may aggravate its guilt, and enhance its punishment. In a civil action, we may remember, a libel must appear to be false, as well as scandalous; for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever offence it may be against the public peace: and therefore, upon a civil action, the truth of the accusation may be pleaded in bar of the suit. But, in a criminal prosecution, the tendency which all libels have to create animosities, and to disturb the public peace, is the sole consideration of the law. And therefore, in such prosecutions,

r 1 Hawk. P. C. 193.
s Moor. 813.
u Moor. 627. 5 Rep. 125. 11 Mod. 99.
w See Vol. III. pag. 125.

the only facts to be considered are, first, the making or publishing of the book or writing; and secondly, whether the matter be criminal: and, if both these points are against the defendant, the offence against the public is complete. The punishment of such libellers, for either making, repeating, printing, or publishing the libel, is fine, and such corporal punishment as the court in their discretion shall inflict; regarding the quantity of the offence, and the quality of the offender. By the law of the twelve tables at Rome, libels, which affected the reputation of another, were made a capital offence: but, before the reign of Augustus, the punishment became
corporal only y. Under the emperor Valentinian/zit was again made
capital, not only to write, but to publish, or even to omit destroying them.
Our law, in this and many other respects, corresponds rather with the
middle age of Roman jurisprudence, when liberty, learning, and humanity,
were in their full vigor, than with the cruel edicts that were established in
the dark and tyrannical ages of the ancient decemviri, or the later
emperors.

IN this, and the other instances which we have lately considered, where
blasphemous, immoral, treasonable, schismatical, seditious, or scandalous
libels are punished by the English law, some with a greater, others with a
less degree of severity; the liberty of the press, properly understood, is by
no means infringed or violated. The liberty of the press is indeed essential
to the nature of a free state: but this consists in laying no previous
restraints upon publications, and not in freedom from censure for criminal
matter when published. Every freeman has an undoubted right to lay what
sentiments the pleases before the public: to forbid this, is to destroy the
freedom of the

x 1 Hawk. P. C. 196.
y ______________________ Quinetiam lex Poenaque lata, malo quae nollet
carme quenquam Describi: _________ vertere modum formidine fuftis.
Hor. ad Aug. 152.
z Cod. 9. 36.

press: but if he publishes what is improper, mischievous, or illegal, he
must take the consequence of his own temerity. To subject the press to the
restrictive power of a licenser, as was formerly done, both before and since
the revolution a, is to subject all freedom of sentiment to the prejudices of
one man, and make him the arbitrary and infallible judge of all
controverted points in learning, religion, and government. But to punish
(as the law does at present) any dangerous or offensive writings, which,
when published, shall on a fair and impartial trial be adjudged of a
pernicious tendency, is necessary for the preservation of peace and god
order, of government and religion, the only solid foundations of civil
 liberty. Thus the will of individuals is still left free; the abuse only of that
free will hereby laid upon freedom, of thought or enquiry: liberty of private
sentiment is still left; the disseminating, or making public, of bad
sentiments, destructive of the ends of society, is the crime which society
corrects. A man (says a fine writer on this subject) may be allowed to keep
poisons in his closet, but not publicly to vend them as cordials. And to this we may

a The art of printing, soon after its introduction, was looked upon (as well in England as in other countries) as merely a matter of state, and subject to the coercion of the crown. It was therefore regulated with us by the king’s proclamations, prohibitions, charters of privilege and of licence, and finally by the decrees of the court of starchamber; which limited the number of printers, and of presses which each should employ, and prohibited new publications unless previously approved by proper licensers. On the demolition of this odious jurisdiction in 1641, the long parliament of Charles I, after their rupture with that prince, assumed the same powers as the starchamber exercised with respect to the licensing of books; and in 1643, 1647, 1649, and 1652, (Scobell. i. 44, 134. ii 88, 230.) issued their ordinances for that purpose, founded principally on the starchamber decree of 1637. In 1662 was passed the statute 13 & 14 Car. II. c. 33. which (with some few alterations) was copied from the parliamentary ordinances. This act expired in 1679, but was revived by statute 1 Jac. II. c. 17. and continued till 1692. It was then continued for two years longer by statute 4 W. & M. c. 24. but, though frequent attempts were made by the government to revive it, in the subsequent part of that reign, (Com. Journ. 11 Feb. 1694. 26 Nov. 1695. 22 Oct. 1696. 9 Feb. 1697. 31 Jan. 1698.) yet the parliament resisted it so strongly, that it finally expired, and the press became properly free, in 1694; and has ever since so continued.

add, that the only plausible argument heretofore used for restraining the just freedom of the press, that it was necessary to prevent the daily abuse of it, will entirely lose its force, when it is shewn (by a reasonable exertion of the law) that the press cannot be abused to any bad purpose, without incurring a suitable punishment: whereas it never can be used to any good one, when under the control of an inspector. So true will it be found, that to censure the licentiousness, is to maintain the liberty, of the press.

CHAPTER THE TWELFTH.
OF OFFENCES AGAINST PUBLIC TRADE.

OFFENCES against public trade, like those of the preceding classes, are either felonious, or not felonious. Of the first sort are,
1. OWLING, so called from its being usually carried on in the night, which is the offence of transporting wool or sheep out of this kingdom, to the detriment of its staple manufacture. This was forbidden at common law, and more particularly by statute 11 Edw. III. c. 1. when the importance of our woolen manufacture was first attended to; and there are now many later statutes relating to this offence, the most useful and principal of which are those enacted in the reign of queen Elizabeth, and since. The statute 8 Eliz. c. 3. makes the transportation of live sheep, or embarking them on board any ship, for the first offence forfeiture of goods, and imprisonment for a year, and that at the end of the year the left hand shall be cut off in some public market, and shall be there nailed up in the openest place; and the second offence is felony. The statutes 12 Car. II. c. 32. and 7 & 8 W. III. c. 28. make the exportation of wool, sheep, or fuller's earth, liable to pecuniary penalties, and the forfeiture of the interest of the ship and cargo by one owners, if privy;

d a Mirr. c. 1. 3.

and confiscation of goods, and three years imprisonment to the master and all the mariners. And the statute 4 Geo. I. c. 11. (amended and farther enforced by 12 Geo. II. c. 21. and 19 Geo. II. c. 34.) makes it transportation for seven years, if the penalties be not paid.

2. SMUGGLING, or the offence if importing goods without paying the duties imposed thereon by the laws of the customs and excise, is an offence generally connected and carried on hand in hand with the former. This is restrained by a great variety of statutes, which inflict pecuniary penalties and seizure of the goods for clandestine smuggling; and affix the guilt of felony, with transportation for seven years, upon more open, daring, and avowed practices: but the last of them, 19 Geo. II. c. 34. is for this purpose instar omnium; for it makes all forcible acts of smuggling, carried on in defiance of the laws, or even in disguise to evade them, felony without benefit of clergy: enacting, that if three or more persons shall assemble, with fire arms or other offensive weapons, to assist in the illegal exportation or importation of goods, or in rescuing the same after seizure, or in rescuing offenders in custody for such offences; or shall pass with such goods in disguise; or shall would, shoot at, or assault any officers of the revenue when in the execution of their duty; such persons shall be felons, without the benefit of clergy. As to that branch of the statute, which
required any person, charged upon oath as a smuggler, under pain of death, to surrender himself upon proclamation, it seems to be expired; as the subsequent statutes b, which continue the original act to the present time, do in terms continue only so much of the said act, as relates to the punishment of the offenders, and not to the extraordinary method of apprehending or causing them to surrender: and for offences of this positive species, where punishment (though necessary) is rendered so by the laws themselves, which by imposing high duties on commodities increase the temptation

to evade them, we cannot surely be too cautious in inflicting the penalty of death c.

3. ANOTHER offence against public trade is fraudulent bankruptcy, which was sufficiently spoken of in a former volume d; when we thoroughly examined the nature of these unfortunate traders. I shall therefore here barely mention over again some abuses incident to bankruptcy, viz. the bankrupt's neglect of surrendering himself to his creditors; his non-conformity to the directions of the several statutes; his concealing or embezze  lling his effects to the value of 20 /.; and his withholding any books or writings with intent to defraud his creditors: all which the policy of our commercial country has made capital in the offender; or, felony without benefit of clergy. And indeed it is allowed in general, by such as are the most averse to the infliction of capital punishment, that the offence of fraudulent bankruptcy, being an atrocious species of the crimen falsi, ought to be put upon a level with those of forgery and falsifying the coin e.

To this head we may also subjoin, that by statute 32 Geo. II. c. 28. it is felony punishable by transportation for seven years, if a prisoner, charged in execution for any debt under 100 /., neglects or refuses on demand to discover and deliver up his effects for the benefit of his creditors. And these are the only felonious offences against public trade; the residue being mere misdemeanors: as,

4. USURY, which is an unlawful contract upon the loan of money, to receive the same again with exorbitant increase. Of this also we had occasion to discourse at large in a former volume f. We there observed that by statute 37 Hen. VIII. c. 9. the rate of interest was fixed at 10 /. per cent. per annum: which the statute 13 Eliz. c. 8. confirms; and ordains, that all
brokers shall be guilty of a praemunire that transact any contracts for more, and the securities themselves shall be void. The statute

d See Vol. II. pag. 481, 482.
e Beccar. ch. 34.
f See Vol. II. pag. 455, &c.

21 Jac. I. c. 17. reduced interest to eight per cent; and, it having been lowered in 1650, during the usurpation, to six per cent, the same reduction was re-enacted after the restoration by statute 12 Car. II. c. 13. and, lastly, the statute 12 Ann. ft. 2. c. 16. has reduced it to five per cent. Wherefore not only all contracts for taking more are in themselves totally void, but also the lender shall forfeit treble the money borrowed. Also if any scrivener or broker takes more than five shillings per cent. procuration-money, or more than twelve-pence for making a bond, he shall forfeit 20 /. with costs, and shall suffer imprisonment for half a year.

5. CHEATING is another offence, more immediately against public trade; as that cannot be carried on without a punctilious regard to common honesty, and faith between man and man. Hither therefore may be referred that prodigious multitude of statutes, which are made to prevent deceits in particular trades, and which are chiefly of use among the traders themselves. For so cautious has the legislature been, and so thoroughly abhors all indirect practices, that there is hardly a considerable fraud incident to any branch of trade, but what is restrained and punished by some particular statute. The offence also of breaking the assise of bread, or the rules laid down by law, and particularly by statute 31 Geo. II. c. 29. and 3 Geo. III. c. 11. for ascertaining its price in every given quantity, is reducible to this head of cheating: as is likewise in a peculiar manner the offence of felling by false weights and measures; the standard of which fell under our consideration in a former volume g. The punishment of bakers breaking the assise, was anciently to stand in the pillory, by statute 51 Hen. III. ft. 6. and for brewers (by the same act) to stand in the tumbrel or dungcart h: which, as we learn from domesday book, was the punishment for knavish brewers in the city of Chester so early as the reign of Edward the confessor.Malam cervifiam faciens, in cathedra ponebatur stercoris i. But

g See Vol. I. pag. 274.
now the general punishment for all frauds of this kind, if indicted (as they may be) at common law, is by fine and imprisonment: though the easier and more usual way is by levying on a summary conviction, by distress and sale, the forfeitures imposed by the several acts of parliament. Lastly, any deceitful practice, in cozening another by artful means, whether in matters of trade or otherwise, as by playing with false dice, or the like, is punishable with fine, imprisonment, and pillory. And by the statutes 33 Hen. VIII. c. 1. and 30 Geo. II. c. 24. if any man defrauds another of any valuable chattels by colour of any false token, counterfeit letter, or false pretence, or pawns or disposes of another's goods without the consent to the owner, he shall suffer such punishment by imprisonment, fine pillory, transportation, whipping, or other corporal pain, as the court shall direct.

6. THE offence of forestalling the market is also an offence against public trade. This, which (as well as the two following) is also an offence at common law, is described by statute 5 & 6 Edw. VI. c. 14. to be the buying or contracting for any merchandize or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price, when there: any of which practices make the market dearer to the fair trader.

7. REGRATING is described by the same statute to be the buying of corn, or other dead victual, in any market, and felling them again in the same market, or within four miles of the place. For this also enhances the price of the provisions, as very successive feller must have a successive profit.

8. ENGROSSING, by the same statute, is the getting into one’s possession, or buying up, of corn or other dead victuals, with intent to fell them again. This must of course be injurious to the public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion.

k 1 Hawk. P. C. 188.
l 2 Hawk. P. C. 235.

And the penalty for these three offences by this statute (which is the last that hath been made concerning them) is the forfeiture of the goods or their value, and two months imprisonment for the first offence; double
value and six months imprisonment for the second; and, for the third, the offender shall forfeit all his goods, be set in the pillory, and imprisoned at the king’s pleasure. Among the Romans these offences, and other male-practices to raise the price of provisions, were punished by a pecuniary mulct. Pocna viginti aureorum statuitur adversus eum, qui contra annonam secerit, societatemve coierit quo annona cariorfiat m.

9. MONOPOLIES are much the same offence in other branches of trade, that engrossing is in provisions: being a licence or privilege allowed by the king for the sole buying and felling, making, working, or using, of any thing whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before. These had been carried to an enormous height during the reign of queen Elizabeth; and were heavily complained of by sir Edward Coke o, in the beginning of the reign of king James the first: but were in great measure remedied by ft 21 Jac. I. c. 3. which declares such monopolies to be contrary to law and void; (except as to patents, not exceeding the grant of fourteen years, to the authors of new inventions;) and monopolists are punished with the forfeiture of treble damages and double costs, to those whom they attempt to disturb; and if they procure any action, brought against them for these damages, to be stayed by any extrajudicial order, other than of the court wherein it is brought, they incur the penalties of praemunire. Combinations also among victuallers or artificers, to raise the price of provisions, or any commodities, or the rate of labour, are in many cases severely punished by particular statutes; and, in general, by statute 2 & 3 Edw. VI. c. 15. with the forfeiture of 10 /., or twenty days imprisonment,
m Ff. 48. 12. 2.
m 1 Hawk. P. C. 231.
o 3 Inst. 181.

with an allowance of only bread and water, for the first offence; 20 /., or the pillory, for the second; and 40 /., for the third, or else the pillory, loss of one ear, and perpetual infamy. In the same manner, by a constitution of the emperor Zeno p, all monopolies and combinations to keep up the price of merchandize, provisions, or workmanship, were prohibited upon pain of forfeiture of goods and perpetual banishment.

10. To exercise a trade in any town, without having previously served as an apprentice for seven years q, is looked upon to be detrimental to public
trade, upon the supposed want of sufficient skill in the trader; and therefore is punished by statute 5 Eliz. c. 4. with the forfeiture of forty shillings by the month.

11. LASTLY, to prevent the destruction of our home manufactures, by transporting and seducing our artists to settle abroad, it is provided by statute 5 Geo. I. c. 27 that such as so entice or seduce them shall be fined 100 /., and be imprisoned three months; and for the second offence shall be fined at discretion, and be imprisoned a year: and the artificers, so going into foreign countries, and not returning within six months after warning given them by the British ambassador where they reside, shall be deemed aliens, and forfeit all their lands and goods, and shall be incapable of any legacy or gift. By statute 23 Geo. II. c. 13. the seducers incur, for the first offence, a forfeiture of 500 /., for each artificer contracted with to be sent abroad, and imprisonment for twelve months; and for the second 1000 /., and are liable to two years imprisonment: and if any person exports any tools or utensils used in the silk or woolen manufactures, he forfeits the same and 200 /., and the captain of the ship (having knowledge thereof) 100 /.: and if any captain of a king’s ship, or officer of the customs, knowingly suffers such exportation, he forfeits 100 /., and his employment; and is for ever made incapable of bearing any public office.

p Cod. 4. 59. 1.

CHAPTER THE THIRTEENTH.
OF OFFENCES AGAINST THE PUBLIC HEALTH,
AND THE PUBLIC POLICE OR economy.

THE fourth species of offences, more especially affecting the commonwealth, are such as are against the public health of the nation; a concern of the highest importance, and for the preservation of which there are in many countries special magistrates or curators appointed.

1. THE first of these offences is a felony; but, by the bluffing of providence for more than a century past, incapable of being committed in this nation. For by statute 1 Jac. I. c. 31. it is enacted, that if any person infected with the plague, or dwelling in any infected house, he commanded by the mayor...
or constable, or other head officer of his town or vill, to keep his house, and shall venture to disobey it; he may be inforced, by the watchmen appointed on such melancholy occasions, to obey such necessary command: and, if any hurt ensue by such enforcement, the watchmen are thereby indemnified. And farther, if such person so commanded to confine himself goes abroad, and converses in company, if he has no plague fore upon him, he shall be punished as a vagabond by whipping, and be bound to his good behaviour: but, if he has any infectious fore upon him uncured, he then shall be guilty of felony. By the statute

26 Geo. II. c. 6. (explained and amended by 29 Geo. II. c. 8.) the method of performing quarantine, or forty days probation, by ships coming from infected countries, is put in a much more regular and effectual order than formerly; and masters of ships, coming from infected places and disobeying the directions there given, or having the plague on board and concealing it, are guilty of felony without benefit of clergy. The same penalty also attends persons escaping from the lazarets, or places wherein quarantine is to be performed; and officers and watchmen neglecting their duty; and persons conveying goods or letters from ships performing quarantine.

2. A SECOND, but much inferior, species of offence against public health is the felling of unwholesome provisions. To prevent which the statute 51 Hen. III. ft. 6. and the ordinance for bakers, c. 7. prohibit the sale of corrupted wine, contagious or unwholesome flesh, or flesh that is bought of a Jew; under pain of amercement for the first offence, pillory for the second, fine and imprisonment for the third, and abjuration of the town for the fourth. And by the statute 12 Car. II. c. 25. 11. any brewing or adulteration of wine is punished with the forfeiture of 100 /., if done by the wholesale merchant; and 40 /., if done by the vintner or retail trader. These are all the offences which may properly be said to respect the public health.

V. THE last species of offences which especially affect the commonwealth are those against the public police and economy. By the public police and economy I mean the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent,
industrious, and inoffensive in their respective stations. This head of
offences must therefore be very miscellaneous, as it comprizes all such
crimes as especially affect public society, and are not comprehended under
any of the four preceding species. These
amount, some of them to felony, and others to misdemesnors only. Among
he former are,

1. THE offence of clandestine marriages: for by the statute 26 Geo. II. c.
33. 1. To solemnize marriage in any other place besides a church, or public
chapel wherein banns have been usually published, except by licence from
the archbishop; --- and, 2. To solemnize marriage in such church or chapel
without due publication of banns, or licence obtained from a proper
authority; --- do both of them not only render the marriage void, but
subject the person solemnizing it to felony, punished by transportation for
fourteen years: as, by three former statutes a, he and his assistants were
subject to a pecuniary forfeiture of 100 /. 3. To make a false entry in a
marriage register; to alter it when made; to forge, or counterfeit, such
entry, or a marriage licence, or aid and abet such forgery; to utter the same
as true, knowing it to be counterfeit; or to destroy or procure the
destruction of any register, in order to vacate any marriage, or subject any
person to the penalties of this act; all these offences, knowingly and
willfully committed, subject the party to to the guilt of felony, without
benefit of clergy.

2. ANOTHER felonious offence, with regard to this holy estate of
matrimony, is what our law corruptly calls bigamy; which properly
signifies being twice married, but with us is used as synonymous to
polygamy, or having a plurality of wives at once b. Such second marriage,
living the former husband or wife, is simply void, and a mere nullity, by
the ecclesiastical law of England: and yet the legislature has thought it just
to make it felony, by reason of its being so great a violation of the public
economy and decency of a well ordered state. For polygamy can never be
endured under any rational civil establishment, whatever specious reasons
may be urged for it by the eastern nations, the fallaciousness of which has
been fully proved by many sensible writers:

a 6 & 7 W. III. c. 6. 7. & 8 W. III. c. 35. 10 Ann. c. 19. 176.
b 3 Inst. 88.
but in northern countries the very nature of the climate seems to reclaim against it; it never having obtained in this part of the world, even from the time of our German ancestors; who, as Tacitus informs us, prope soli barbarorum singulis uxoribus contenti sunt. It is therefore punished by the laws both of ancient and modern Sweden with death. And with us in England it is enacted by statute 1 Jac. I. c. 11. that if any person, being married, do afterwards marry again, the former husband or wife being alive, it is felony; but within the benefit of clergy. The first wife in this case shall not be admitted as an evidence against her husband, because she is the true wife; but the second may, for she is indeed no wife at all; and so, vice versa, of a second husband. This act makes an exception to five cases, in which such second marriage, though in the three first it is void, is yet no felony. 1. Where either party hath been continually abroad for seven years, whether the party in England hath notice of the other's being living or no. 2. Where either of the parties hath been absent from the other seven years, within this kingdom, and the remaining party hath had no notice of the other's being alive within that time. 3. Where there is a divorce or separation a mensa et thoro by sentence in the ecclesiastical court. 4. Where the first marriage is declared absolutely void by any such sentence, and the parties loosed a vinculo. Or, 5. Where either of the parties was under the age of consent at the time of the first marriage: for in such case the first marriage was voidable by the disagreement of either party, which this second marriage very clearly amounts too. But, if at the age of consent the parties had agreed to the marriage; and afterwards one of them should marry again; I should apprehend that such second marriage would be within the reason and penalties of the act.

c de mor. Germ. 18.
d Stiernh. de jure Sueon. l. 3. c. 2.
e 1 Hal. P. C. 693.

3. A THIRD species of felony against the good order and economy of the kingdom, is by idle soldiers and mariners wandering about the realm, or persons pretending so to be, and abusing the name of that honourable profession. Such a one, not having a testimonial or pass from a justice of the peace, limiting the time of his passage; or exceeding the time limited for fourteen days, unless he falls sick; or forging such testimonial; is by statute 39 Eliz. c. 17. made guilty of felony, without benefit of clergy. This sanguinary law, though in practice deservedly antiquated, still remains a disgrace to our statute-book: yet attended with this mitigation, that the
offender may be delivered, if any honest freeholder or other person of substance will take him into his service, and he abides in the same for one years; unless licenced to depart by his employer, who in such case shall forfeit ten pounds.

4. OUTLANDISH persons calling themselves Egyptians, or gypsies, are another object of the severity of some of our unrepealed statutes. These are a strange kind of commonwealth among themselves of wandering impostors and jugglers, who made their first appearance in Germany about the beginning of the sixteenth century, and have since spread themselves all over Europe. Munster, it is true g, who is followed and relied upon by Spelman h, fixes the time of their first appearance to the year 1417; but, as he owns, that the first whom he ever saw were in 1524, it is probably an error of the press for 1517: especially as other historians j inform us, that when sultan Selim conquered Egypt, in the year 1517, several of the natives refused to submit to the Turkish yoke; but, being at length subdued and banished, they agreed to disperse in small parties all over the world, where their supposed skill in the black art gave them an universal reception, in that age of superstition and credulity. In the compass of a very few years they gained such a number of idle proselytes,

f 3 Inst. 85.
g Cofmogr. l. 3.
h Gloff. 193.
j Mod. Univ. Hist. xliii. 271.

(who imitated their language and complexion, and betook themselves to the same arts of chiromancy, begging, and pilfering) that they became troublesome and even formidable to most of the states of Europe. Hence they were expelled from France in the year 1560, and from Spain in 1591 i. And the government in England took the alarm much earlier: for in 1530, they are described by statute 22 Hen. VIII. c. 10. as outlandishpeople, calling themselves Egyptians, using no craft not featof merchandize, who have come into this realm and gone fromshire to shire and place to place in great company, and usedgreat, subtil, and crafty means to deceive the people; bearingthem in hand, that they by palmistry could tell men's andwomen's fortunes; and so many times by craft and subtiltyhave deceived the people of their money, and also have committed many heinous felonies and robberies. Wherefore they are directed to avoid the realm, and not to return under pain of imprisonment, and forfeiture of
their goods and chattels; and, upon their trials for any felony which they may have committed, they shall not be intitled to a jury de medietate linguae. And afterwards, it is enacted by statutes 1 & 2 Ph. & M. c. 4. and 5 Eliz. c. 20. that if any such persons shall be imported into the kingdom, the importer shall forfeit 40/. And if the Egyptians themselves remain one month in this kingdom; or if any person, being fourteen years old, (whether natural born subject or stranger) which hath been seen or found in the fellowship of such Egyptians, or which hath disguised him or herself like them, shall remain in the same one month, at one or several times; it is felony without benefit of clergy: and sir Matthew Hale informs us k, that at one Suffolk assizes no less than thirteen gypsies were executed upon these statutes, a few years before the restoration. But, to the honour of our national humanity, there are no instances more modern than this, of carrying these laws into practice.

k 1 Hal. P. C. 671.

5. To descend next to offences, whose punishment is short of death. Common nuisances are a species of offences against the public order and economical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires l. The nature of common nuisances, and their distinction from private nuisances, were explained in the preceding volume m; when we considered more particularly the nature of the private fort, as a civil injury to individuals. I shall here only remind the student, that common nuisances are such inconvenient or troublesome offences, as annoy the whole community in general, and not merely some particular person; and therefore are indictable only, and not actionable; as it would be unreasonable to multiply suits, by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow subjects. Of this nature are, 1. Annoyances in highways, bridges, and public rivers, by rendering the same inconvenient or dangerous to pass: either positively, by actual obstructions; or negatively, by want of reparations. For both of these, the persons so obstructing, or such individuals as are bound to repair and cleanse them, or (in default of these last) the parish at large, may be indicted, distreined to repair and amend them, and in some cases fined. Where there is an house erected, or an inclosure made, upon any part of the king's demesnes, or of an highway, or common street, or public water, or such like public things, it is properly
called a purpresture n. 2. All those kinds of nuisances, (such as offensive trades and manufactures) which when injurious to a private man are actionable, are, when detrimental to the public, punishable by public prosecution, and subject to fine according to the quantity of the misdemeanor: and particularly the keeping of hogs in any city or market town is indictable as a public nuisance o.

l 1 Hawk. P. C. 197.
m Vol. III. pag. 216.

n Co. Litt. 277. from the French poulpris, an inclosure.
o Salk. 460.

3. All disorderly inns or ale-houses, bawdy-houses, gaming-houses, stage-plays unlicenced, booths and stages for rope-dancers, mountebanks, and the like, are public nuisances, and may upon indictment be suppressed and fined p. Inns, in particular, being intended for the lodging and receipt of travelers, may be indicted, suppressed, and the inn-keepers fined, if they refuse to entertain a traveler without a very sufficient cause: for thus to frustrate the end of their institution is held to be disorderly behaviour q. Thus too the hospitable laws of Norway punish, in the severest degree, such inn-keepers as refuse to furnish accommodations at a just and reasonable price r. 4. By statute 10 & 11 W. III. c. 17. all lotteries are declared to be public nuisances, and all grants, patents, or licences for the same to be contrary to law. 5. Cottages are held to be common nuisances, if erected singly on the waste, being harbours for thieves and other idle and dissolute persons. Therefore it is enacted by statute 31 Eliz. c. 7. that no person shall erect a cottage, unless he laws to it four acres of freehold land of inheritance to be occupied therewith, on pain to forfeit to the king 10 /. for its erection, and 40 s. per month for its continuance: and no owner or occupier of a cottage shall suffer any inmates therein, or more families than one to inhabit there, on pain to forfeit 10s. per month to the lord of the leet. This seems, upon our present more enlarged notions, a hard and impolitic law; depriving the people of houses to dwell in, and consequently preventing the populousness of towns and parishes: which, though it is generally endeavoured to be guarded against, though a fatal rural policy, (being sometimes, when the poor are ill-managed, an intolerable hardship) yet, taken in a national view, and on a supposition of proper industry and good parochial government, is a very great advantage to any kingdom. But indeed this, like most other rigid or inconvenient laws, is rarely put in execution. 6. The making and felling of fireworks and
squibs, or throwing them about in any street, is, on account of the danger that may

p 1 Hawk. P. C. 198. 225.
q1 Hal. P. C. 225.
r Stiernh. de jure Sucon. l. 2. c. 9.

ensue to any thatched or timber buildings, declared to be a common nuisance, by statute 9 & 10 W. III. c. 7. and therefore is punishable by fine. 7. Eaves-droppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance and presentable at the court-leet s: or are indictable at the sessions, and punishable by fine and finding sureties for the good behaviour t. 8. Lastly, a common scold, communis rixatrix, (for our law-latin confines it to the feminine gender) is a public nuisance to her neighbourhood. For which offence she may be indicted u; and, if convicted, shall w be sentenced to be placed in a certain engine of correction called the trebucket, castigatory, or cucking stool, which in the Saxon language signifies the scolding stool; though now it is frequently corrupted into ducking stool, because the residue of the judgment is, that, when she is so placed therein, she shall be plunged in the water for her punishment x.

6. IDLENESS in any person whatsoever is also a high offence against the public economy. In China it is a maxim, that if there be a man who does not work, or a woman that is idle, in the empire, somebody must suffer cold or hunger: the produce of the lands not being more than sufficient, with culture, to maintain the inhabitants; and therefore, though the idle person may shift off the want from himself, yet it must in the end fall somewhere. The court also of Areopagus at Athens punished idleness, and exerted a right of examining every citizen in what manner he spent his time; the intention of which was y, that the Athenians, knowing they were to give an account of their occupations, should follow only such as were laudable, and that there might be no room left for such as lived by unlawful arts. The civil law expelled all sturdy vagrants from the city z: and,

s Kitch. of courts. 20.
t Ibid. 1 Hawk. P. C. 132.
u 6 Mod. 213.
in our own law, all idle persons or vagabonds, whom our ancient statutes describe to be such as wake on the night, and sleep on the day, and haunt customable taverns, and ale-houses, and routs about; and no man wot from whence they come, newhither they go; or such as are most particularly described by statute 17 Geo. II. c. 5. and divided into three classes, idle and disorderly persons, rogues and vagabonds, and incorrigible rogues: --- all these are offenders against the good order, and blemishes in the government, of any kingdom. They are therefore all punished, by the statute last-mentioned; that is to say, idle and disorderly persons with one month's imprisonment in the house of correction; rogues and vagabonds with whipping and imprisonment not exceeding six months; and incorrigible rogues with the like discipline and confinement, not exceeding two years: the breach and escape from which confinement in one of an inferior class, ranks him among incorrigible rogues; and in a rogue (before incorrigible) makes him a felon, and liable to be transported for seven years. Persons harbouring vagrants are liable to a fine of forty shillings, and to pay all expenses brought upon the parish thereby; in the same manner as by our ancient laws, whoever harboured any stranger for more than two nights, was answerable to the public for any offence that such his inmate might commit.

7. UNDER the head of public economy may also be properly ranked all sumptuary laws against luxury, and extravagant expenses in dress, diet, and the like; concerning the general utility of which to a state, there is much controversy among the political writers. Baron Montesquieu lays it down b, that luxury is necessary in monarchies, as in France; but ruinous to democracies, as in Holland. With regard therefore to England, whose government is compounded of both species, it may still be a dubious question, how far private luxury is a public evil; and, as such, cognizable by public laws. and indeed our legis-

a LL. Edw. c. 27. Bracton. l. 3. tr. 2.c. 10. 2.
b Sp. L. b. 7. c. 2 & 4.
lators have several times changed their sentiments as to this point: for formerly there were a multitude of penal laws existing, to restrain excess in apparel; chiefly made in the reigns of Edward the third, Edward the fourth, and Henry the eighth, against piked shoes, short doublets, and long coats; all of which were repealed by statute 1 Jac. I. c. 25. But, as to excess in diet, there still remains one ancient statute unrepealed, at dinner or supper, with more than two courses; except upon some great holydays there specified, in which he may be served with three.

8. Next to that of luxury, naturally follows the offence of gaming, which is generally introduced to supply or retrieve the expenses occasioned by the former: it being a king of tacit confession, that the company engaged therein do, in general, exceed the bounds of their respective fortunes; and therefore they cast lots to determine upon whom the ruin shall at present fall, that the rest may be saved a little longer. But, taken in any light, it is an offence of the most alarming nature; tending by necessary consequence to promote public idleness, theft, and debauchery among those of a lower class: and, among persons of a superior rank, it hath frequently been attended with the sudden ruin and desolation of ancient and opulent families, an abandoned prostitution of every principle of honour and virtue, and too often hath ended in self-murder. To restrain this pernicious vice, among the inferior sort of people, the statute 33 Hen. VIII. c. 9. was made; which prohibits to all but gentlemen the games of tennis, tables, cards, dice, bowls, and other unlawful diversions there specified, unless in the time of Christmas, under pecuniary pains and imprisonment. And the same law, and also the statute 30 Geo. III. c. 24. inflict pecuniary penalties, as well upon the master of any public house wherein servants are permitted to game, as upon the servants themselves who are found to be gaming there. But this is not the principal ground of modern complaint: it is the gaming in high life, that demands the attention of the magistrate; a passion to which every valuable consideration is made a sacrifice, and which we seem to have inherited from our ancestors the ancient Germans; whom Tacitus describes to have been bewitched with the spirit of play to a most exorbitant degree. They addict themselves, says
he, to dice,(which is wonderful) when sober, and a serious employment; with such a mad desire of winning or losing, that, when stript of every thing else, they will stake at last their liberty,and their very selves. The loser goes into a voluntary slavery,and, though younger and stronger than his antagonist, suffers himself to be bound and sold. And this perseverance in so bada cause they call the point of honour: ea est in re prava pervicacia, ipsi sidem vocant. One would almost be tempted to think Tacitus was describing a modern Englishman. When men are thus intoxicated wit so frantic a spirit, laws will be of little avail: because the same false sense of honour, that prompts a man to sacrifice himself, will deter him from appealing to the magistrate. Yet it is proper that laws should be, and be known publicly, that gentlemen may learn what penalties they willfully incur, and what a confidence they repose in sharpers; who, if successful in play, are certain to be paid with honour, or, if unsuccessful, have it in their power to be still greater gainers by informing: For by statute 16 Car. II. c. 7. if any person by playing or betting shall lose more than 100 /., at one time, he shall not be compellable to pay the same; and the winner shall forfeit treble the value, one moiety to the king, the other to the informer. The statute 9 Ann. c. 14. enacts, that all bonds and other securities, given for money won at play, or money lent at the time to play withal, shall be utterly void: that all mortgages and incumbrances of lands, made upon the same consideration, shall be and enure to the use of the heir of the mortgagor: that, if any person at one time loses 10 /., at play, he may sue the winner, and recover it back by action of debt at law; and, in case the loser does not, any other person may sue the win-

e de mor. Germ c. 24.

ner for treble the sum so lost; and the plaintiff in either case may examine the defendant himself upon oath: and that in any of these suits no privilege of parliament shall be allowed. The statute farther enacts, that if any person cheats at play, and at one time wins more than 10 /., or any valuable thing, he may be indicted thereupon, and shall forfeit five times the value, shall be deemed infamous, and suffer such corporal punishment as in case of willful perjury. By several statutes of the reign of king George II f, all private lotteries by tickets, cards, or dice, (and particularly the games of faro, basset, ace of hearts, hazard, passage, rolly polly, and all other games with dice, except baggammon) are prohibited under a penalty of 200 /., for him that shall erect such lotteries, and 50 /., a time for the players. Public lotteries, unless by authority of parliament, and all manner
of ingenious devices, under the denomination of sales or otherwise, which in the end are equivalent to lotteries, were before prohibited by a great variety of statutes under heavy pecuniary penalties. But particular descriptions will ever be lame and deficient, unless all games of mere chance are at once prohibited; the inventions of sharpers being swifter than the punishment of the law, which only hunts them from one device to another. The statute 13 Geo. II. c. 19. to prevent the multiplicity of horse races, another fund of gaming, directs that no plates or matches under 50 /., value shall be run, upon penalty of 200 /., to be paid by the owner of each horse running, and 100 /., by such as advertise the plate. By statute 188 Geo. II. c. 34. the statute 9 Ann. is farther enforced, and some deficiencies supplied: the forfeitures of that act may now be recovered in a court of equity; and moreover, if any man be convicted upon information or indictment of winning or losing at any fitting 10 /., or 20 /., within twenty four hours, he shall forfeit five times the sum. Thus careful has the legislature been to prevent this destructive vice: which may shew that our laws against gaming

L. 12 Geo. II. c. 28. 13 Geo. II. c. 19. 18 Geo. II. c. 34.
10 & 11 W. III. c. 17. 9 Ann. c. 6. 56. 10 Ann. c. 26. 109. 8 Geo. I. c. 2. 36, 37. 9 Geo. I. c. 19. 4, 5. 6 Geo. II. c. 35. 29, 30.

are not so deficient, as ourselves and our magistrates in putting those laws in execution.

9. LASTLY, there is another offence, so constituted by a variety of acts of parliament, which are so numerous and so confused, and the crime itself of so questionable a nature, that I shall not detain the reader with many observations thereupon. And yet it is an offence which the sportsmen of England seem to think of the highest importance; and a matter, perhaps the only one, of general and national concern: associations having been formed all over the kingdom to prevent its destructive progress. I mean the offence of destroying such beasts and fowls, as are ranked under the denomination of game: which, we may remember, was formerly observed h, (upon the old principles of the forest law) to be a trespass and offence in all persons alike, who have not authority from the crown to kill game (which is royal property) by the grant of either a free warren, or at least a manor of their own. But the laws, called the game laws, have also inflicted additional punishments (chiefly pecuniary) on persons guilty of this
general offence, unless they be people of such rank or fortune as is therein particularly specified. All persons therefore, of what property or distinction soever, that kill game out of their own territories, or even upon their own estates, without the king's licence expressed by the grant of a franchise, are guilty of the first original offence, of encroaching on the royal prerogative. And those indigent persons who do so, without having such rank or fortune as is generally called a qualification, are guilty not only of the original offence, but of the aggravations also, created by the statutes for preserving the game: which aggravations are so severely punished, and those punishments so implacably inflicted, that the offence against the king is seldom thought of, provided the miserable delinquent can make his peace with the lord of the manor. This offence, thus aggravated, I have ranked under the present head, because the only rational footing, upon which we can consider it as a

See Vol. II. pag. 417, &c.
I Burn's Justice, tit. Game. 3.

crime, is that in low and indigent persons it promotes idleness, and takes than away from their proper employments and callings; which is an offence against the public police and economy of the commonwealth.

THE statutes for preserving the game are many and various, and not a little obscure and intricate; it being remarked I, that in one statute only, 5 Ann. c. 14. there is false grammar in no fewer than six places, besides other mistakes: the occasion of which, or what denomination of persons were probably the penners of these statutes, I shall not at present enquire. It is in general sufficient to observe, that the qualifications for killing game as they are usually called, or more properly the exemptions from the penalties inflicted by the statute law, are, 1. The having a freehold estate of 100 /., per annum; there being fifty times the property required to enable a man to kill a partridge, as to vote for a knight of the shire: 2. A leasehold for ninety nine years of 150 /., per annum: 3. Being the son and heir apparent of an esquire (a very loose and vague description) or person of superior degree: 4. Being the owner, or keeper, of a forest, park, chafe, or warren. For unqualified persons transgressing these laws, by killing game, keeping engines for that purpose, or even having game in their custody, or for persons (however qualified) that kill game, or have it in possession, at unseasonable times of the year, there are various penalties assigned, corporal and pecuniary, by different statutes k; on any of which, but only
on one at a time, the justices may convict in a summary way, or prosecutions may be carried on at the assises. And, lastly, by statute 28 Geo. II. c. 12. no person, however qualified to kill, may make merchandize of this valuable privilege, by felling or exposing to sale any game, on pain of like forfeiture as if he had no qualification.

k Burn's Justice, tit. Game.

CHAPTER THE FOURTEENTH.
OF HOMICIDE.

IN the ten preceding chapters we have considered, first, such crimes and misdemesnors as are more immediately injurious to God and his holy religion; secondly, such as violate or transgress the law of nations; thirdly, such as more especially affect the king, the father and representative of his people; fourthly, such as more directly infringe the rights of the public or commonwealth, taken in its collective capacity; and are now, lastly, to take into consideration those which in a more peculiar manner affect and injure individuals or private subjects.

WERE these injuries indeed confined to individuals only, and did they affect none but their immediate objects, they would fall absolutely under the notion of private wrongs; for which a satisfaction would be due only to the party injured: the manner of obtaining which was the subject of our enquiries in the preceding volume. But the wrongs, which we are now to treat of, are of a much more extensive consequence; 1. Because it is impossible they can be committed without a violation of the laws of nature; of the moral as well as political rules of right: 2. Because they include in them almost always a breach of the public peace: 3. Because by their example and evil tendency they threaten and endanger the subversion of all civil so-

Ciety. Upon these accounts it is, that, besides the private satisfaction due and given in may cases to the individual, by action for the private wrong, the government also calls upon the offender to submit to public punishment for the public crime. And the prosecution of these offences is always at the suit and in the name of the king, in whom by the texture of our constitution the jus gladii, or executory power of the law, entirely resides. Thus too, in the old Gothic constitution, there was a threefold
punishment inflicted on all delinquents: first, for the private wrong to the party injured; secondly, for the offence against the king by disobedience to the laws; and thirdly, for the crime against the public by their evil example a. Of which we may trace the groundwork, in what Tacitus tells us of his Germans b; that, whenever offenders were fined, pars mulctae regi, vel civitati, pars psi qui vindicatur vel propinquus ejus, exsolvitur.

THESE crimes and misdemeanors against private subjects are principally of three kinds; against their persons, their habitations, and their property.

OF crimes injurious to the persons of private subjects, the most principal and important is the offence of taking away that life, which is the immediate gift of the great creator; and which therefore no man can be entitled to deprive himself or another of, but in some manner either expressly commanded in, or evidently deducible from, those laws which the creator has given us; the divine laws, I mean, of either nature or revelation. The subject therefore of the present chapter will be, the offence of homicide or destroying the life of man, in its several stages of guilt, arising from the particular circumstances of mitigation or aggravation which attend it.

NOW homicide, or the killing of any human creature, is of three kinds; justifiable, excusable, and felonious. The first has no share of guilt at all; the second very little; but the third is

a Stiernhook. l. 1. c. 5.
b de mor. Germ. c. 12.

the highest crime against the law of nature, that man is capable of committing.

I. JUSTIFIABLE homicide is of divers kinds.

1. SUCH as is owing to some unavoidable necessity, without any will, intention, or desire, and without any inadverrence or negligence, in the party killing, and therefore without any shadow of blame. As, for instance, by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who hath forfeited his life by the laws and verdict of his country. This is an act of necessity, and even of civil duty; and therefore not only justifiable, but commendable, where the law
requires it. But the law must require it, otherwise it is not justifiable: therefore wantonly to kill the greatest of malefactors, a felon or a traitor, attainted or outlawed, deliberately, uncompelled, and extrajudicially, is murder c. For as Bracton d very justly observes, istud homicidium si sit ex livore, vel delectatione estundendi humannum sanguinem, licet just e occidaturifte, tamen occisor peccat mortaliter, propter intentionem corruptam. And farther, if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly, the judge is guilty of murder e. and upon this account sir Matthew Hale himself, though he accepted the place of a judge of the common pleas under Cromwell's government (since it is necessary to decide the disputes of civil property in the worst of times) yet declined to fit on the crown side at the assises, and try prisoners; having very strong objections to the legality of the usurper's commission f: a distinction perhaps rather too refined; since the unlawful of crimes is at least as necessary to society, as maintaining the boundaries of property. Also such judgment, when legal, must be executed by the proper officer, or his appointed deputy; for no one else is required by law to do it, which requisition it is, that justifies

c 1 Hal. P. C. 497.
d fel. 120.
e 1 Hawk. P. C. 70. 1 Hal. P. C. 497.
f Burnet in his life.

the homicide. If another person doth it of his own head, it is held to be murder g: even though it be the judge himself h. It must farther be executed, servato juris ordine; it must pursue the sentence of the court. If an officer beheads one who is adjudged to be hanged, or vice versa, it is murder I: for he is merely ministerial, and therefore only justified when he acts under the authority and compulsion of the law; but, if a sheriff changes one kind of death for another, he then acts by his own authority, which extends not to the commission of homicide: and, besides, this licence might occasion a very gross abuse of his power. The king indeed may remit part of a sentence; as, in the case of treason, all but the beheading: but this is no change, no introduction of a new punishment; and in the case of felony, where the judgment is to be hanged, the king (it hath been said) cannot legally order even a peer to be beheaded k. But this doctrine will be more fully considered in a subsequent chapter.
AGAIN: in some cases homicide is justifiable, rather by the permission, than by the absolute command of the law: either for the advancement of public justice, which without such indemnification would never be carried on with proper vigor; or, in such instances where it is committed for the prevention of some atrocious crime, which cannot otherwise avoided.

2. HOMICIDES, committed for the advancement of public justice, are; 1. Where an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults and resists him l. 2. If an officer, or any private person, attempts to take a man charged with felony, and is resisted; and, in the endeavour to take him, kills him m. This is of a piece with the old Gothic constitutions, which (StiernHOOK informs us n)surem, si aliter capi non posset, occidere permittunt. 3. In case of a riot, or rebellious assembly, the officers endeavouring to disperse the mob are justifiable in killing them, both at common law o, and by the riot act, 1 Geo. I. c. 5. 4. Where the prisoners in a gaol, or going to gaol, assault the gaoler or officer, and he in his defence kills any of them, it is justifiable, for the sake of preventing an escape p. 5. If trespassers in forests, parks, chafes, or warrens, will not surrender themselves to the keepers, they may be slain; by virtue of the statute 21 Edw. I. ft. 2. de malefaotoribus in parcis, and 3 & 4 W. & M. c. 10. But, in all these cases, there must be an apparent necessity on the officer's side; viz. that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, the deer-stealers could not but escape, unless such homicide were committed: otherwise, without such absolute necessity, it is not justifiable. 6. If the champions in a trial by battle killed either of them the other, such homicide was justifiable, and was imputed to the just judgment of God, who was thereby presumed to have decided in favour of the truth q.
3. IN the next place, such homicide, as is committed for the prevention of any forcible and atrocious crime, is justifiable by the law of nature r; and also by the law of England, as it stood so early as the time of Bracton s, and as it is since declared by statute 24 Hen. VIII. c. 5. If any person attempt to burn itt,) and shall be killed in such attempt, the flayer shall be acquitted and discharged. This reaches not to any crime unaccompanied with force, as picking of pockets, or to the breaking open of any house in the day time, unless it carries with it an attempt of robbery also. So the Jewish law, which punished no theft with death, makes homicide only justifiable, in case of nocturnal house-breaking:if a thief be found breaking up, and he be smitten

that he die, no blood shall be shed for him: but if the funbe risen upon him, there shall blood be shed for him; for heshould have made full restitution u. At Athens, if any theft was committed by night, it was lawful to kill the criminal, if taken in the fact w: and, by the Roman law of the twelve tables, a thief might be slain by night with impunity; or even by day, if he armed himself with any dangerous weapon x: which amounts very nearly to the same as is permitted by our own constitutions.

THE Roman law also justifies homicide, when committed in defence of the chastity either of oneself or relations y: and so also, according to Selden z, stood the law in the Jewish republic. The English law likewise justifies a woman, killing one who attempts to ravish her a: and so too the husband or father may justify killing a man, who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other b. And I make no doubt but the forcibly attempting a crime, of a still more detestable nature, may be equally resisted by the death of the unnatural aggressor. For the one uniform principle that runs through our own, and all other laws, seems to be this: that where a crime, in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting. But we must not carry this doctrine to the same visionary
length that Mr. Locke does; who holds that all manner of force without
right upon a man's person, puts him in a state of war with the aggressor;
and, of consequence, that, being in such a state of war, he may lawfully kill
him that conclusion may be in a state of uncivilized nature, yet the law

u Exod. Xxii. 2.
w Potter. Antiqu. b. 1. c. 24.
x Cic. pro Milone. 3. Ff. 9. 2. 4.
y Divus Hadrianus rejcripsit, eum quistuprum sibi vel suis inscrentem
occidie, dimittendum. (Ff. 48. 88. 1.)
z de legib. Hebrer. l. 4. c. 3.
a Bac. Elem. 34. 1 Hawk. P. C. 71.
b 1 Hal. P. C. 485, 486.
c Eff. on gov. p. 2. c. 3.

of England, like that of every other well-regulated community, is too
tender of the public peace, too careful of the lives of the subjects, to adopt
so contentious a system; nor will suffer with impunity any crime to be
prevented by death, unless the same, if committed, would also be punished
by death.

IN these instances of justifiable homicide, you will observe that the flayer
is in no kind of fault whatsoever, not even in the minutest degree; and is
therefore to be totally acquitted and discharged, with commendation
rather than blame. But that is not quite the case in excusable homicide, the
very name whereof imports some fault, some error, or omission; so trivial
however, that the law excuses it from the guilt of felony, though in
strictness it judges it deserving of some little degree of punishment.

II. EXCUSABLE homicide is of two sorts; either per infortunium, by
misadventure; or se defendendo, upon a principle of self-preservation. We
will first see wherein these two species of homicide are distinct, and then
wherein they agree.

1. HOMICIDE per infortunium, or misadventure, 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 stander by; or, where a person, qualified to keep a gun, is shooting
at a mark, and undesignedly kills a man d: for the act is lawful, and the
effect is merely accidental. So where a parent is moderately correcting his
child, a master his servant or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only misadventure; for the act of correction was lawful: but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases (according to the circumstances) murder; for the act of immoderate correction is unlawful. Thus by an edict of the emperor Constantine, when the rigor of the Roman law with regard to slaves began to relax and soften, a master was allowed to chastise his slave with rods and imprisonment, and, if death accidentally ensued, he was guilty of no crime: but if he struck him with a club or a stone, and thereby occasioned his death; or if in any other yet grosser manner immoderate suo jure utatur, tunc reus homicidii sit.

BUT to proceed. A tilt or turnament, the martial diversion of our ancestors, was however an unlawful act; and so are boxing and swordplaying, the succeeding amusement of their posterity: and therefore if a knight in the former case, or a gladiator in the latter, be killed, such killing is felony of manslaughter. But, if the king command or permit such diversion, it is said to be only misadventure, for then the act is lawful. In like manner as, by the laws both of Athens and Rome, he who killed another in the pancratium, or public games, authorized or permitted by the state, was not held to be guilty of homicide. Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he has done nothing unlawful; but manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness, of inevitably dangerous consequence. And in general, if death ensues in consequence of any idle, dangerous, and unlawful sport, as shooting or casting stones in a town, or the barbarous diversion of cock-throwing, in these and similar cases, the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts.

2. HOMICIDE in self-defence, or se defendendo, upon a sudden affray, is also excusable rather than justifiable, by the English law. This species of self-defence must be distinguished from that just now mentioned, as calculated to hinder the perpetra-
tion of a capital crime; which is not only a matter of excuse, but of justification. But the self-defence, which we are now speaking of, is that whereby a man may protect himself from an assault, or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him. And this is what the law expresses by the word chance-medley, or (as some rather choose to write it) chaud-medley; the former of which in its etymology signifies a casual affray, the latter an affray in the heat of blood or passion: both of them of pretty much the same import; but the former is in common speech too often erroneously applied to any manner of homicide by misadventure; whereas it appears by the statute 24 Hen. VIII. c. 5. and our ancient books l, that it is properly applied to such killing, as happens in self-defence upon a sudden reencounter m. This right of natural defence does not imply a right of attacking: for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defence, but in sudden and violent cases; when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible means of escaping from his assailant.

IN some cases this species of homicide (upon chance-medley in self-defence) differs but little from manslaughter, which also happens frequently upon chance-medley in the proper legal sense of the word n. But the true criterion between them seems to be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer hath not begun to fight, or (having begun) endeavours to decline any farther struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence o. For which reason the law requires, that the person, who kills another

l Staundf. P. C. 16.
m 3 Inst. 55. 57. Fost. 275. 276.
in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that, not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow subjects the law countenances no such point of honour: because the king and his courts are the vindices injuriarum, and will give too the party wronged all the satisfaction he deserves p. In this the civil law also agrees with ours, or perhaps goes rather farther; qui cum aliter tueri se non possunt, damni culpam dederint, innoxii sunt q. The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him r: for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then in his defence he may kill his assailant instantly. And this is the doctrine of universal justice s, as well as of the municipal law.

AND, as the manner of the defence, so is also the time to be considered: for if the person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge and not defence. Neither, under the colour of self defence, will the law permit a man to screen himself from the guilt of deliberate murder: for if two persons, A and B, agree to fight a duel, and A gives the first onset, and B retreats as far as he safely can, and then kills A, this is murder; because of the previous malice and concerted design t. But if A upon a sudden quarrel assaults B first, and upon B's returning the assault, A really and bona side flees; and, being driven to the wall, turns again upon B and kills him; this may be se defendendo according to some of our writers u:

p 1 Hal. P. C. 481. 483.
q Ff. 9. 2. 45.
r 1 Hal. P. C. 483.
s Puff. b. 2. c. 5. 13.
t 1 Hal. P. C. 479.
u 1 Hal. P. C. 482.
though others w have thought this opinion too favourable; inasmuch as
the necessity, to which he is at last reduced, originally arose from his own
fault. Under this excuse of self-defence, the principal civil and natural
relations are comprehended; therefore master and servant, parent and
child, husband and wife, killing an assailant in the necessary defence of
each other respectively, are excused; the act of the relation assisting being
construed the same as the act of the party himself x.

THERE is one species of homicide se defendendo, where the party slain is
equally innocent as he who occasions his death: and yet this homicide is
also excusable from the great universal principle of self-preservation,
which prompts every man to save his own life preferably to that of
another, where one of them must inevitably perish. As, among others, in
that case mentioned by lord Bacon y, where two persons, being
shipwrecked, and getting on the same plank, but finding it not able to save
them both, one of them thrusts the other from it, whereby he is drowned.
He who thus preserves his own life at the expense of another man's, is
excusable though unavoidable necessity, and the principle of self-defence;
since their both remaining on the same weak plank is a mutual, though
innocent, attempt upon, and an endangering of, each other's life.

LET us next take a view of those circumstances wherein these two species
of homicide, by misadventure and self-defence, agree; and those are in
their blame and punishment. For the law sets so high a value upon the life
of a man, that it always intends some misbehaviour, it presumes
negligence, or at least a want of sufficient caution in him who was so
unfortunate as to commit it; who therefore is not altogether faultless z.
And as to the necessity which excuses a man who kills another se
defendendo,

w 1 Hawk. P. C. 75.
x 1 Hal. P. C. 484.
y Elem. c. 5. See also 1 Hawk. P. C. 73.
z 1 Hawk. P. C. 72.

lord Bacon a entitles it necessitas culpabilis, and thereby distinguishes it
from the former necessity of killing a thief or a malefactor. For the law
intends that the quarrel or assault arose from some unknown wrong, or
some provocation, either in word or deed: and since in quarrels both
defendants
who was originally in the wrong; the law will not hold the survivor entirely
guiltless. But it is clear, in the other case, that where I kill a thief that
breaks into my house, the original default can never be upon my side. The
law besides may have a farther view, to make the crime of homicide more
odious, and to caution men how they venture to kill another upon their
own private judgment; by ordaining, that he who flays his neighbour,
without an express warrant from the law so to do, shall in no case be
absolutely free from guilt.

NOR is the law of England singular in this respect. Even the slaughter of
enemies required a solemn purgation among the Jews; which implies that
the death of a man, however it happens, will leave some stain behind it.
And the mosaical law b appointed certain cities of refuge for him who killed
his neighbour unawares; as if a man goeth into the wood with
his neighbour to hew wood, and his hand fetcheth a stroke with the ax to
cut down a tree, and the head flippeth from the helve, and lighteth upon his
neighbour that he die, he shallflee unto one of these cities and live. But it
seems he was not held wholly blameless, any more than in the English law;
since the avenger of blood might fly him before he reached his asylum, or
if he afterwards stirred out of it till the death of the high priest. In the
imperial law likewise c casual homicide was excused, by the indulgence of
the emperor signed with his own sign manual, adnotatione principis:?
otherwise the death of a man, however committed, was in some degree
punishable. Among the Greeks d homicide by misfortune was expiated by

a Elem. c. 5.
b Numb. c. 35. and Dcut. c. 19.
c Cod. 9. 16. 5.
d Plato de Leg. lib. 9.

voluntary banishment for a yeare. In Saxony a fine is paid to the kindred of
the slain; which also among the western Goths, was little inferior to that of
voluntary homicide f: and in France g no person is ever absolved in cases of
this nature, without a largess to the poor, and the charge of certain masses
for the soul of the party killed.

THE penalty inflicted by our laws is said by sir Edward Coke to have been
anciently no less than death h; which however is with reason denied by
later and more accurate writers i. It seems rather to have consisted in a
forfeiture, some say of all the goods and chattels, others of only part of
them, by way of fine or weregildk: which was probably disposed of, as in France, in pios usus, according to the humane superstition of the times, for the benefit of his soul, who was thus suddenly sent to his account, with all his imperfections on his head. But that reason having long ceased, and the penalty (especially if a total forfeiture) growing more severe than was intended, in proportion as personal property has become more considerable, the delinquent has now, and has had as early as our records will reachl, a pardon and writ of restitution of his goods as a matter of course and right, only paying for suing out the same. And indeed, to prevent this expense, in cases where the death has notoriously happened by misadventure or in self-defence, the judges will usually permit (if not direct) a general verdict of acquittance.

III. FELONIOUS homicide is an act of a very different nature from the former, being the killing of a human creature, of any age or sex, without justification or excuse. This may be done, either by killing one’s self, or another man.

SELF-MURDER, the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure, though the attempting it seems to be countenanced by the civil lawo, yet was punished by the Athenian law with cutting off the hand, which committed the desperate deedp. And also the law of England wisely and religiously considers, that no man hath a power to destroy life, but by commission from God, the author of it: and, as the suicide is guilty of a double offence; one spiritual, in invading the
prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest, crimes, making it a peculiar species of felony, a felony committed on oneself. a felo de se therefore is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death: as if, attempting to kill another, he runs upon his antagonist's sword; or, shooting at another, the gun bursts and kills himself. The party must be of years of discretion, and in his senses, else it is no crime. But this excuse ought not to be strained to that length, to which our coroners' juries are apt to carry it, viz. that the very act of suicide is an evidence of insanity; as if every man who acts contrary to reason, had no reason at all: for the same argument would prove every other criminal non compus, as well as the self-murderer. The law very rationally judges, that every melancholy or hypochondriac fit does not deprive a man of the capacity of discerning right from wrong; which is necessary, as was observed in a former chapter, to form a legal excuse. And

oSi quis impatientia doloris, aut taediovitae, aut morbo, aut furore, aut pudore, mori maluit, non animadvertatur in eum. Ff. 49. 16. 6.
q 1 Hawk. P. c. 68. 1 Hal. P. C. 413.
r See pag. 24.

therefore, if a real lunatic kills himself in a lucid interval, he is a felo de se as much as another mans.

BUT now the question follows, what punishment can human laws inflict on one who has withdrawn himself from their reach? They can only act upon what he has left behind him, his reputation and fortune: on the former, by an ignominious burial in the highway, with a stake driven through his body; on the latter, by a forfeiture of all his goods and chattels to the king: hoping that his care for either his own reputation, or the welfare of his family, would be some motive to restrain him from so desperate and wicked an act. And it is observable, that this forfeiture has relation to the time of the act done in the felon's lifetime, which was the cause of his death. As if husband and wife be possessed jointly of a term of years in land, and the husband drowns himself; the land shall be forfeited to the king, and the wife shall not have it by survivorship. For by the act of
casting himself into the water he forfeits the term; which gives a title to the
king, prior to the wife's title by survivorship, which could not accrue till
the instant of her husband's death. And, though it must be owned that
the letter of the law herein borders a little upon severity, yet it is some
alleviation that the power of mitigation is left in the breast of the
sovereign, who upon this (as on all other occasions) is reminded by the
oath of his office to execute judgment in mercy.

THE other species of criminal homicide is that of killing another man. But
in this there are also degrees of guilt, which divide the offence into
manslaughter, and murder. The difference between which may be partly
collected from what has been incidentally mentioned in the preceding
articles, and principally consists in this, that manslaughter arises from the
sudden heat of the passions, murder from the wickedness of the heart.

s Hal. P. C. 412.
t Finch. L. 216.

I. MANSLAUGHTER is therefore thus defined, the unlawful killing of
another, without malice either express or implied: which may be either
voluntarily, upon a sudden heat; or involuntarily, but in the commission of
some unlawful act. These were called in the Gothic constitutions
homicidia vulgaria; quae aut casu, aut etiam fponte committuntur, fed in fubitaneo
quodamiacundiae calore et impetu. And hence it follows, that in
manslaughter there can be no accessories before the fact; because it must
be done without premeditation.

AS to the first, or voluntary branch: if upon a sudden quarrel two persons
fight, and one of them kills the other, this is manslaughter: and so it is, if
they upon such an occasion go out and fight in a field; for this is one
continued act of passion: and the law pays that regard to human frailty,
as not to put a hasty and a deliberate act upon the same footing with
regard to guilt. So also if a man be greatly provoked, as by pulling his nose,
or other great indignity, and immediately kills the aggressor, though this is
not excusable se defendendo, since there is no absolute necessity for doing
it to preserve himself; yet neither is it murder, for there is no previous
malice; but it is manslaughter. But in this, and in every other case of
homicide upon provocation, if there be a sufficient cooling-time for
passion to subside and reason to interpose, and the person so provoked
afterwards kills the other, this is deliberate revenge and not heat of blood,
and accordingly amounts to murderz. So, if a man takes another in the act of adultery with his wife, and kills him directly upon the spot; though this was allowed by the laws of Solona, as likewise by the Roman civil law, (if the adulterer was found in the husband's own houseb) and also among the ancient Gothsc; yet in England it is not absolutely ranked in the class

u 1 Hal. P. C. 466.
w Stiernh. de jure Goth. l. 3. c. 4.
x 1 Hawk. P. C. 82.
y Kelyng. 135.
z Fost. 296.
a Piutarch. in vit. Solon.
b Ff. 48. 5. 24.
c Stiernh. de jure Goth. l. 3. c. 2.

of justifiable homicide, as in case of a forcible rape, but it is manslaughterd. It is however the lowest degree of it: and therefore in such a case the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocationc. Manslaughter therefore on a sudden provocation differs from excusable homicide se defendendo in this: that in one case there is an apparent necessity, for self-preservation, to kill the aggressor; in the other no necessity at all, being only a sudden act of revenge.

THE second branch, or involuntary manslaughter, differs also from homicide excusable by misadventure, in this; that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As if two persons play at sword and buckler, unless by the king's command, and one of them kills the other: this is manslaughter, because the original act was unlawful; but it is not murder, for the one had no intent to do the other any personal mischieff. So where a person does an act, lawful in itself, but in an unlawful manner, and without due caution and circumspection: as when a workman flings down a stone or piece of timber into the street, and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done: if it were in a country village, where few passengers are, and he calls out to all people to have a care, it is misadventure only: but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warningg; and murder, if he knows of their passing
and gives no warning at all, for then it is malice against all mankind. And, in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, it will be murder; but if no more was intended than a mere trespass, it will only amount to manslaughter.

NEXT, as to the punishment of this degree of homicide: the crime of manslaughter amounts to felony, but within the benefit of clergy; and the offender shall be burnt in the hand, and forfeit all his goods and chattels.

BUT there is one species of manslaughter, which is punished as murder, the benefit of clergy being taken away from it by statute; namely, the offence of mortally stabbing another, though done upon sudden provocation. For by statute 1 Jac. I. c. 8. when one thrusts or stabs another, not then having a weapon drawn, or who hath not then first stricken the party stabbing, so that he dies thereof within six months after, the offender shall not have the benefit of clergy, though he did it not of malice aforethought. This statute was made on account of the frequent quarrels and stabbings with short daggers, between the Scotch and the English, at the accession of James the first; and, being therefore of a temporary nature, ought to have expired with the mischief, which it meant to remedy. For, in point of solid and substantial justice, it cannot be said that the mode of killing, whether by stabbing, strangling or shooting, can either extenuate or enhance the guilt: unless where, as in the case of poisoning, it carries with it an internal evidence of cool and deliberate malice. But the benignity of the law hath construed the statute so favourably in behalf of the subject, and so strictly when against him, that the offence of stabbing stands almost upon the same footing, as it did at the common law. thus, (not to repeat the cases before-mentioned, of stabbing an adulteress, & c. which are barely manslaughter, as at common law) in the construction of this statute it hath been doubted, whether, if
the deceased had struck at all before the mortal blow given, this takes it out of the statute, though in the preceding quarrel the

i Foster. 258.
k 1 Lord Raym. 140.
l Fost. 299, 300.

the stabber had given the first blow; and it seems to be the better opinion, that this is not within the statute. Also it hath been resolved, that the killing a man by throwing a hammer or other weapon is not within the statute; and whether a shot with a pistol be so or not, is doubted. But if the party slain had a cudgel in his hand, or had thrown a pot or a bottle or discharged a pistol at the party stabbing, this is a sufficient having a weapon drawn on his side within the words of the statute.

2. WE are next to consider the crime of deliberate and wilful murder; a crime at which human nature starts, and which is I believe punished almost universally throughout the world with death. The words of the mosacial law (over and above the general precept to Noah, that whoso sheddeth man's blood, byman shall his blood be shed?) are very emphatical in prohibiting the pardon of murderers. Moreover ye shall take no satisfaction for the life of a murderer, who is guilty of death, but he shall surely be put to death; for the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it. And therefore out law has provided one course of prosecution, (that by appeal, of which hereafter) wherein the king himself is excluded the power of pardoning murder: so that, were the king of England so inclined, he could not imitate that Polish monarch mentioned by Puffendorf; who thought proper to remit the penalties of murder to all the nobility, in an edict with this arrogant preamble, nos, divinijuris rigorem moderantes, & c. But let us now consider the definition of this great offence.

THE name of murder was anciently applied only to the secret killing of anothers; (which the word, moerda, signifies in the Teutonic language) and it was defined homicidium quod nullo

m Fost. 301. 1 Hawk. P. C. 77.
n 1 Hal. P. C. 470.
o 1 Hawk. P. C. 77.
p Gen. ix. 6.
vidente, nullo sciente, clam perpetraturu : for which the will wherein it was committed, or (if that were too poor) the whole hundred, was liable to a heavy amercement; which amercement itself was also denominated murdrumw. This was an ancient usage among the Goths in Sweden and Denmark; who supposed the neighbourhood, unless they produced the murderer, to have perpetrated or at least connived at the murderx: and, according to Bractony, was introduced into this kingdom by king Canute, to prevent his countrymen the Danes from being privily murdered by the English; and was afterwards continued by William the conqueror, for the like security to his own Normansz. And therefore if, upon inquisition had, it appeared that the person found slain was an Englishman, (the presentment whereof was denominated englescheriea) the country seems to have been excused from this burden. But, this difference being totally abolished by statute 14 Edw. III. c. 4. we must now (as is observed by Staundfordebb) define murder in quite another manner, without regarding whether the party slain was killed openly or secretly, or whether he was of English or foreign extraction.

MURDER is therefore now thus defined, or rather described, by sir Edward Cokec; when a person, of found memory and discretion, unlawfully killeth any reasonable creature in being and under the king's peace, with malice aforethought, either express or implied. The best way of examining the nature of this crime will be by considering the several branches of this definition.

FIRST, it must be committed by a person of found memory and discretion: for a lunatic or infant, as was formerly observed, are incapable of committing any crime; unless in such cases where

u Glanv. l. 14. c. 3.
w Bract. l. 3. tr. 2. c. 15. 7. Stat. Marlbr. c. 26 Fost. 281.
x Stiernh. l. 3. c. 4.
y l. 3. tr. 2. c. 15.
z 1 Hal. P. C. 447.
a Bract. ubi supr.
they shew a consciousness of doing wrong, and of course a discretion, or
discernment, between good and evil.

NEXT, it happens when a person of such found discretion unlawfully
killeth. The unlawfulness arises from the killing without warrant or
excuse: and there must also be an actual killing to constitute murder; for a
bare assault, with intent to kill, is only a great misdemesnor, though
formerly it was held to be murderd. The killing may be by poisoning,
striking, starving, drowning, and a thousand other forms of death, by
which human nature may be overcome. Of these the most detestable of all
is poison; because it can of all others be the least prevented either by
manhood or forethoughte. And therefore by the statute 22 Hen. VIII. c. 9.
it was made treason, and a more grievous and lingering kind of death was
inflicted on it than the common law allowed; namely, boiling to death; but
this act did not live long, being repealed by 1 Edw. VI. c. 12. There was
also, by the ancient common law, one species of killing held to be murder,
which is hardly so at this day, nor has there been an instance wherein it
has been held to be murder for many ages pastf: I mean by bearing false
witness against another, with an express premeditated design to take away
his life, so as the innocent person be condemned and executedg. The
Gothic laws punished in this case, both the judge, the witnesses, and the
prosecutor; peculiari poena judicem puniunt; peculiari testes, quorum sides
judicem feduxit; peculiari denique et maximauctorem, ut homicidamh. And,
among the Romans, the lex Cornelia, de ficariis, punished the false
witness with death, as being guilty of a species of assassination.i And there
is no doubt

d 1 Hal. P. C. 425.
e 3 Inst. 48.
f Fost. 132. In the case of Macdaniel and Berry, reported by sir Michael
Foster, though the attorney general declined to argue this point of law, I
have grounds to believe it was not from any apprehension that the point
was not maintainable, but from other pudential reasons. Nothing
therefore should be concluded from the waiving of that prosecution.
g Mirror. c. 1. 9. Britt. c. 5. Bracton. l. 3. c. 4.
h Stiernh. de jure Goth. l. 3. c. 3.
i Ff. 48. 8. 1.
but this is equally murder in foro conscientiae as killing with a sword; though the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the peril of their own lives) has not yet punished it as such. If a man however does such an act, of which the probable consequence may be, and eventually is, death; such killing may be murder, although no stroke be struck by himself: as was the case of the unnatural son, who exposed his sick father to the air, against his will, by reason whereof he died; and, of the harlot, who laid her child in an orchard, where a kite struck it and killed it. So too, if a man hath a beast that is used to do mischief; and he, knowing it, suffers it to go abroad, and it kills a man; even this is manslaughter in the owner: but if he had purposely turned it loose, though barely to frighten people and make what is called sport, it is with us (as in the Jewish law) as much murder, as if he had incited a bear of a dog to worry them. If a physician or surgeon gives his patient a potion or plaister to cure him, which contrary to expectation kills him, this is neither murder, nor manslaughter, but misadventure; and he shall not be punished criminally, however laible he might formerly have been to a civil action for neglect or ignorancen: but it hath been holden, that if it be not a regular physician or surgeon, who administers the medicine or performs the operation, it is manslaughter at the leasto. Yet sir Matthew Hale very justly questions the law of this determination; since physic and salves were in use before licensed physicians and surgeons: wherefore he treats this doctrine as apocryphal, and fitted only to gratify and flatter licentiates and doctors in physic; though it may be of use to make people cautious and wary, how they meddle too much in so dangerous an employmentp. In order also to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered;

k 1 Hawk. P. C. 78.
l 1 Hal. P. C. 432.
m Ibid., 431.
n Mirr. c. 4. 16. See Vol. III. pag. 122.
o Britt. c. 5. 4. Inst. 251.
p 1 Hal. P. C. 430.

in the computation of which, the whole day upon which the the hurt was done shall be reckoned the first q.
FARTHER; the person killed must be a reasonable creature in being, and under the king's peace, at the time of the killing. Therefore to kill an alien, a Jew, or an outlaw, who are all under the king's peace or protection, is as much murder as to kill the most regular born Englishman; except he be an alien enemy, in time of war. To kill a child in its mother's womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them. But, as there is one case where it is difficult to prove the child's being born alive, namely, in the case of the murder of bastard children by the unnatural mother, it is enacted by statute 21 Jac. I. c. 27. that if any woman be delivered of a child, which if born alive should by law be a bastard; and endeavours privately to conceal its death, by burying the child or the like; the mother so offending shall suffer death as in the case of murder, unless she can prove by one witness at least that the child was actually born dead. This law, which favours pretty strongly of severity, in making the concealment of the death almost conclusive evidence of the child's being murdered by the mother, is nevertheless to be also met with in the criminal codes of many other nations of Europe; as the Danes, the Swedes, and the French: but I apprehend it has of late years been usual with us in England, upon trials for this offence to require some sort of presumptive evidence that the child was born alive, before the other constrained presumption (that the child, whose death is concealed, was therefore killed by its parent) is admitted to convict the prisoner.

LASTLY, the killing must be committed with malice aforethought, to make it the crime of murder. This is the grand crime, which now distinguishes murder from other killing: and this malice prepense, malitia praecogitata, is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved, and malignant heart; un disposition a faire un male chose. and it may be either express, or implied in law. Express malice is when one, with a sedate deliberate mind and formed design, doth kill another: which formed design is evidenced by external circumstances
discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. This takes in the case of deliberate duelling, where both parties meet avowedly with an intent to murder: thinking it their duty, as gentlemen, and claiming it as their right, to wanton with their won lives and those of their fellow creatures; without any warrant or authority from any power either divine or human, but in direct contradiction to the laws both of God and man: and therefore the law has justly fixed the crime and punishment of murder, on them, and on their seconds also. Yet it requires such a degree of passive valour, to combat the dread of even underserved contempt, arising from the false notions of honour too generally received in Europe, that the strongest prohibitions and penalties of the law will never be entirely effectual to eradicate this unhappy custom; till a method be found out of compelling the original aggressor to make some other satisfaction to the affronted party, which the world shall esteem equally reputable, as that which is now given at the hazard of the life and fortune, as well of the person insulted, as of him who hath given the insult. Also, if even upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is, by an express evil design, the genuine sense of malitia. As when a park-keeper tied a boy, that was stealing wood, to a horse's tail, and dragged him along the park; when a master corrected his servant with an iron bar, and a schoolmaster stamped on his scholar's belly; so that each of the sufferers died; these were justly held to be murders, because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter. Neither shall he be guilty of a less crime, who kills another in consequence of such a wilful act, as shews him to be an enemy to all mankind in general; as going deliberately with a horse used to strike, or discharging a gun, among a multitude of people. So if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice. And, if two or more come together to do an unlawful act against the king's peace, of which the
probable consequence might be bloodshed; as to beat a man, to commit a riot, or to rob a park; and one of them kills a man; it is murder in them all, because of the unlawful act, the malitia praecogitata, or evil intended beforehand b.

ALSO in many cases where no malice is expressed, the law will imply it: as, where a man wilfully poisons another, in such a deliberate act the law presumes malice, though no particular enmity can be provedc. And if a man kills another suddenly, without any; or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act, upon a slight or no apparent cause. No affront, by words, or gestures only, is a sufficient provocation, so as to excuse or extenuate such acts of violence as manifestly endanger the life of anotherd. But if the person so provoked had unfortunately killed the other, by beating him in such a manner as shewed only an intent to chastise and not to kill him, the law so far considers the provocation of contumelious behaviour, as adjudge it only manslaughter, and not murdere. In like manner if one kills an officer of justice, either

z 1 Hal. P. C. 454. 47. 4.
a 1 Hawk. P. C. 74.
b Ibid. 84.
Hal. P. C. 455.
d 1 Hawk. P. C. 82. 1 Hal. P. C. 455, 456.
e Fost. 291.

civil or criminal, in the execution of his duty, or any of his assistants endeavouring to conserve the peace, or any private person endeavouring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes, the law will imply malice, and the killer shall be guilty of murderf. And if one intends to do another felony, and undesignedly kills a man, this is also murdere. Thus if one shoots at A and misses him, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case, where one lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murderh. It were endless to go through all the cases of homicide, which have been adjudged either expressly, or impliedly, malicious: these therefore may suffice as a specimen; and we may take it for a general rule, that all homicide is malicious, and of course amounts to murder, unless where
justified by the command or permission of the law; excused on a principle of accident or self-preservation; or alleviated into manslaughter, by being either the involuntary consequence of some act, not strictly lawful or (if voluntary) occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury: the latter of whom are to decide whether the circumstances alleged be proved to have actually existed; the former, how far they extend to take away or mitigate the guilt. For all homicide is presumed to be malicious, until the contrary appeareth upon evidence.

THE punishment of murder, and that of manslaughter, were formerly one and the same; both having the benefit of clergy: so that none but unlearned persons, who least knew the guilt of it, were put to death for this enormous crime. But now, by statute 23 Hen. VIII. c. 1. and 1 Edw. VI. c. 12. the benefit of clergy is taken away from murder though malice presense. In atrocious cases it was frequently usual for the court to direct the murderer, after execution, to be hung upon a gibbet in chains, near the place where the fact was committed: but this was no part of the legal judgment; and the like is still sometimes practiced in the case of notorious thieves. This, being quite contrary to the express command of the mosacial law, seems to have been borrowed from the civil law; which, besides the terror of the example, gives also another reason for this practice, viz. that it is a comfortable fight to the relations and friends of the deceased. But now in England, it is enacted by statute 25 Geo II. c. 37. that the judge, before whom a murderer is convicted, shall in passing sentence direct him to be executed on the next day but one, (unless the same shall be sunday, and then on the monday following) and that his body be delivered to the surgeons to be dissected and anatomized; and that the judge may direct his body to be afterwards hung in chains, but in no wise to be buried without dissection. And, during the short but awful interval between sentence and execution, the prisoner shall be kept alone, and sustained with only bread and water. But a power is allowed to
the judge, upon good and sufficient cause, to respite the execution, and relax the other restraints of this act.

BY the Roman law, parricide, or the murder of one's parents or children, was punished in a much severer manner than any other kind of homicide. After being scourged, the delinquents were sewed up in a leathern sack, with a live dog, a cock, a vi-

k 1 Hal. P. C. 450.
The body of a malefactor shall not remain all night upon the tree; but thoufhalt in any wise bury him in that day, that the land be not defiled. Deut. xxi. 23.

mFamofos latrones, in his locis, ubi graffati sunt, furca figendos placuit; ut, et confpectu deterreantur alii, et folatio fit cognatis interemptorum, codem loco poena reddita, in quo latrones bomicidia feciffent. Ff. 48. 19 28. 15.

n Fost. 107.

per, and an ape, and so cast into the feao. Solon, it is true, in his laws, made none against parricide; apprehending it impossible that any one should be guilty of so unnatural a barbarity. And the Persians, according to Herodotus, entertained the same notion, when they adjudged all persons who killed their reputed parents to be bastards. And, upon some such reason as this, must we account for the omission of a exemplary punishment for this crime in our English laws; which treat it no otherwise than as simple murder, unless the child was also the servant of his parent.

FOR, though the breach of natural relation is unobserved, yet the breach of civil or ecclesiastical connexion, when coupled with murder, denominates it a new offence; no less than a species of treason, called parva proditio, or petit treason: which however is nothing else but an aggravated degree of murder; although, on account of the violation of private allegiance, it is stigmatized as an inferior species of treasons. And thus, in the ancient Gothic constitution, we find the breach both of natural and civil relations ranked in the same class with crimes against the sate and the soveraign.

PETIT treason, according to the statute 25 Edw. III. c. 2. may happen three ways: by a servant killing his master, a wife her husband, or an ecclesiastical person (either secular, or regular) his superior, to whom he
owes faith and obedience. A servant who kills his master whom he has left, upon a grudge conceived against him during his service, is guilty of petit treason: for the traiterous intention was hatched while the relation subsisted between them; and this is only an execution of that intention u. So if a wife be divorced a mensa et thoro, still the vinculum ma-

o Ff. 48. 9. 9.
q 1 Hal. P. C. 380.
r Foster. 107. 324. 336.
s See pag. 75.
tOmnium graviffima cenfetur vie factaat incolis in patriam, fu

rimmonii subsists; and if the kills such divorced husband, she is a traitressw. And a clergyman is understood to owe canonical obedience, to the bishop who ordained him, to him in whose diocese he is beneficed, and also to the metropolitan of such suffragan or diocesan bishop: and therefore to kill any of these is petit treasonx. As to the rest, whatever has been said, or remains to be observed hereafter, with respect to wilful murder, is also applicable to the crime of petit treason, which is no other than murder in its most odious degree: except that the trial shall be as in cases of high treason, before the improvements therein made by the statutes of William IIIy; and also except in its punishment.

THE punishment of petit treason, in a man, is to be drawn and hanged, and, in a woman, to be drawn and burnedz: the idea of which latter punishment seems to have been handed down to us from the laws of the ancient Druids, which condemned a woman to be burned for murdering her husbanda; and it is now the usual punishment for all sorts of treasons committed by those of the female sexb. Persons guilty of petit treason were first debarred the benefit of clergy by statute 12 Hen. VII. C. 7.

w 1 Hal. P. C. 381.
x Ibid.
y Foster. 337.
z 1 Hal. P. C. 382. 3. Inst. 311.
CHAPTER THE FIFTEENTH.
OF OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.

HAVING in the preceding chapter considered the principal crime or public wrong, that can be committed against a private subject, namely, by destroying his life; I proceed now to enquire into such other crimes and misdemeanors, as more peculiarly affect the security of his person, which living.

OF these some are felonious, and in their nature capital; others are simple misdemeanors, and punishable with a lighter animadversion. Of the felonies the first is that of mayhem.

I. MAYHER, mahemium, was in part considered in the preceding volume, as a civil injury: but it is also looked upon in a criminal light by the law; being an atrocious breach of the king's peace, and an offence tending to deprive him of the aid and assistance of his subjects. For mayhem is properly defined to be, as we may remember, the violently depriving another of the use of such of his members, as may render his the less able in fighting, either to defend himself, or to annoy his adversary. And therefore the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts, the loss of which in all animals abates their courage, are held to be mayhems. But the cutting off his ear, or nose, or the like, are not held to be mayhems at common law; because they do not weaken but only disfigure him.

BY the ancient law of England he that maimed any man, whereby he lost any part of his body, was sentenced to lose the like part; membrum pro membroc : which is still the law in Sweden. But this went afterwards out of use: partly because the law of retaliation, as was formerly shewn, is at
best an inadequate rule of punishment; and partly because upon a
repetition of the offence the punishment could not be repeated. So that, by
the common law, as it for a long time stood, mayhem was only punishable
with fine and imprisonementf; unless perhaps the offence of mayhem by
castration, which all our old writers held to be felony; et sequitur aliquando
poena capitalis, aliquando perpetuum exilium, cum omnium bonorum
adeptioneg. And this, although the mayhem was committed upon the
fighest provocationh.

BUT subsequent statutes have put the crime and punishment of mayhem
more out of doubt. For, first, by statute 5 Hen. IV. c. 5. to remedy a
mischief that then prevailed, of beating, wounding, or robbing a man, and
them cutting out his tongue or putting out his eyes, to prevent him from
being an evidence against them, this offence is declared to be felony, if
done of malice prepense; that is, as sir Edward Cokei explains it,
voluntarily

\[ c 3 \text{ Inst. 118.} \]
\[ d \text{ Mes, si la pleynte foit faite de femme qu' avere tollet a bome} \]
\[ e \text{ fes members, en tiel case perdra la feme la une meyn per jugement, come} \]
\[ f \text{ le membre dount ele avera trespasse. (Brit. c. 25.)} \]
\[ g \text{ d Stiernhook de jure Sueon. l. 3. c. 3.} \]
\[ h \text{ e See pag. 12.} \]
\[ i \text{ f 1 Hawk. P. C. 112.} \]
\[ j \text{ g Bract. Fol. 144.} \]
\[ k \text{ h Sir Edward Coke (3 Inst. 62.) has transcribed a record of Henry the} \]
\[ l \text{ third's time, (Claufl. 13 Hen. III. m. 9.) by which a gentleman of} \]
\[ m \text{ Somersetshire and his, wife appear to have been apprehended and} \]
\[ n \text{ committed to prison, being indicted for dealing thus with John the monk,} \]
\[ o \text{ who was caught in adultery with the wife.} \]
\[ p \text{ i 3 Inst. 62.} \]

and of set purpose, though done upon a sudden occasion. Next, in order of
time, is the statute 37 Hen. VIII. c. 6. which directs, that if a man shall
maliciously and unlawfully cut off the ear of any of the king's subjects, he
shall not only forfeit treble damages to the party grieved, to be recovered
by action of trespass at common law, as a civil satisfaction; but also 10 l. by
way of fine to the king, which was his criminal amercement. The last
statute, but by far the most severe and effectual of all, is that of 22 & 23
Car. II. c. 1. called the Coventry act; being occasioned by a assault on sir
John Coventry in the street, and slitting his nose, in revenge (as was
supposed) for some obnoxious words uttered by him in parliament. By this statute it is enacted, that if any person shall 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 other person, with intent to maim or to disfigure him; such person, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy.

On this statute Mr Coke, a gentleman of Suffolk, and one Woodburn, a labourer, were indicted in 1722; Coke for hiring and abetting Woodburn, and Woodburn for the actual fact, of slitting the nose of Mr Crispe, Coke's brother in law. The case was somewhat singular. The murder of Crispe was intended, and he was left for dead, being terribly hacked and disfigured with a hedgebill; but he recovered. Now the bare intent to murder is no felony: but to disfigure, with an intent to disfigure, is made so by this statute; on which they were therefore indicted. And Coke, who was a disgrace to the profession of the law, had the effrontery to rest his defence upon this point, that the assault was not committed with an intent to disfigure, but with an intent to murder; and therefore not within the statute. But the court held, that if a man attacks another to murder him with such an instrument as a hedge bill, which cannot but endanger the disfiguring him; and in such attack happens not to kill, but only to disfigure him; he may be indicted on this statute: and it shall be left to the jury whether it were not a design to murder by disfiguring, and consequently a malicious intent to disfigure as well as to murder. Accordingly the jury found them guilty of such previous intent to disfigure, in order to effect their principal intent to murder, and they were both condemned and executed (State Trials. VI. 212.)

Thus much for the felony of mayhem: to which may be added the offence of wilfully and maliciously shooting at any person, which may endanger either killing or maiming him. This, though no such evil consequence ensues, is made felony without benefit of clergy by statute 9 Geo. I. c. 22. and thereupon one Arnold was convicted in 1723, for shooting at lord Onslow; but, being half a madman, was never executed, but confined in prison, where he died about thirty years after.

II. THE second offence, more immediately affecting the personal security of individuals, relates to the female part of his majesty's subjects; being that of their forcible abduction and marriage; which is vulgarly called
stealing an hiress. For by statute 3 Hen. VII. c. 2. it is enacted, that if any person shall for lucre take any woman, maid, widow, or wife, having substance either in goods or lands, or being heir apparent to her ancestors, contrary to her will; and afterwards she be married to such misdoer, or by his consent to others, or defiled; such person, and all his accessories, shall be deemed principal felons: and by statute 39 Eliz. c. 9. the benefit of clergy is taken away from all such felons, except accessories after the offence.

IN the construction of this statute it hath been determined, 1. That the indictment must allege that the taking was for lucre, for such are the words of the statute. 2. In order to shew this, it must appear that the woman has substance either real or personal, or is an heir apparent. 3. It must appear that she was taken away against her will. 4. It must also appear, that she was afterwards married, or defiled. And though possibly the marriage or defilement might be by her subsequent consent, being won thereunto by flatteries after the taking, yet this is felony, if the first taking were against her will: and so vice versa, if the woman be originally taken away with her own consent, yet if she afterwards refuse to continue with the offender, and be forced against her will, she may, from that time, as properly be said to be taken against her will, as if she never had given any consent at all; for, till the force was put upon her, the was in her own power. 5. It is held that a woman, thus taken away and married, may be sworn and give evidence against the offender, though he is her husband de facto; contrary to the general rule of law: because he is no husband de jure, in case the actual marriage was also against her will. In cases indeed where the actual marriage is good, by the consent of the inveigled woman obtained after her forcible abduction, sir Matthew Hale seems to question how far her evidence should be allowed: but other authorities seem to agree, that it should even then be admitted; esteeming it absurd, that the offender should thus take advantage of his own wrong, and that the very act of marriage, which is a principal ingredient of his crime, should (by a forced construction of law) be made use of to stop the mouth of the most material witness against him.
AN inferior degree of the same kind of offence, but not attended with force, is punished by the statute 4 & 5 Ph. & Mar. c. 8. which enacts, that if any person, above the age of fourteen, unlawfully shall convey or take away any woman child unmarried, (which is heldr to extend to bastards as well as to legitimate children) within the age of sixteen years, from the possession and against the will of the father, mother, guardians, or governors, he shall be imprisoned two year, or fined at the discretion of the justices: and if he deflowers such maid or woman child, or, without the consent of parents, contracts matrimony with her, he shall be imprisoned five years, or fined at the discretion of the justices, and the shall forfeit all her lands to her next of kin, during the life of her said husband. So that

0 1 Hawk. P. C. 110.
1 Hal. P. C. 661.
r Stra. 1162.

as these stolen marriages, under the age of sixteen, were usually upon mercenary views, this act, besides punishing the seducer, wisely removed the temptation. But this latter part of the act is now rendered almost useless, by provisions of a very different kind, which make the marriage totally void, in the statute 26 Geo. II. c. 33.

III. A THIRD offence, against the female part also of his majesty's subjects, but attended with greater aggravations than that of forcible marriage, is the crime of rape, raptus mulierum, or the carnal knowledge of a woman forcibly and against her will. This, by the Jewish law, was punished with death, in case the damsel was betrothed to another man; and, in case she was not betrothed, then a heavy fine of fifty shekels was to be paid to the damsel's father, and she was to be the wife of the ravisher all the days of his life; without that power of divorce, which was in general permitted by the mosaic law.

THE civil law punishes the crime of ravishment with death and confiscation of goods: under which it includes both the offence of forcible abduction, or taking away a woman from her friends, of which we last spoke; and also the present offence of forcibly dishonouring them; either of which, without the other, is in that law, sufficient to constitute a capital crime. Also the stealing away a woman from her parents or guardians, and
debauching her, is equally penal by the emperor's edict, whether she consent or is forced: five volentibus, five nolentibus mulieribus, tale facinus suerit perpetratum. And this, in order to take away from women every opportunity of offending in this way; whom the Roman laws suppose never to go astray, without the seduction and arts of the other sex: and therefore, by restraining and making so highly penal the solicitations of the men, they meant to secure effectually the honour of the women.

s See vol. I. pag. 437. & c.
t Dcut. xxii. 25.
u Cod. 9. tit. 13.

Si enim ipsi rapirose metu, vel atrocitate poenae, ab hujufmodi facinore se temperaverint, mulli mulieri, five volenti, five nolenti, peccandi locus relinquetur; quia hoc ipsum velle mulierum, ab infidiis nequiffimi hominis, qui meditatur rapinam, inducitur. Nisi enim eam solicitaverit, nisi odiofis artibus circumvenerit, nonfaciet eam velle in tantum dedecus fefe prodere. But our English law does not entertain quite such sublime ideas of the honour of either sex, as to lay the blame of a mutual fault upon one of the transgressors only: and therefore makes it a necessary ingredient in the crime of rape, that it must be against the woman's will.

RAPE was punished by the Saxon laws, particularly those of king Athelstan, with death: which was also agreeable to the old Gothic or Scandinavian constitutiosx. But this was afterwards thought too hard: and in its stead another severe, but not capital, punishment was inflicted by William the conqueror; viz. castration and loss of eyesy; which continued till after Bracton wrote, in the reign of Henry the third. But in order to prevent malicious accusations, it was then the law, (and, it seems, still continues to be so in appeals of rapez) that the woman should immediately after, dum recens suerit maleficium, go to the next town, and there make discovery to some credible persons of the injury she has suffered; and afterwards should acquaint the high constable of the hundred, the coroners, and the sheriff with the outragea. This seems to correspond in some degree with the laws of Scotland and Arragon b, which require that complaint must be made within twenty four hours: though afterwards by statute Westm. 1 c. 13. the time of limitation in England was extended to forty days. At present there is no time of limitation fixed: for, as it is usually now punished by indictment at the suit of the king, the
maxim of law takes place that nullum tempus occurrit regi: but the jury
will rarely give credit to a stale

w Bracton. l. 3. c. 28.
x Stiernh. de jure Sucon. l. 3. c. 2.
z 1 Hal. P. C. 632.
b Barrington. 107.

complaint. During the former period also it was held for lawc , that the
woman (by consent of the judge and her parents) might redeem the
offender from the execution of his sentence, by accepting him for her
husband; if he also was willing to agree to the exchange, but not otherwise.

IN the 3 Edw. I. by the statute Westm. 1. c. 13. the punishment of rape was
much mitigated: the offence itself being reduced to a trespass, if not
prosecuted by the woman within forty days, and subjecting the offender
only to two years imprisonment, and a fine at the king's will. But, this
lenity being productive of the most terrible consequences, it was in ten
years afterwards, 13 Edw I. found necessary to make the offence of rape
felony, by statute Westm. 2. c. 34. And by statute 18 Eliz. c. 7. it is made
felony without benefit of clergy: as is also the abominable wickedness of
carnally knowing or abusing any woman child under the age of ten years;
in which case the consent or non-consent is immaterial, as by reason of
her tender years she is incapable of judgment and discretion. Sir Matthew
Hale is indeed of opinion, that such profligate actions committed on an
infant under the age of twelve years, the age of female discretion by the
common law, either with or without consent, amount to rape and felony;
as well since as before the statute of queen Elizabethd : but he law has in
general been held only to extend to infants under ten.

A MALE infant, under the age of fourteen years, is presumed by law
incapable to commit a rape, and therefore it seems cannot be found guilty
of ti. For though in other felonies malitia supplet aetatem, as has in some
cases been shewn; yet, as to this particular species of felony, the law
supposes an imbecility of body as well as minde.

d 1 Hal. P. C. 631.
THE civil law seems to suppose a prostitute or common harlot incapable of any injuries of this kind: not allowing any punishment for violating the chastity of her, who hath indeed no chastity at all, or at least hath no regard to it. But the law of England does not judge so hardly of offenders, as to cut off all opportunity of retreat even from common strumpets, and to treat them as never capable of amendment. It therefore holds it to be felony to force even a concubine or harlot; because the woman may have forsaken that unlawful course of life: for, as Bracton well observes, licet meretrix suerit antea, certe tunetemoris non suit, cum reclamando nequitiae ejus consentire noluit.

AS to the material facts requisite to be given in evidence and proved upon an indictment of rape, they are of such a nature, that though necessary to be known and settled, for the conviction of the guilty and preservation of the innocent, and therefore are to be found in such criminal treatises as discourse of these matters in detail, yet they are highly improper to be publicly discussed, except only in a court of justice. I shall therefore merely add upon this head a few remarks from sir Matthew Hale, with regard to the competency and credibility of witnesses; which may, salvo pudore, be considered.

AND, first, the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance: if the witness be of good same; if she presently discovered the offence, and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other side, if she be of evil same, and stands unsupported by others; if the concealed the injury for any considerable time after she had opportunity to complain; if the

f Cod. 9. 9. 22. Ff. 47. 2. 39.
h fol. 147.

place, where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry; these and
the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned.

MOREOVER, if the rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness, if she hath sense and understanding to know the nature and obligations of an oath; and, even if she hath not, it is thought by sir Matthew Halei that she ought to be heard without oath, to give the court information; though that alone will not be sufficient to convict the offender. And he is of this opinion, first, because the nature of the offence being secret, there may be no other possible proof of the actual fact; though afterwards there may be concurrent circumstances to corroborate it, proved by other witnesses: and, secondly, because the law allows what the child told her mother, or other relations, to be given in evidence, since the nature of the case admits frequently of no better proof; and there is much more reason for the court to hear the narration of the child herself, than to receive it at second hand from those who swear they heard her say so. And indeed it is now settled, that infants of any age are to be heard; and, if they have any idea of an oath, to be also sworn: it being found by experience that infants of very tender years often give the clearest and truest testimony. But in any of these cases, whether the child be sworn or not, it is to be wished, in order to render her evidence credible, that there should be some concurrent testimony, of time, place and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion. There may be therefore, in many cases of this nature, witnesses who are competent, that is, who may be admitted to be heard; and yet, after being heard, may prove not to be credible, or such as the jury is bound to believe. For one excel-

i 1 Hal. P. C. 634.

lence of the trial by jury is, that the jury are triors of the credit of the witnesses, as well as of the truth of the fact.

IT is true, says this learned judgei, that rape is a mostdetestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent. He then relates two very extraordinary cases of malicious prosecutions for this crime, that had happened within his own
observation; and concludes thus: I mention these instances, that we may be the more cautious upon trials of offences of this nature, wherein the court and jury may with so much ease be imposed upon, without great care and vigilance; the heinousness of the offence many times transporting the judge and jury with so much indignation, that they are overhastily carried to the conviction of the person accused thereof, by the confident testimony of sometimes false and malicious witnesses.

IV. WHAT has been here observed, especially with regard to the manner of proof, which ought to be the more clear in proportion as the crime is the more detestable, may be applied to another offence, of a still deeper malignity; the infamous crime against nature, committed either with man or beast. A crime, which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out: for, if false, it deserves a punishment inferior only to that of the crime itself.

I WILL not act so disagreeable part, to my readers as well as myself, as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature. It will be more eligible to imitate in this respect the delicacy of our English law, which

k 1 Hal. P. C. 635.

treats it, in its very indictments, as a crime not fit to be named; peccatum illud horrible, inter christianos non nominandum. A taciturnity observed likewise by the edict of Constantius and Constans: ubi scelus est id, quod non proficit scire, jubemus insurgere leges, armari jura gladio ultore, ut exquisitis poenis subdantur insanes, qui sunt, vel qui futuri sunt, rei. Which leads me to add a work concerning its punishment.

THIS the voice of nature and of reason, and the express law of God, determine to be capital. Of which we have a signal instance, long before the Jewish dispensation, by the destruction of two cities by fire from heaven: so that this is an universal, not merely a provincial, precept. And our ancient law in some degree imitated this punishment, by commanding such miscreants to be burnt to death; though Fleta says they should be buried alive: either of which punishments was indifferently used for this crime among the ancient Gothsp. But now the general punishment of all
felonies is the same, namely, by hanging: and this offence (being in the
times of popery only subject to ecclesiastical censures) was made single
felony by the statute 25 Hen. VIII. c. 6. and felony without benefit of clergy
by statute 5 Eliz. c. 17. And the rule of law herein is, that, if both are
arrived at years of discretion, agentes et consentientes pari poena
plectanturq.

THESE are all the felonious offences, more immediately against the
personal security of the subject. The inferior offences, or misdemesnors,
that fall under this head, are assaults, batteries, wounding, false
imprisonment, and kidnapping.

V, VI, VII. WITH regard to the nature of the three first of these offences in
general, I have nothing farther to add to what has already been observed in
the preceding book of these com-

l Cod. 9. 9. 31. 
m Levit. xx. 13. 15. 
n Brit. c. 9. 
o l. 1. c. 37. 
p Stiernh. de jure Goth. l. 3. c. 2. 
q 3 Inst. 59.

mentariesr; when we considered them as private wrongs, or civil injuries,
for which a satisfaction or remedy is given to the party aggrieved. But,
taken in a public light, as a breach of the king's peace, an affront to his
government, and a damage done to his subjects, they are also indictable
and punishable with fine and imprisonment; or with other ignominious
corpora penalties, where they are committed with any very atrocious
designs. As in case of an assault with an intent to murder, or with an
intent to commit either of the crimes last spoken of; for which intentional
assaults, in the two last cases, indictments are much more usual, than for
the absolute perpetration of the facts themselves, on account of the
difficulty of proof: and herein, besides heavy fine and imprisonment, it is
usual to award judgment of the pillory.

THERE is also one species of battery, more atrocious and penal than the
rest, which is the beating of a clerk in orders, or clergyman; on account of
the respect and reverence due to his sacred character, as the minister and
ambassador of peace. Accordingly it is enacted by the statute called articuli
cleri, 9 Edw. II. c. 3. that if any person lay violent hands upon a clerk, the amends for the peace broken shall be before the king; that is by indictment in the king's courts: and the assailant may also be sued before the bishop, that excommunication or bodily penance may be imposed: which if the offender will redeem by money, to be given to the bishop, or the party grieved, it may be sued for before the bishop; whereas otherwise to sue in any spiritual court, for civil damages for the battery, falls within the danger of praemunire. But suits are, and always were, allowable in the spiritual court, for money agreed to be given as a commutation for penance. So that upon the whole it appears, that a person guilty of such brutal behaviour to a clergyman, is subject to three kinds of prosecution, all of which may be pursued for one and the same offence: an indictment, for the breach of the king's peace by such assault and battery; a civil action, for the special damage sustained by the party injured; and a suit in the ecclesiastical court, first, pro correctione et salute animae by enjoining penance, and then again for such sum of money as shall be agreed on for taking off the penance enjoined: it being usual in those courts to exchange their spiritual censures for a round compensation in money; perhaps because poverty is generally esteemed by the moralists the best medicine pro salute animae.

VIII. THE two remaining crimes and offences, against the persons of his majesty's subjects, are infringements of their natural liberty: concerning the first of which false imprisonment, its nature and incidents, I must content myself with referring the student to what was observed in the preceding volumew, when we considered it as a mere civil injury. But, besides the private satisfaction given to the individual by action, the law also demands public vengeance for the breach of the king's peace, for the loss which the state sustains by the confinement of one of its members, and for the infringement of the good order of society. We have before seenx, that the most atrocious degree of this offence, that of fending any subject of this realm a prisoner into parts beyond the seas, whereby he is deprived of the friendly assistance of the laws to redeem him from such his
captivity, is punished with the pains of praemunire, and incapacity to hold any office, without any possibility of pardon. Inferior degrees of the same offence of false imprisonment are also punishable by indictment (like assaults and batteries) and the delinquent may be fined and imprisoned. And indeed there can be no doubt, but that all kinds of crimes of a public nature all disturbances of the peace, all oppressions, and other misdemeanours whatsoever, of a notoriously evil example, may be indicted at the suit of the king.

w See Vol. III. pag. 127.
x See pag. 116.
y Stat. 31 Car. II. c. 2.
z West. Symbol. part. 2. pag. 92.
a 1 Hawk. P. C. 210.

IX. THE other remaining offence, that of kidnapping, being the forcible abduction or stealing away of man, woman, or child from their own country, and felling them into another, was capital by the Jewish law, He that stealeth a man, and selleth him, or if he be found in his hand, he shall surely be put to death. So likewise in the civil law, the offence of spirit ing away and stealing men and children, which was called plagium, and the offenders plagiarii, was punished with death. This is unquestionably a very heinous crime, as it robs the king of his subjects banishes a man from his country, and may in its consequences; and therefore the common law of England has punished it with fine, imprisonment, and pillory. And also the statute 11 & 12 W. III. c. 7. though principally intended against pirates, has a clause that extends to prevent the leaving of such persons abroad, as are thus kidnapped or spirited away; by enacting, that if any captain of a merchant vessel shall (during his being abroad) force any person on shore, or wilfully leave him behind, or refuse to bring home all such men as he carried out, if able and desirous to return, he shall suffer three months imprisonment. And thus much for offences that more immediately affect the persons of individuals.

b Exod. xxi, 16.
c Ff. 48. 15. 1.
d Raym. 474. 3 Show, 221. Skinn 47. Comb. 10.
CHAPTER THE SIXTEENTH.
OF OFFENCES AGAINST THE HABITATIONS
OF INDIVIDUALS.

THE only two offences, that more immediately affect the habitations of
individuals or private subjects, are those of arson and burglary.

I. ARSON, ab ardendo, is the malicious and wilful burning of the house or
outhouses of another man. This is an offence of very great malignity, and
much more pernicious to the public than simple theft: because, first, it is
an offence against that right, of habitation, which is acquired by the law of
nature as well as by the laws of society; next, because of the terror and
confusion that necessarily attends it; and, lastly, because in simple theft
the thing stolen only changes its master, but still remains in esse for the
benefit of the public, whereas by burning the very substance is absolutely
destroyed. It is also frequently more destructive than murder itself, of
which too it is often the cause: since murder, atrocious as it is, seldom
extends beyond the felonious act designed; whereas fire too frequently
involves in the common calamity persons unknown to the incendiary, and
not intended to be hurt by him, and friends as well as enemies.

For which reason the civil law punishes with death such as maliciously set
fire to houses in towns, and contiguous to others; but is more merciful to
such as only fire a cottage, or house, standing by itself.

OUR English law also distinguishes with much
accuracy upon this crime.
And therefore we will enquire, first, what is such a house as may be the
subject of this offence; next, wherein the offence itself consists, or what
amounts to a burning of such house; and, lastly how the offence is
punished.

1. NOT only the bare dwelling house, but all outhouses that are parcel
thereof, though not contiguous thereto, nor under the same roof, as barns
and stables, may be the subject of arson. And this by the common law:
which also accounted it felony to burn a single barn in the field, if filled
with hay or corn, though not parcel of the dwelling house. The burning of a
stack of corn was anciently likewise accounted arson. And indeed all the
niceties and distinctions which we meet with in our books, concerning
what shall, or shall not, amount to arson, seem now to be taken away by a
variety of statutes; which will be mentioned in the next chapter, and have made the punishment of wilful burning equally extensive as the mischief. The offence of arson (strictly so called) may be committed by wilfully setting fire to one's own house, provided one's neighbour's house is thereby also burnt; but if no mischief is done but to one's own, it does not amount to felony, though the fire was kindled with intent to burn another's. For by the common law no intention to commit a felony amounts to the same crime; though it does, in some cases, by particular statutes. However such wilful firing one's own house, in a town, is a high misdemeanour, and punishable by fine, imprisonment, and perpetual sureties for the good behaviour. And if a landlord or reversioner sets fire

a Ff. 48. 19. 28. 12.
b 1 Hal. P. C. 567.
c 3 Inst. 69.
d 1 Hawk. P. C. 105.
e Cro. Car. 377.
f 1 Hal. P. C. 568. 1 Hawk. P. C. 106.

to his house, of which another is in possession under a lease from himself or from those whose estate he hath, it shall be accounted arson; for, during the lease, the house is the property of the tenant.

2. AS to what shall be said a burning, so as to amount to arson: a bare intent, or attempt to do it, by actually setting fire to an house, unless it absolutely burns, does not fall within the description of incendit et combussit; which were words necessary, in the days of law-latin, to all indictments of this sort. But the burning and consuming of any part is sufficient; though the fire be afterwards extinguished. Also it must be a malicious burning; otherwise it is only a trespass: and therefore no negligence or mischance amounts to it. For which reason, though an unqualified person, by shooting with a gun, happens to set fire to the thatch of a house, this sir Matthew Hale determines not to be felony, contrary to the opinion of former writers. But by statute 6 Ann c. 31. any servant, negligently setting fire to a house or outhouses, shall forfeit 100l, or be sent to the house of correction for eighteen months: in the same manner as the Roman law directed, qui negligenter ignes apud sehabuerint, fuftibus vel flagellis caedik.
3. THE punishment of arson was death by our ancient Saxon lawsl. And, in the reign of Edward the first, this sentence was executed by a king of lex talionis; for the incendiaries were burnt to deathm: as they were also by the gothic constitutionsn. The statute 8 Hen. VI. c. 6. made the wilful burning of houses, under some special circumstances therein mentioned, amount to the crime of high treason. But it was again reduced to felony by the general acts of Edward VI and queen Mary: and now the punishment of all capital felonies is uniform, namely, by suspension. The offence of arson was denied the benefit of clergy by statute

g Fost. 115.
h 1 Hawk. P. C. 106.
i 1 Hal. P. C. 569.
k Ff. 1. 15. 4.
l LL. Inne. c. 7.
m Britt. c. 9.
n Stierh. de jure Goth. l. 3. c. 6.

21 Hen. VIII. c. 1. but that statute was repealed by 1 Edw. VI. c. 12. and arson was afterwards held to be ousted of clergy, with respect to the principal offender, only by inference and deduction from the statute 4 & 5 P. & M. c. 4. which expressly denied it to the accessoryo; though now it is expressly denied to the principal also, by statute 9 Geo. I. c. 22.

II. BURGLARY, or nocturnal housebreaking, burgi latrocinium, which by our ancient law was called hamesecken, as it is in Scotland to this day, has always been looked upon as a very heinous offence: not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation, which every individual might acquire even in a state of nature; an invasion, which in such a state, would be sure to be punished with death, unless the assailant were the stronger. But in civil society, the laws also come in to the assistance of the weaker party: and, besides that they leave him this natural right of killing the aggressor, if he can, (as was shewn in a former chapterp) they also protect and avenge him, in case the might of the assailant is too powerful. And the law of England has so particular and tender a regard to the immunity of a man's house, that it styles it his castle, and will never suffer it to be violated with impunity: agreeing herein with the sentiments of ancient Rome, as expressed in the words of Tullyq; quid enim sanctius, quid omni religione munitius, quam domus
uniuscujusque civium For this reason no doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private. Hence also in part arises the animadversion of the law upon eaves-droppers, nuisancers, and incendiaries: and to this principle it must be assigned, that a man may assemble people together lawfully (at least if they do not exceed eleven) without danger of raising a riot, rout, or unlawful assembly, in order to

l. See pag. 180.
q Pro. domo, 41.

protect and defend his house; which he is not permitted to do in any other caser.

THE definition of a burglar, as given us by sir Edward Cokes, is, he that by night breaketh and entreth into a mansionhouse, with intent to commit a felony. In this definition there are four things to be considered; the time, the place, the manner, and the intent.

1. THE time must be by night, and not by day; for in the day time there is no burglary. We have seen, in the case of justifiable homicide, how much more heinous all laws made an attack by night, rather than by day; allowing the party attacked by night to kill the assailant with impunity. As to what is reckoned night, and what day, for this purpose: anciently the day was accounted to begin only at sunrising, and to end immediately upon sunset; but the better opinion seems to be, that if there be daylight or crepusculum enough, begun or left, to discern a man's face withal, it is no burglary. But this does not extend to moonlight; for then many midnight burglaries would go unpunished: and besides, the malignity of the offence does not so properly arise from its being done in the dark, as at the dead of night; when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner, and rendered his castle defenceless.

2. AS to the place. It must be, according to sir Edward Coke's definition, in a mansion house; and therefore to account for the reason why breaking open a church is burglary, as it undoubtedly is, he quaintly observes that it is domus mansionalis Deiw. But it does not seem absolutely necessary, that it should in all cases be a mansion-house; for it may also be committed by breaking the
gates or walls of a town in the night; though that perhaps Sir Edward Coke would have called the mansion-house of the garrison or corporation. Selman defines burglary to be, nocturnadiruptio alicujus habitaculi, vel ecclesiae, etiam murorum portarumveburgi, ad feloniam perpetrandam. And therefore we may safely conclude, that the requisite of its being domus mansionalis is only in the burglary of a private house; which is the most frequent, and in which it is indispensably necessary to form its guilt, that it must be in a mansion or dwelling house. For no distant barn, warehouse, or the like, are under the same privileges, nor looked upon as a man's castle of defence: nor is a breaking open of houses wherein no man resides, and which therefore for the time being are not mansion-houses, attended with the same circumstances of midnight terror. A house however, wherein a man sometimes resides, and which the owner hath only left for a short season, animo revertendi, is the object of burglary; though no one be in it, at the time of the fact committed. And if the barn, stable, or warehouse be parcel of the mansionhouse, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenants, if within the curtilage or homestall. A chamber in a college or an inn of court, where each inhabitant hath a distinct property, is, to all other purposes as well as this, the mansion-house of the owner. So also is a room or lodging, in any private house, the mansion for the time being of the lodger. The house of a corporation, inhabited in separate apartments by the officers of the body corporate, is the mansion-house of the corporation. And not of the respective officers. But if I hire a shop, parcel of another man's house, and work or trade in it, but never lie there; it is no dwellinghouse, nor can burglary be committed therein: for by the lease it is severed from the rest of the house, and therefore is not the dwellinghouse of him who occupies the other part;

y 1 Hal. P. C. Fost. 77.
z 1 Hal. P. C. 558. 1 Hawk. P. C. 104.
neither can I be said to dwell therein, when I never lie therec . Neither can burglary be committed in a tent or booth erected in a market or fair; though the owner may lodge thereind : for the law regards thus highly nothing but permanent edifices; a house or church, the wall, or gate of a town; and it is the folly of the owner to lodge in so fragile a tenement: but his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted wagon in the same circumstance.

3. AS to the manner of committing burglary: there must be both a breaking and an entry to complete it. But they need not be both done at once: for, if a hole be broken one night, and the same breakers enter the next night through the same, they are burglarse . there must be an actual breaking; not a mere legal clausum fregit, (by leaping over invisible ideal boundaries, which may constitute a civil trespass) but a substantial and forcible eruption. As at least by breaking; not a mere legal clausum fregit, (by leaping over invisible ideal boundaries, which may constitute a civil trespass) but a substantial and forcible eruption. As at least by breaking, or taking out the glass of, or otherwise opening, a window; picking lock, or opening it with a key; nay, by lifting up the latch of a door, or unloosing any other fastening which the owner has provided. But if a person leaves his doors or windows open, it is his own folly and negligence; and if a man enters therein, it is no burglary: yet, if he afterwards unlocks an inner or chamber door, it is fof . But to come down a chimney is held a burglarious entry; for that is as much closed, as the nature of things will permitg . So also to knock at a door, and upon opening it to rush in, with a felonious intent; or, under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance, in order to search for traitors, and then to bind the constable and rob the house; all these entries have been adjudged burglarious, though there was no actual breaking: for the law will not suffer itself to be trifled with by such evasions, especially under the cloke of legal processh . And so, if a servant

a 1 Hal. P. C. 556.
b Foster. 38, 39.
c 1 Hal. P. C. 558.
d 1 Hawk. P. C. 104.
e 1 Hal. P. C. 551.
f Ibid. 553.
g 1 Hawk. P. C. 102. 1 Hal. P. C. 552.
opens and enters his master's chamber door with a felonious design; or if any other person lodging in the same house, or in a public inn, opens and enters another's door, with such evil intent; it is burglary. Nay, if the servant conspires with a robber, and lets him into the house by night, this is burglary in both: for the servant is doing an unlawful act, and the opportunity afforded him, of doing it with greater ease, rather aggravates than extenuates the guilt. As for the entry, any the least degree of it, with any part of the body, or with an instrument held in the hand, is sufficient: as, to step over the threshold, to put a hand or a hook in at a window to draw out goods, or a pistol to demand one's money, are all of them burglarious entries. The entry may be before the breaking, as well as after: for by statute 12 Ann. c. 7. if a person enters into or is within, the dwelling house of another, without breaking in, either by day or by night, with intent to commit felony, and shall in the night break out of the same, this is declared to be burglary; there having before been different opinions concerning it: lord Bacon holding the affirmative, and sir Matthew Hale the negative. But it is universally agreed, that there must be both a breaking, either in fact or by implication, and also an entry, in order to complete the burglary.

4. AS to the intent; it is clear, that such breaking and entry must be with a felonious intent, otherwise it is only a trespass. And it is the same, whether such intention be actually carried into execution, or only demonstrated by some attempt or overt act, of which the jury is to judge. And therefore such a breach and entry of a house as has been before described, by night, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary; whether the thing be actually perpetrated or not. Nor does it make any difference, whether the offence were felony at common law, or only created so by statute; since

i 1 Hal. P. C. 553. 1 Hal. P. C. 103.
k 1 Hal. P. C. 1 Hawk. P. C. 103.
l Elem. 65.
m 1 Hal. P. C. 554.

that statute, which makes an offence felony, gives it incidentally all the properties of a felony at common law.
THUS much for the nature of burglary; which is, as has been said, a felony at
common law, but within the benefit of clergy. The statute however of 18
Eliz. c. 7. takes away clergy from the principals, and that of 3 & 4 W. & M.
c. 9. from all accessories before the fact. And, in like manner, the laws of
Athens, which punished no simple theft with death, made burglary a
capital crime.

n 1 Hawk. P. C. 105.

CHAPTER THE SEVENTEENTH.
OF OFFENCES AGAINST PRIVATE PROPERTY.

THE next, and last, species of offences against private subjects, are such as
more immediately affect their property. Of which there are two, which are
attended with a breach of the peace; larceny, and malicious mischief: and
one, that is equally injurious to the rights of property, but attended with
no act of violence; which is the crime of forgery. Of these three in their
order.

1. larceny, or theft, by contraction for latrocin, latrocinium, is
distinguished by the law into two sorts; the one called simple larceny, or
plain theft unaccompanied with any other atrocious circumstance; and
mixt or compound larceny, which also includes in it the aggravation of a
taking from one's house or person.

AND, first, of simple larceny: which, when it is the stealing of goods above
the value of twelvopence, is called grand larceny; when of goods to that
value, or under, is petit larceny: offences, which are considerably
distinguished in their punishment, but not otherwise. I shall therefore first
consider the nature of simple larceny in general; and then shall observe
the different degrees of punishment, inflicted on its two several branches.

SIMPLE larceny then is the felonious taking, and carrying away, of the
personal goods of another. This offence certainly commenced then,
whenever it was, that the bounds of property, or laws of meum and tuum,
were established. How far such an offence can exist in a state of nature,
where all things are held to be common, is a question that may be solved
with very little difficulty. The disturbance of any individual, in the occupation of what he has seised to his present use, seems to be the only offence of this king incident to such a state. But, unquestionably, in social communities, when property is established, the necessity whereof we have formerly seen, any violation of that property is subject to be punished by the laws of society: though how far that punishment should extend, is matter of considerable doubt. At present we will examine the nature of theft, or larceny, as laid down in the foregoing definition.

1. IT must be a taking. This implies the consent of the owner to be wanting. Therefore no delivery of the goods from the owner to the offender, upon trust, can ground a larceny. As if A lends B a horse, and he rides away with it; or, if I fend goods by a carrier, and he carries them away; these are no larcinies. But if wine, and takes away part thereof, or if he carries it to the place appointed, and afterwards takes away the whole, these are larcinies: for here the animus furandi is manifest; since in the first case he had otherwise no inducement to open the goods, and in the second the trust was determined, the delivery having taken its effect. But bare non-delivery shall not of course be intended to arise from a felonious design; since that may happen from a variety of other accidents. Neither by the common law was it larceny in any servant to run away with the goods committed to him to keep, but only a breach of civil trust. But by statute 33 Hen. VI. c. 1. the servants of persons

a See Vol. II. pag. 8, & c.
b 1 Hal. P. C. 504.
c 3 Inst. 107.

Deceased, accused of embezzling their master's goods, may by writ out of chancery (issued by the advice of the chief justices and chief baron, or any two of them) and proclamation made thereupon, be summoned to appear personally in the court of king's bench, to answer their master's executors in any civil suit for such goods; and shall, on default of appearance, be attainted of felony. And by statute 21 Hen. VIII. c. 7. if any servant embezzles his master's goods to the value of forty shillings, it is made felony; except in apprentices, and servants under eighteen years old. But if he had not the possession, but only the care and oversight of the goods, as the butler of plate, the shepherd of sheep, and the like, the embezzling of them is felony at common law. So if a guest robs his inn or tavern of a piece of plate, it is larceny; for he hath not the possession delivered to him,
but merely the usee: and so it is declared to be by statute 3 & 4 W. & M. c. 9. if a lodger runs away with the goods from his ready furnished lodging. Under some circumstances also a man maybe guilty of felony in taking his own goods: as if he steals them from a pawnbroker, or any one to whom he hath delivered and entrusted them, with intent to charge such bailee with the value; or if he robs his own messenger on the road, with intent of charge the hundred with the loss according to the statute of Winchesterf.

2. THERE must not only be a taking, but a carrying away: cepit et aportavit was the old law-latin. A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient aportation, or carrying away. As if a man be leading another's horse out of a close, and be inn, has removed them from his chamber down stairs; these have been adjudged sufficient carryings away, to constitute a larcenyg. Or if a thief, intending to steal plate, takes it out of a chest in which it was, and lays it down upon the floor, but is surprized before he can make his escape with it; this is larcenyh.

d 1 Hal. P. C. 506.
e 1 Hawk. P. C. 90.
f Foster. 123, 124.
g 3 Inst. 108, 109.

chest in which it was, and lays it down upon the floor, but is surprized before he can make his escape with it; this is larcenyh.

3. THIS taking, and carrying away, must also be felonious; that is, done animo furandi: or, as the civil law expresses it, lucri causai. This requisite, besides excusing those who labour under incapacities of mind or will, (of whom we spoke sufficiently at the entrance of this book) indemnifies also mere trespassers, and other petty offenders. As if a servant takes his master's horse, without his knowledge, and brings him home again: if a neighbour takes another's plough, that is left in the field, and uses it upon his own land, and then returns it: if, under colour of arrear of rent, where none is due, I distrein another's cattle, or fiefe them: all these are misdemeanors and trespasses, but no feloniesl. The ordinary discovery of a felonious intent is where the party doth it clandestinely, or being charged with the facts, denies it. But this is by no means the only criterion of criminality: for in cases that may amount to larceny the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those, which may evidence a felonious intent,
of animum furandi: wherefore they must be left to the due and attentive consideration of the court and jury.

4. THIS felonious taking and carrying away must be of the personal goods of another: for if they are things real, or favour of the reālty, larceny at the common law cannot be committed of them. Lands, tenements, and hereditaments (either corporeal or incorporeal) cannot in their nature be taken and carried away. And of things likewise that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house, no larceny could be committed by the rules or the common law; but the severance of them was, and in many things is still, merely a trespass: which depended on a subtility in the legal notions of

h 1 Hawk. P. C. 93.
i Inst. 4. 1. 1.
k See pag. 20.
l 1 Hal. P. C. 509.

our ancestors. These things were parcel of the real estate; and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immoveablem. And if they were severed by violence, so as to be changed into moveables; and at the same time, by one and the same continued act, carried off by the person who severed them; they could never be said to be taken from the proprietor, in this their newly acquired state of mobility (which is essential to the nature of larceny) being never, as such, in the actual or constructive possession of any one, but of him who committed the trespass. He could not in strictness be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods. But if the thief severs them at one time, whereby the trespass is completed, and they are converted into personal chattels, in the constructive possession of him on whose soil they are left or laid; and comes again at another time, when they are so turned into personalty, and takes them away; it is larceny: and so it is, if the owner, or any one else, has severed them. And now, by the statute 4 Geo II. c. 32. to steal, or sever with intent to steal, any lead or iron fixed to a house, or in any court or garden thereunto belonging, is made felony, liable to transportation for seven years: and to steal underwood or hedges, and the like, to rob orchards or gardens of fruit growing therein, to steal or otherwise destroy any turnips or the roots of madder when growing, are by the statutes 43 Eliz. c. 7. 15
Car. II. c. 2. 23. Geo. II. c. 26. and 31 Geo. II. c. 35. punishable criminally, by whipping, small fines, imprisonment, and satisfaction to the party wronged, according to the nature of the offence. Moreover, the stealing by night of any trees, or of any roots, shrubs, or plants to the value of 5s, is by statute 6 Geo. III. c. 36. made felony in the principals, aiders, and abettors, and in the purchasers thereof knowing the same to be stolen: and by statute 6 Geo. III. c. 48. the stealing of any timber trees therein specified, and of any root,

m See Vol. II. pag. 16.

n 5 Inst. 109. 1 Hal. P. C. 510.
o Oak, beech, chasnut, walnut, ash, elm, cedar, fir, asp, lime, svaaimore, and Birth.

shrub, or plant, by day or night, is liable to pecuniary penalties for the two first offences, and for the third is constituted a felony liable to transportation for seven years. Stealing are out of mines is also no larceny, upon the same principle of adherence to the freehold; with an exception only to mines of black lead, the stealing of are out of which is felony without benefit of clergy by statute 25 Geo. II. c. 10. Upon nearly the same principle the stealing of writings relating to a real estate is no felony, but a trespass: because they concern the land, or (according to our technical language) favour of the realty, and are considered as part of it by the law; so that they descend to the heir together with the land which they concern.

BONDS, bills, and notes, which concern mere choses in action, were also at the common law held not to be such goods whereof larceny might be committed; being of no intrinsic valuer, and not importing any property in the possession of the person from whom they are taken. But by the statute 2 Geo. II. c. 25. they are now put upon the same footing, with respect to larcinies, as the money they were meant to secure. And, by statute 7 Geo. III. c. 50. if any officer or servant of the post-office shall secrete, embezzle, or destroy any letter or packet, containing any bank note or other valuable paper particularly specified in the act, or shall steal the same out of any letter of packet, he shall be guilty of felony without benefit of clergy. Or, if he shall destroy any letter or packet with which he has received money for the posture, or shall advance the rate of posture on any letter or packet sent by the post, and shall secrete the money received by such advancement, he shall be guilty of single felony. larceny also could
not at common law be committed of treasure-trove, or wreck, till seised by the king or him who hath the franchise; for till such seizure no one hath a determinate property therein. But by statute 26 Geo. II. c. 19. plundering, or stealing from, any ship in distress (whether wreck or no wreck)

q See Vol. II. pag. 438.
r 8 Rep. 33.

is felony without benefit of clergy: in like manner as, by the civil laws, this inhumanity is also punished in the same degree as the most atrocious theft.

larceny also cannot be committed of such animals, in which there is no property either absolute or qualified; as of beasts that are feræ naturæ, and unreclaimed such as deer, hares, and conies, in a forest, chase, or warren; fish in an open river or pond; or wild fowls at their natural liberty. But if they are reclaimed or confined, and may serve for food, it is otherwise, even at common law: for of deer so inclosed in a park that they may be taken at pleasure, fish in a trunk, and pheasants or partridges in a mew, larceny may be committed. And now, by statute 9 Geo. I. c. 22. to kill or steal any deer in a forest, or other place, enclosed; to rob a warren; or to steal fish from a river or pond, being in this last case armed and disguised; these are felonies without benefit of clergy. And by statute 13 Car. II. c. 10. to steal deer in any forest, though uninclosed, is a forfeiture of 20l. for the first offence, and by statute 10 Geo. II. c. 32. seven years transportation for the second offence: which punishment is also inflicted for the first offence upon such as come to hunt there armed with offensive weapons. Also by statute 5 Geo. III. c. 14. the penalty of transportation for seven years is inflicted on persons stealing or taking fish in any water within a park, paddock, orchard, or yard; and on the receivers, aiders, and abettors: and the like punishment, or whipping, fine, or imprisonment, is provided for the taking or killing of conies in open warrens. And a forfeiture of five pounds to the owner of the fishery is made payable by persons taking or destroying (or attempting so to do) any fish in any river or other water within any inclosed ground being private property. Stealing hawks, in disobedience to the rules prescribed by the statute 37 Edw. III. c. 19. is also felony. It is also saidy, that, if swans

s Cab. 6. 2. 18.
be lawfully marked, it is felony to steal them, though at large in a public river; and that it is likewise felony to steal them, though unmarked, if in any private river or pond: otherwise it is only a trespass. But, of all valuable domestic animals, as horses, and of all animals domitae naturae, which serve for food, as swine, sheep, poultry, and the like larceny may be committed; and also of the flesh of such as are ferae naturae, when killed. As to those animals, which do not serve for food, and which therefore the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein, and maintain a civil action for the loss of them, yet they are not of such estimation, as that the crime of stealing them amounts to larceny.

NOTWITHSTANDING however that no larceny can be committed, unless there be some property in the thing taken, and an owner; yet, if the owner be unknown, provided there be a property, it is larceny to steal it; and an indictment will lie, for the goods of a person unknown. In like manner as, among the Romans, the lex Hostilia de furtis provided, that a prosecution for theft might be carried on without the intervention of a grave; which is the property of those, whoever they were, that buried the deceased: but stealing the corpse itself, which has no owner, (though a matter of great indecency) is no felony, unless some of the gravecloths be stolen with it. Very different from the law of the Franks, which seems to have respected both as equal offences; when it directed that a person, who had dug a corpse out of the ground in order to strip it, should be banished from society, and no one suffered to relieve his wants, till the relations of the deceased consented to his readmission.

z 1 Hal. P. C. 511.
a See Vol. II. pag. 393.
b 1 Hal. P. C. 512.
c Ibid.
d Gravin. L. 3. 106.
e See Vol. II. pag. 429.
HAVING thus considered the general nature of simple larceny, I come next to treat of its punishment. Theft, by the Jewish law, was only punished with a pecuniary fine, and satisfaction to the party injured. And in the civil law, till some very late constitutions, we never find the punishment capital. The late of Draco at Athens punished it with death: but his laws were said to be written in blood; and Solon afterwards changed the penalty to a pecuniary mulct, And so the Attic laws in general continued; except that once, in a time of dearth, it was made capital to break into a garden, and steal figs: but this law, and the informers against the offence, grew so odious, that from them all malicious informers were styled sycophants; a name, which we have much perverted from its original meaning. From these examples, as well as the reason of the thing, many learned and scrupulous men have questioned the propriety, if not lawfulness, of inflicting capital punishment for simple theft. And certainly the natural punishment for injuries to property seems to be the loss of the offender's own property: which ought to be universally the case, were all men's fortunes equal. But as those, who have no property themselves, are generally the most ready to attack the property of others, it has been found necessary instead of a pecuniary to substitute a corporal punishment: yet how far this corporal punishment ought to extend, is what has occasioned the doubt. Sir Thomas More, and the marquis Beccariak, at the distance of more than two centuries, have very sensibly proposed that kind of corporal

\[\text{G Exod. c. xxii.}\]
\[\text{H Petit. LL. Attic. l. 7. tit. 5.}\]
\[\text{i Eft enim ad vindicanda furta nimis atrox, nec tamen ad refrænanda fufficiens: quippe neque furtum simplex tam ingens facinus eft, ut capite debeat plecti; neque ulla poena eft tanta, nt ab latrociniiis cohibeat eos, qui nullam aliam artem quaerendi victus babent. (Mori Utopia. Edit. Glaflg. 1750. pag. 21.)Denique, cum lex Mofaica, Quanquam inclemens et afpera, tamen pecunia furtum, haud motce, mulctavit; ne putemus Deum, in nova lege clementiae qua pater imperat filiiis, majorem indulfifue nobis invicem faeviendi licentiam. Haec funt cur non licere putem: quam vero fit abfurum, atque etiam perniciosum reipublicae, surem atque homicideam ex aequo puniri, nemo eft (opinor) qui nefciat. (Ibid. 39.)}\n\[\text{j Utop. pag. 42.}\]
\[\text{k ch. 22.}\]
punishment, which approaches the nearest to a pecuniary satisfaction; viz. a temporary imprisonment, with an obligation to labour, first for the party robbed, and afterwards for the public, in works of the most slavish kind: in order to oblige the offender to repair, by his industry and diligence, the depredations he has committed upon private property and public order. But, notwithstanding all the remonstrances of speculative politicians and moralists, the punishment of theft still continues, throughout the greatest part of Europe, to be capital: and Puffendorf, together with sir Matthew Halem, are of opinion that this must always be referred to the prudence of the legislature; who are to judge, say they, when crimes are become so enormous as to require such sanguinary restrictions. Yet both these writers agree, that such punishment should be cautiously inflicted, and never without the utmost necessity.

OUR ancient Saxon laws nominally punished theft with death, if above the value of twelvepence: but the criminal was permitted to redeem his life by a pecuniary ransom; as, among their ancestors the Germans, by a stated numer of cattle. o But in the ninth year of Henry the first, this power of redemption was taken away, and all persons guilty of larceny above the value of twelvepence were directed to be hanged; which law continues in force to this day. p For though the inferior species of theft, or petit larceny, is only punished by whipping at common lawq, or by statute 4 Geo. I. c. 11. may be extended to transportation for seven years, yet the punishment of grand larceny, or the stealing above the value of twelvepence, (which sum was the standard in the time of king Athelstan, eight hundred years ago) is at common law regularly death. Which, considering the great intermediate alteration in the price or denomination of money, is undoubtedly a very rigorous constitution; and made sir Henry Spelman (above a century since, when money was at twice its present rate) complain, that while every thing else was risen in its nominal value, and become dearer, the life of man had continually grown cheaperr.

l L. of N. b. 8. c. 3.
m 1 Hal. P. C. 13.
n See pag. 9.
o Tac. de mor. Germ. c. 12.
p 1 Hal. P. C. 12. 3 Inst. 53.
q 3 Inst. 218.
It is true, that the mercy of juries will often make them strain a point, and bring in larceny to be under the value of twelvepence, when it is really of much greater value: but this is a kind of pious perjury, and does not at all excuse our common law in this respect from the imputation of severity, but rather strongly confesses, the charge. It is likewise true, that by the merciful extensions of the benefit of clergy by our modern statute law, a person who commits a simple larceny to the value of thirteen pence or thirteen hundred pounds, though guilty of a capital offence, shall be excused the pains of death: but this is only for the first offence. And in many cases of simple larceny the benefit of clergy is taken away by statute: as from horsestealings; taking woolen cloth from off the tenterst, or linen from the place of manufacture; stealing sheep or other cattle specified in the acts; thefts on navigable rivers above the value of forty shillings; plundering vessels in distress, or that have suffered shipwreck; stealing letters sent by the post; and also stealing deer, hares, and conies under the peculiar circumstances mentioned in the Waltham black act. Which additional severity is owing to the great malice and mischief of the theft in some of these instances; and, in others, to the difficulties men would otherwise lie under to preserve those goods, which are so easily carried off. Upon which last principle the Roman law punished more severely than other thieves the abigei, or stealers of cattle; and the balnearii, or such as stole the cloths of persons who were washing in the public baths: both which constitutions seem to be borrowed from the laws of Athens.

r Gloff. 350.

s Stat. 1 Edw. VI. C. 12. 2. & 3. Edw. VI.
t Stat. 22 Car. II. c. 5.
z Stat. 9 Geo. I. c. 22.
v Stat. 18 Geo. II. c. 27.
a Ff. 47. t. 14.
b Ibid. t. 17.
u Stat. 14 Geo. II. c. 6. 15 Geo. II. c. 34.
w Stat. 24 Geo. II. c. 45.

And so too the ancient Goths punished with unrelenting severity thefts of cattle, or of corn that was reaped and left in the field: such kind of property (which no human industry can sufficiently guard) being esteemed under the peculiar custody of heaven. And thus much for the offence of simple larceny.

MIXED, or compound larceny is such as has all the properties of the former, but is accompanied with one of, or both, the aggravations of a taking from one's house or person. First therefore of larceny from the house, and then of larceny from the person.

1. larceny from the house, though it seems (from the considerations mentioned in the preceding chapter to have a higher degree of guilt than simple larceny, yet is not at all distinguished from the other at common law: unless where it is accompanied with the circumstance of breaking the house by night; and then we have seen that it falls under another description, viz. that of burglary. But now by several acts of parliament (the history of which is very ingeniously deduced by a learned modern writer, who hath shewn them to have gradually arisen from our improvements in trade and opulence) the benefit of clergy is taken from larcinies committed in an house in almost every instanceh. The multiplicity of which acts are apt to create some confusion; but upon comparing them diligently we may collect, that the benefit of clergy is denied upon the following domestic aggravations of larceny; viz. 1. In all larcinies above the value of twelvepence, from a church, or from a dwelling-house, or booth, any person being therein. 2. In all larcinies to the value of 5 s. committed by breaking the dwelling-house, though no person be therein. 3. In all larcinies to the value of 40 s. from a dwelling-house, or its outhouses, without breaking in, and whether any person be therein or no. 4 In all larcinies to the value of 5 s. from any shop, warehousei, coachhouse, or stable; whether the same be broken open or
not, and whether any person be therein or no. In all these cases, whether happening by day or by night, the benefit of clergy is taken away from the offenders.

2. larceny from the person is either by privately stealing; or by open and violent assault, which is usually called robbery.

THE offence of privately stealing from a man's person, as by picking his pocket or the like, without his knowledge, was debarred of the benefit of clergy, so early as by the statute 8 Eliz. c. 14. But then it must be such a larceny, as stands in need of the benefit of clergy, viz. of above the value of twelvepence; else the offender shall not have judgment of death. For the statute creates no new offence; but only takes away the benefit of clergy, which was a matter of grace, and leaves the thief to the regular judgment of the ancient law. k. This severity (for a most severe law it certainly is) seems to be owing to the ease with which such offences are committed, and the difficulty of property, in the manual occupation or corporal possession of the owner, which was an offence even in a state of nature. And therefore the faccularii, or cutpurses, were more severely punished than common thieves by the Roman and Athenian laws l.

OPEN and violent larceny from the person, or robbery, the rapina of the civilians, is the felonious and forcible taking, from the person of another, of goods or money to any value, by putting him in fear m. 1. There must be a taking, otherwise it is no robbery. A mere attempt to rob was indeed held to be felony, so late as Henry the fourth's time n: but afterwards it was taken to be only a misdemeanour, and punishable with fine and imprison-

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i See Foster. 78, 79. Barr. 379.
k 1 Hawk. P. C. 98.
m 1 Hawk. P. C. 95.
n 1 Hal. P. C. 532.
well as a pound, thus forcibly extorted, makes a robbery. 3. Lastly, the
taking must be by force, or a previous putting in fear; which makes the
violation of the person more atrocious than privately stealing. For if one
privately steals sixpence from the person of another, and afterwards keeps
it by putting him in fear, this is no robbery, for the fear is subsequent:
neither is it capital, as privately stealing, being under the value of
twelvepence. Yet this putting in fear does not imply, that any great degree
of terror or affright in the party robbed is necessary to constitute a
robbery: it is sufficient that so much force, or threatening by work or
gesture, be used, as might create an apprehension of danger, or oblige a
man to part with his property without or against his consents. Thus, if a
man be knocked down without previous warning, and stripped of his
property while senseless, though strictly he cannot be said to be put in
fear, yet this is undoubtedly a robbery. Or, if a person with a sword drawn
begs an alms, and I give it him through mistrust and apprehension of
violence, this is a felonious robbery. So if, under a pretence of sale, a man
forcibly extorts money from another, neither shall this subterfuge avail
him. But it is doubted, whether the forcing a higler, or other chapman, to
sell his wares, and giving him the full value of them, amounts to so
heinous a crime as robbery.

0 1 Hal. P. C. 533.
p 1 Hawk. P. C. 97.
q Ff. 4. 2. 14. 12.
r 1 Hal. P. C. 534.
s Fost. 128.
t 1 Hawk. P. C. 96.
u Ibid. 97.

THIS species of larceny is debarred of the benefit of clergy by statute 23
Hen. VIII. c. 1. and other subsequent statutes; not indeed in general, but
only when committed in or near the king’s highway. A robbery therefore in
a distant field, or footpath, was not punished with death; but was open
to the benefit of clergy, till the statute 3 & 4 W. & M. c. 9. which takes away
clergy from robbery wherefoever committed.

II. MALICIOUS mischief, or damage, is the next species of injury to
private property, which the law considers as a public crime. This is such as
is done, not animo furandi, or with an intent of gaining by another's loss;
which is some, though a weak, excuse: but either out of a spirit of wanton
cruelty, or black and diabolical revenge. In which it bears a near relation to the crime of arson; for as that affects the habitation, so this does the other property, of individuals. And therefore any damage arising from this mischievous disposition, though only a trespass at common law, is now by a multitude of statutes made penal in the highest degree. Of these I shall extract the contents in order of time.

AND, first, by statute 22 Hen. VIII. c. 11. perversely and maliciously to cut down or destroy the powdike, in the fens of Norfolk and Ely, is felony. By statute 43 Eliz. c. 13. (for preventing rapine on the northern borders) to burn any barn or stack of corn or grain; or to pery, or make spoil, of the persons or goods of the subject upon deadly feud, in the four northern counties of Northumberland, Westmorland, Cumberland, and Durham; or to give or take any money or contribution, there called blackmail, to secure such goods from rapine; is felony without benefit of clergy. By statute 22 & 23 Car. II. c. 7. to burn any ricks or stacks of corn, hay, or grain, barns, houses, buildings, or kilns; or maliciously, unlawfully, and willingly to kill any horses, sheep, or other cattle, in the night time, is felony; but the offender may make his election to be transported for seven years: and to maim or hurt such cattle is a trespass, for which treble damages shall be recovered. By statute 1 Ann. st. 2. c. 9. captains and mariners belonging to ships, and destroying the same, to the prejudice of the owners, (and by 4 Geo. I, c. 48. maliciously to set on fire any underwood, wood, or coppice, is made single felony. By statute 6 Geo. I. c. 23. the wilful and malicious taring, cutting, spoiling, burning, or defacing of the garments or cloths of any person passing in the streets or highways, is felony. This was occasioned by the insolence of certain weavers and others; who, upon the introduction of some Indian fashions prejudicial to their own manufactures, made it their practice to cast aqua fortis in the streets upon such as wore them. By statute 9 Geo. I. c. 22. commonly called the Waltham black act, occasioned by the devastations committed in Epping forest, near Waltham inn Essex, by persons in disguise or with their faces blacked; (who seem to have resembled the Roberdsmen, or followers of Robert Hood, that in the reign of Richard the first committed great outrages on the borders of England and Scotlandx ;) by this black act, I say, which has in part been mentioned under the several heads of riots, mayhem, and larceny, it is farther enacted, that unlawfully and
maliciously to set fire to any house, barn, or outhouse, or to any hovel, cock, mow, or stack of corn, straw, hay, or wood; or to break down the head of any fishpond, whereby the fish shall be lost; or to kill, maim, or wound any cattle; or to cut down, or destroy, or platation, for ornament, shelter, or profit; all these malicious acts are felonies without benefit of clergy: and the hundred shall be chargeable for the damages, unless the offender be convicted. In like manner by the Roman law to cut down trees, and especially vines, was punished in the same degree as robbery. By statutes 6 Geo. II. c. 37. and 10 Geo. II. c. 32. it is also made felony without the benefit of clergy, maliciously to cut down any river of sea bank, whereby lands may be overflowed; or to cut any hop-binds growing in a plantation of hops, or wilfully and maliciously to set fire to any mine or delph of coal. By statute 28 Geo. II. c. 19 to set fire to any goss, furze, or fern, growing in any forest or chase, is subject to a fine of five pounds. And by statute 6 Geo. III. c. 36 & 48. wilfully to spoil or destroy any timber or other trees, roots, shrubs, or plants, is for the two first offences liable to pecuniary penalties; and for the third if in the day time, and even for the first if at night, the offender shall be guilty of felony, and liable to transportation for seven years. And these are the punishments of malicious mischief.

III. FORGERY, or the crimen falsi, is an offence, which was punished by the civil law with deportation or banishment, and sometimes with death. It may with us be defined (at common law) to be, the fraudulent making or alteration of a writing to the prejudice of another man's right: for which the offender may suffer fine, imprisonment, and pillory. And also by a variety of statutes, a more severe punishment is inflicted on the offender in many particular cases, which are so multiplied of late as almost to become general. I shall mention the principal instances.

BY statute 5 Eliz. c. 14. 50 forge or 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 in 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 impri-
sonment. For any forgery relating to a term of years, or annuity, bond, obligation, acquittance, release, or discharge of any debt or demand of any personal chattels, the same forfeiture is given to the party grieved; and on the offender is inflicted the pillory, loss of one of his ears, and half a year's imprisonment: the second offence in both cases being felony without benefit of clergy.

BESIDES this general act, a multitude of others, since the revolution, (when paper credit was first established) have inflicted capital punishment on the forging or altering of bank bills or notes, or other securieties; of bills of credit issued from the exchequer; of south sea bonds, & cc; of lottery orders; of army or nany debentures; of East India bonds; of writings under seal of the London, or royal exchange, assurance; of a letter of attorney or other power to receive or transfer stock or annuities, or for the personating a proprietor thereof, to receive or transfer such annuities, stock, or dividends: to which may be added, though not strictly reducible to this head, the counterfeiting of mediterranean passes, under the hands of the lords of the admiralty, to protect one from the piratical states of barbary; the forging or imitating any stamps to defraud the stamp office; and the forging any marriage register or licence: all which are by distinct acts of parliament made felonies without benefit of clergy.

And by statute 31 Geo. II. c. 32. forging or counterfeiting any stamp or mark to denote the standard of gold and silver plate, and certain other offences of the like tendency, are made felony, but not without benefit of clergy.

b See the several acts for issuing them.
d See the several acts for the lotteries.
e Stat. 5. Geo. 1. c. 14. 9 Geo. I. c. 5.
f Stat. 12 Geo. 1. c. 32.
g Stat. 6. Geo. 1. c. 18.
h Stat. 8 Geo. I. c. 22. 9 Geo. 1. c. 12.
i Stat. 4. Geo. II. c. 18.
k See the several stamp acts.
THERE are also two other general laws, with regard to forgery; the one 2 Geo. II. c. 35. whereby the first offence in forging or publishing any forged deed, will, writing obligatory, bill of exchange, promissory note, indorsement or affrgment thereof, or any acquittance or receipt for money or goods, with intention to defraud any person, is made felony without benefit of clergy. And by statute 7 Geo. II. c. 22. it is equally penal to forge or utter a counterfeit acceptance of a bill of exchange, or the number of any accountable receipt for any note, bill, or any other security for money; or any warrant or order for the payment of money, or delivery of goods. So that, I believe, through the number of these general and special provisions, there is now hardly a case possible to be conceived, wherein forgery, that tends to defraud, whether in the name of a real or fictitious person, is not made a capital crime.

THESE are the principal infringements of the rights of property; which were the last species of offences against individuals or private subjects, which the method of our distribution has led us to consider. We have before examined the nature of all offences against the public, or commonwealth; against the king or supreme magistrate, the father and protector of that community; against the universal law of all civilized nations; together with some of the more atrocious offences, of publicly pernicious consequence, against God and his holy religion. And these several heads comprehend the whole circle of crimes and misdemeanors, with the punishment annexed to each, that are cognizable by the laws of England.

CHAPTER THE EIGHTEENTH.
OF THE MEANS OF PREVENTING OFFENCES.

WE are now arrived at the fifth general branch or head, under which I proposed to consider the subject of this book of our commentarie; viz. the means of preventing the commission of crimes and misdemeanors. And really it is an honour, and almost a singular one, ot our English laws, that they furnish a title of this sort: since preventive justice is upon every principle, of reason, of humanity, and of sound policy, preferable in all
respects to punishing justice; the execution of which, though necessary, and in its consequences a species of mercy to the commonwealth, is always attended with many harsh and disagreeable circumstances.

THIS preventive justice consists in obliging those persons, whom there is probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behaviour. This requisition of sureties has been several times mentioned before, as part of the penalty inflicted upon such as have been guilty of certain gross misdemeanors: but there also it must be understood rather as a caution against the repetition of the offence, than any immediate pain or punishment. And

a Beccar. ch. 41.

indeed, if we consider all human punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes, than to expiate the past: since, as was observed in a former chapter, all punishments inflicted by temporal laws may be classed under three heads; such as tend to the amendment of the offender himself, or to deprive him of any power to do future mischief, or to deter others by his example: all of which conduce to one and the same end, of preventing future crimes, whether that be effected by amendment, disability, or example. But the caution, which we speak of at present, is such as is intended merely for prevention, without any crime actually committed by the party, but arising only from a probable suspicion, that some crime is intended or likely to happen; and consequently it is not meant as any degree of punishment, unless perhaps for a man's imprudence in giving just ground of apprehension.

By the Saxon constitution these sureties were always at hand, by means of king Alfred's wise institution of decennaries or frankpledges; wherein, as has more than once been observed, the whole neighbourhood or tithing of freemen were mutually pledges for each others good behaviour. But, this great and general security being now fallen into disuse and neglected, there hath succeeded to it the method of making suspected persons find particular and special securities for their future conduct: of which we find mention in the laws of king Edward the confessord; tradat sidejuffores de...
pace et legalitate tuenda. Let us therefore consider, first, what this security is; next, who may take or demand it; and, lastly, how it may be discharged.

1. THIS security consists in being bound, with one or more sureties, in a recognizance or obligation to the king, entered on record, and taken in some court or by some judicial officer; whereby the parties acknowledge themselves to be indebted to the crown in the sum required; (for instance 100 l.) with condition

b See pag. 11.
d Cap. 18.

to be void and of none effect, if the party shall appear in court on such a day, and in the mean time shall keep the peace: either generally, towards the king, and all his liege people; or particularly also, with regard to the person who craves the security. Or, if it be for the good behaviour, then on condition that he shall demean and behave himself well, (or be of good behaviour) either generally or specially, for the time therein limited, as for one or more years, or for life. This recognizance, if taken by a justice of the peace, must be certified to the next sessions, in pursuance of the statute 3 Hen. VII. c. 1. and if the condition of such recognizance be broken, by any breach of the peace in the one case, or any misbehaviour in the other, the recognizance becomes forfeited or absolute; and, being estreated or extracted (taken our from among the other records) and sent up to the exchaquer, the party and his sureties, having now become the king's absolute debtors, are sued for the several sums in which they are respectively bound.

2. ANY justices of the peace, by virtue of their commission, or those who are ex officio conservators of the peace, as was mentioned in a former volumec, may demand such security according to their own discretion: or it may be granted at the request of any subject, upon due cause shewn, provided such demandant be under the king's protection; for which reason it hath been formerly doubted, whether Jews, Pagans, or persons convicted of a praemunire, were intitled theretof. Or, if the justice is averse to act, it may be granted by a mandatory writ, called a supplicavit, issuing out of the court of king's bench or chancery; which will compel the justice to act, as a ministerial and not as a judicial officer: and he must make a return to such writ, specifying his compliance, under his hand and
sealg. But this writ is seldom used: for, when application is made to the superior courts, they usually take the recognizances there, under the directions of the statute 21 Jac. I. c. 8. And indeed a peer or peeress cannot be bound over in any other place, than the courts of king's bench or chancery: though a justice of the peace has a power to require sureties of any other person, being compos mentis and under the degree of nobility, whether he be a fellow justice or other magistrate, or whether he be merely a private man. Wives may demand it against their husbands; or husbands, if necessary, against their wives. But feme-coverts, and infants under age, ought to find security by their friends only, and not to be bound themselves: for they are incapable of engaging themselves to answer any debt; which, as we observed, is the nature of these recognizances or acknowledgements.

3. A RECOGNIZANCE may be discharged, either by the demise of the king, to whom the recognizance is made; or by the death of the principal party bound thereby, if not before forfeited; or by order of the court to which such recognizance is certified by the justices (as the quarter sessions, assises, or king's bench) if they see sufficient cause: or if he at whose request it was granted, if granted upon a private account, will release it, or does not make his appearance to pray that it may be continued.

THUS far what has been said is applicable to both species of recognizances, for the peace, and for the good behaviour; de pace, et legalitate, tuenda, as expressed in the laws of king Edward. But as these two species of securities are in some respects different, especially as to the cause of granting, or the means of forfeiting them; I shall now consider them separately: and first, shall shew for what cause such a recognizance, with sureties for the peace, is grantable; and then, how it may be forfeited.

1. ANY justice of the peace may, ex officio, bind all those to keep the peace, who in his peace, who in his presence make any affray; or threaten to kill or beat another; or contend together with hot
and angry words; or go about with unusual weapons or attendance, to the terror of the people; and all such as he knows to be common barretors; and such as are brought before his by the constable for a breach of the peace in his presence; and all such persons, as, having been before bound to the peace, have broken it and forfeited their recognizances. Also, wherever any private man hath just cause to fear, that another will burn his house, or do him a corporal injury, by killing, imprisoning, or beating him; or that he will procure others so to do; he may demand surety of the peace against such person: and every justice of the peace is bound to grant it, if he who demands it will make oath, that he is actually under fear of death or bodily harm; and will shew that he has just cause to be so, by reason of the other's menaces, attempts, or having lain in wait for him; and will also farther swear, that he does not require such surety out of malice or for mere vexation. This is called swearing the peace against another: and, if the party does not find such sureties, as the justice in his discretion shall require, he may immediately be committed till he does.

2. SUCH recognizance for keeping the peace, when given, may be forfeited by any actual violence, or even an assault, or menace, to the person of him who demanded it, if it be a special recognizance: or, if the recognizance be general, by any unlawful action whatsoever, that either is or tending to a breach of the peace; or, more particularly, by any one of the many species of offences which were mentioned as crimes against the public peace in the eleventh chapter of this book; or, by any private violence committed against any of his majesty's subjects. But a bare trespass upon the lands or goods of another, which is a ground for a civil action, unless accompanied with a wilful breach of the peace, is no forfeiture of the recognizance. Neither are mere reproachful words, as calling a man knave or liar, any breach of the peace, so as to forfeit one's recognizance.

k 1 Hawk. P. C. 126.
l Ibid. 127.
m Ibid. 128.
n Ibid. 131.
(being looked upon to be merely the effect of heat and passion) unless they amount to a challenge to fight.

THE other species of recognizance, with sureties, is for the good abearance, or good behaviour. This includes security for the peace, and somewhat more: we will therefore examine it in the same manner as the other.

1. FIRST then, the justices are empowered by the statute 34 Edw III. c. 1. to bind over to the good behaviour towards the king and his people, all them that be not of good same, wherever they be found, to the intent that the people be not toubled nor endamaged, nor the peace diminished, nor merchants and others, passing by the highways of the realm, be disturbed nor put in the peril which may happen by such offenders. Under the general words of this expression, that be not of good same, it is holden that a man may be bound to his good behaviour for causes of scandal, contra bonos mores, as well as contra pacem; as, for haunting bawdy houses with women of bad name; or for keeping such women in his own house; or for words tending to scandalize the government, or in abuse of the officers of justice, especially in the execution of their office. Thus also a justice may bind over all night-walkers; eaves-droppers; such as keep suspicious company, or are reported to be pilferers or robbers; such as sleep in the day, and wake on the night; common drunkards; whoremasters; the putative fathers of bastards; cheats; idle vagabonds; and other persons, whose misbehaviour may reasonably bring them within the general words of the statute, of so great a latitude, as leaves much to be determined by the discretion of the magistrate himself. But, if he commits a man for want of sureties, he must express the cause thereof with convenient certainty; and take care that such cause be a good one.

0 1 Hawk. P. C. 130.
p Ibid. 132.

2. A RECOGNIZANCE for the good behaviour may be forfeited by all the same means, as one for the security of the peace may be; and also by some others. As, by going armed with unusual attendance, to the terror of the people; by speaking words tending to sedition; or, by committing any of those acts of misbehaviour, which the recognizance was intended to prevent. But not by barely giving fresh cause of suspicion of that which perhaps may never actually happen: for, though it is just to compel
suspected persons to give security to the public against misbehaviour that is apprehended; yet it would be hard, upon such suspicion, without the proof of any actual crime, to punish them by a forfeiture of their recognizance.

q 1 Hawk. P. C. 133.

CHAPTER THE NINETEENTH.
OF COURTS OF A CRIMINAL JURISDICTION.

THE sixth, and last, object of our enquiries will be the method of inflicting those punishments, which the law has annexed to particular offences; and which I have constantly subjoined to the description of the crime itself. In the discussion of which I shall pursue much the same general method, that I followed in the preceding book, with regard to the redress of civil injuries: by, first, pointing out the several courts of criminal jurisdiction, wherein offenders may be prosecuted to punishment; and by, secondly, deducing down in their natural order, and explaining, the several proceedings therein.

FIRST then, in reckoning up the several courts of criminal jurisdiction, I shall, as in the former case, begin with an account of such, as are of a public and general jurisdiction throughout the whole realm; and, afterwards, proceed to such, as are only of a private and special jurisdiction, and confined to some particular parts of the kingdom.

I. IN our enquiries into the criminal courts of public and general jurisdiction, I must in one respect pursue a different order from that in which I considered the civil tribunals. For there, as the several courts had a gradual subordination to each other, the superior correcting and reforming the errors of the inferior, I thought it best to begin with the lowest, and so ascend gradually to the courts of appeal, or those of the most extensive powers. But as it is contrary to the genius and spirit of the law of England, to suffer any man to be tried twice for the same offence in a criminal way, especially if acquitted upon the first trial; therefore these criminal courts may be said to be all independent of each other: at least so far, as that the sentence of the lowest of them can never be controlled or reversed by the highest
jurisdiction in the kingdom, unless for error in matter of law, apparent upon the face of the record; though sometimes causes may be removed from one to the other before trial. And therefore as, in these courts of criminal cognizance, there is not the same chain and dependence as in the others, I shall rank them according to their dignity, and begin with the highest of all; viz.

I. THE high court of parliament; which is the supreme court in the kingdom, not only for 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. As for acts of parliament to attain particular persons of treason or felony, or to inflict pains and penalties, beyond or contrary to the common law, to serve a special purpose, I speak not of them; being to all intents and purposes new laws, made pro re nata, and by no means an execution of such as are already in being. But an impeachment before the lords by the commons of Great Britain, in parliament, is a prosecution of the already known and established law, and has been frequently put in practice; being a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom. A commoner cannot however be impeached before the lords for any capital offence,

a 1 Hal. P. C. * 150.

but only for high misdemeanors: /b a peer may be impeached for any crime. And they usually (in case of an impeachment of a peer for treason) address the crown to appoint a lord high steward, for the greater dignity and regularity of their proceedings; which high steward was formerly elected by the peers themselves, though he was generally commissioned by the king; /c but it hath of late years been strenuously maintained, /d that the fably necessary, but that the house may proceed without one. The articles of impeachment are a kind of bills of indictment, found by the house of commons, and afterwards tried by the lords; who are in cases of misdemeanors considered not only as their own peers, but as the peers of the whole nation. This is a custom derived to us from the constitution of the ancient Germans; who in their great councils sometimes tried capital accusations relating to the public:licet apud concilium accusare quoque, et discriminem capitis intendere . And it has a peculiar propriety in the English constitution; which has much improved upon the ancient model imported hither from the continent.
When, in 4 Edw. III. the king demanded the earls, barons, and peers, to give judgment against Simon de Bereford, who had been a notorious accomplice in the treasons of Roger earl of Mortimer, they came before the king in parliament, and said all with one voice, that the said Simon was not their peer; and therefore they were not bound to judge him as a peer of the land. And when afterwards, in the same parliament, they were prevailed upon, in respect of the notoriety and heinousness of his crimes, to receive the charge and to give judgment against him, the following protest and proviso was entered on the parliament roll. And it is assented and accorded by our lord the king, and all the great men, in full parliament, that albeit the peers as judges of the parliament, have taken upon them in the presence of our lord the king to make and render the said judgment; yet the peers who now are, or shall be in time to come, be not bound or charged to render judgment upon others than peers; nor that the peers of the land have power to do this, but thereof ought ever to be discharged and acquitted: and that the aforesaid judgment now rendered be not drawn to example or consequence in time to come, whereby the said peers may be charged hereafter to judge others than their peers, contrary to the laws of the land, if the like case happen, which God forbid? (Rot. Parl. 4 Edw. III. n 2 & 6. 2 Brad. Hist. 190. Selden. Judic. In parl. ch. 1.)

For, though in general the union of the legislative and judicial powers ought to be most carefully avoided, yet it may happen that a subject, intrusted with the administration of public affairs, may infringe the rights of the people, and be guilty of such crimes, as the ordinary magistrate either dares not or cannot punish. Of these the representatives of the people, or house of commons, cannot properly judge; because their constituents are the parties injured: and can therefore only impeach. But before what court shall this impeachment be tried? Not before the ordinary tribunals, which would naturally be swayed by the authority of so powerful an accuser. Reason therefore will suggest, that this branch of the legislature, which represents the people, must bring its charge before the other branch, which consists of the nobility, who have neither the same interests, nor the same passions as popular assemblies. This is a vast superiority, which the constitution of this island enjoys, over those of the Grecian or Roman republics; where the people were at the same time both
judges and accusers. It is proper that the nobility should judge, to insure justice to the accused; as it is proper that the people should accuse, to insure justice to the commonwealth. And therefore, among other extraordinary circumstances attending the authority of this court, there is one of a very singular nature, which was insisted on by the house of commons in the case of the earl of Danby in the reign of Charles II; and is now enacted by statute 12 & 13 W. III. c. 2. that no pardon under the great seal shall be pleadable to an impeachment by the commons of Great Britain in parliament.

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 misprison of either. The office of this great magistrate is very ancient; and was formerly hereditary, or at least held for life, or dum bene se gesserit: but now it is usually, and hath been for many centuries past, granted pro hac vice only; and it hath been the constant practice (and therefore seems now to have become necessary) to grant it to a lord of parliament, else he is incapable to try such delinquent peer. When such an indictment is therefore found by a grand jury of freeholders in the king's bench, or at the assizes before the justices of oyer and terminer, it is to be removed by a writ of certiorari into the court of the lord high steward, which only has power to determine it. A peer may plead a pardon before the court of king's bench, and the judges have power to allow it; in order to prevent the trouble of appointing an high steward, merely for the purpose of receiving such plea. But he may not plead, in that inferior court, any other plea; as guilty, or not guilty, of the indictment; but only in this court: because, in consequence of such plea, it is possible that judgment of death might be awarded against him. The king therefore, in case a peer be indicted of treason, felony, or misprison, creates a lord high steward pro hac vice by commission under the great seal; which recites the indictment so found, and gives his grace power to receive and try if fecundum legem et consuetudinem Angliae.
Then, when the indictment is regularly removed, by writ of certiorari, commanding the inferior court to certify it up to him, the lord high steward directs a precept to a serjeant at arms, to summon the lords to attend and try the indicted peer. This precept was formerly issued to summon only eighteen or twenty, selected from the body of the peers: then the number came to be indefinite; and the custom was, for the lord high steward to summon as many as he thought proper, (but of late years not less than twenty three) and that those lords only should sit upon the trial: which threw a monstrous weight of

m Pryn. on 4 Inst. 46.


o Kelynge. 56.

power into the hands of the crown, and this its great officer, of selecting only such peers as the then predominant party should most approve of. And accordingly, when the earl of Clarendon fell into disgrace with Charles II, there was a design formed to prorogue the parliament, in order to try him by a select number of peers; it being doubted whether the whole house could be induced to fall in with the views of the court p. But now, by statute 7 W. III. c. 3. upon all trials of peers for treason or misprison, 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 our lord the king in parliament q. It is true, a lord high steward is always appointed in that case, to regulate and add weight to the proceedings; but he is rather in the nature of a speaker pro tempore, or chairman of the peers are therein the judge of it; for the collective body of the peers are therein the judges both of law and fact, and the high steward has a vote with the rest, in right of his peerage. But in the court of the lord high steward, which is held in the recess of parliament, he is the sole judge in matters of law, as the lords triors are in matters of fact; and as they may
not interfere with him in regulating the proceedings of the court, so he has no right to intermix with them in giving any vote upon the trial. Therefore, upon the conviction and attainder of a peer for murder in full parliament, it hath been holden by the judges, that in case the day appointed in the judgment for execution should lapse before execution done, a new time of execution may be appointed by either the high court of parliament, during its

q Fost. 141.
r State Trials, Vol. 214. 232. 3.
s Fost. 139.

sitting, though no high steward be existing; or, in the recess of parliament, by the court of king’s bench, the record being removed into that court.

IT has been a point of some controversy, whether the bishops have now a right to sit in the court of the lord high steward, to try indictments of treason and misprison. Some incline to imagine them included under the general words of the statute of king William, all peers, who have a right to sit and vote in parliament: but the expression had been much clearer, if it had been, all lords, and not, all peers; for though bishops, on account of the baronies annexed to their bishopricks, are clearly lords of parliament, yet, their blood not being ennobled, they are not universally allowed to be peers with the temporal nobility: and perhaps this word might be inserted purposely with a view to exclude them. However, there is no instance of their sitting on trials for capital offences, even upon impeachments or indictments in full parliament, much less in the court we are now treating of; for indeed they usually voluntarily withdraw, but enter a protest declaring their right to stay. It is certain that, in the eleventh chapter of the constitutions of Clarendon, made in parliament 11 Hen. II. they are expressly excluded from sitting and voting in trials of life or limb: episcopi, sicut caeteri barones, debent interesse judiciis cum baronibus, quousque perveniatur ad diminutionem membrorum, vel ad mortem: and Becket’s quarrel with the king hereupon was not on account of the exception, (which was agreeable to the canon law) but of the general rule, that compelled the bishops to attend at all. And the determination of the house of lords in the earl of Danby’s case, which hath ever since been adhered to, is consonant to these constitutions; that the lords spiritual have a right to stay and sit in court in capital cases, till the court proceeds to the vote of
guilty, or not guilty. It must be noted, that this resolution extends only to
trials in full parliament: for to the court of the lord high steward (in which
no vote can be given, but mere-

```plaintext
Lords Journ. 15 May 1679.

ly that of guilty or not guilty) no bishop, as such, ever was or could be
summoned; and though the statute of king William regulates the
proceedings in that court, as well as in the court of parliament, yet it never
intended to new-model or alter its constitution; and consequently does not
give the lords spiritual any right in cases of blood which they had not
before. And what makes their exclusion more reasonable, is, that they
have no right to be tried themselves in the court of the lord high steward,
and therefore surely ought not to be judges there. For the privilege of
being thus tried depends upon nobility of blood, rather than a seat in the
house; as appears from the trials of popish lords, of lords under age, and
(since the union) of the Scots nobility, though not in the number of the
sixteen; and from the trials of females, such as the queen consort or
dowager, and of all peeresses by birth; and peeresses by marriage also,
unless they have, when dowagers, disparaged themselves by taking a
commoner to their second husband.

3. THE court of king's bench, concerning the nature of which we partly
enquired in the preceding book, was (we may remember) divided into a
crown side, and a plea side. And on the crown side, or crown office, it takes
cognizance of all criminal causes, from high treason down to the most
trivial misdemeanors or breach of the peace. Into this court also
indictments from all inferior courts may be removed by writ of certiorari,
and tried either at bar, or at nisi prius, by a jury of the county out of which
the indictment is brought. The judges of this court are the supreme
coroners of the kingdom. And the court itself is the principal court of
criminal jurisdiction (though the two former are of greater dignity) known
to the laws of England. For which reason by the coming of the court of
king's bench into any county, (as it was removed to Oxford on account of
the sickness in 1665) all former commissions of oyer and ter-

u Fost. 248.
w Bro. Abr. t. Trial. 142.
y See Vol. III. pag. 41.
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miner, and general gaol delivery, are at once absorbed and determined
ipso facto: in the same manner as by the old Gothic and Saxon
constitutions, jure vetusto obtinut, quievisse omnia inferiorajudicia,
dicente jus regez.

INTO this court of king's bench hath reverted all that was good and
salutary of the jurisdiction of the court of starchamber, camera stellataa:
which was a court of very ancient originalb, but new-modelled by statutes
3 Hen. VII. c. 1. and 21 Hen. VIII. c. 20. consisting of divers lords spiritual
and temporal, being privy counsellors, together with two judges of the
courts of common law, without the intervention of any jury. Their
jurisdiction extended legally over riots, perjur, misbe-

a This is said (Lamb. Arch. 154.) to have been so called, either from the
Saxon work preopan, to steer or govern; or from its punishing the crimen
stellionatus, or cosenage; or because the room wherein it sate, the old
council chamber of the palace of Westminster, (Lamb. 148.) was full of
windows; or (to which sir Edward Coke, 4 Inst. 66. accedes) because haply
the roof thereof was at the first gurnished with gilded stars. As all these are
merely conjectures, (for no stars are said to have remained in the roof so
late as the reign of queen Elizabeth) I shall venture to propose another
conjectural etymology, as plausible perhaps as any of them. It is well
known that, before the banishment of the Jews under Edward I, their
contracts and obligations were denominated in our ancient records starra
or starrs, from a corruption of the Hebrew word, sbetar, a covenant.
(Tovey's Angl. Judaic. 32. Selden. tit. of hon. ii. 34. Uxor Ebraic. i. 14.)
These starrs, by an ordinance of Richard the first, preserved by Hoveden,
were commanded to be enrolled and deposited in chests under three keys
in certain places; one, and the most considerable, of which was in the
king's exchequer at Westminster: and no starr was allowed to be valid,
unless it were found in some of the said repositaries. (Madox Hist. exch. c.
vii. 4. 5. 6.) The room at the exchequer, wher the chefts containing these
starrs were kept, was probably called the starr-chamber; and, when the
Jews were expelled the kingdom, was applied to the use of the king's
council, when sitting in their judicial capacity. To confirm this; the first
time the starr-chamber is mentioned in any record, (Rot. clauf. 41 Edw. III.
m. 13.) it is said to have been situated near the receipt of the exchequer:
that the king's council, his chancellor, treasurer, justices, and other sages,
were assembled en la chaumbre des esteilles pres la resceipt al Westminster. For in process of time, when the meaning of the Jewish starrs was forgotten, the word star-chamber was naturally rendered in law-french, la chaumbre des esteilles, and in law-latin, camera stellata; which continued to be the style in latin till the dissolution of that court. b Lamb. Arch. 156.

haviour of sheriffs, and other notorious misdemesnors, contrary to the laws of the land. Yet this was afterwards (as lord Clarendon informs usc) stretched to the asserting of all proclamations, and orders of state; to the vindicating of illegal commissions, and grants of monopolies; holding for honourable that which pleased, and for just that which profiteth, and becoming both a court of law to determine civil rights, and a court of revenue to enrich the treasury: the counciltable by proclamations enjoining to the people that which was not enjoined by the laws, and prohibiting that which was not prohibited; and the star-chamber, which consisted of the same persons in different rooms, censuring the breach and disobedience to those proclamations by very great fines, imprisonments, and corporal severities: so that any disrespect to any acts of state, or to the persons of statesmen was in no time more penal, and the foundations of right never more in danger to be destroyed. For which reasons, it was finally abolished by statute 16 Car. I. c. 10. to the general joy of the whole nationd.

4. THE court of chivalry, of which we also formerly spokef as a military court, or court of honour, when held before the earl marshal only, is also a criminal court, when held before the lord high constable of England jointly with the earl marshal. And then it has jurisdiction over pleas of life and member, arising in matters of arms and deeds of war, as well out of the realm as within it. But the criminal, as well as civil
c Hist. of Reb. Book 1 & 3.
d The just odium, into which this tribunal had fallen before its dissolution, has been the occasion that few memorials have reached us of its nature, jurisdiction, and practice; except such as, on account of their enormous oppression, are recorded in the histories of the times. There are however to be met with some reports of its proceedings in manuscript; of which the author hath one, for the first three years of king Charles: and there is in the British Museum (Harl. MSS. Vol. I. no. 1226.) a very full, methodical,
and accurate account of the constitution and course of this court, complied by William Hudson of Gray's Inn, an eminent practitioner therein.

Part of its authority, is fallen into entire disuse: there having been no permanent high constable of England (but only pro hac vice at coronations and the like) since the attainder and execution of Stafford duke of Buckingham in the thirteenth year of Henry VIII; the authority and charge, both in war and peace, being deemed too ample for a subject: so ample, that when the chief justice Fineux was asked by king Henry the eighth, how far they extended, he declined answering; and said, the decision of that question belonged to the law of arms, and not to the law of England.

5. THE high court of admiralty, held before the lord high admiral of England, or his deputy, styled the judge of the admiralty, is not only a court of civil, but also of criminal, jurisdiction. This court 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 statute 15 Ric. II. 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, which are then a sort of ports of havens; such as are the ports of London and Glocester, though they lie at a great distance from the sea. But, as this court proceeded without jury, in a method much conformed to the civil law, the exercise of a criminal jurisdiction therein was contrary to the genius of the law of England; inasmuch as a man might be there deprived of his life by the opinion of a single judge, without the judgment of his peers. And besides, as innocent persons might thus fall a sacrifice to the caprice of a single man, so very gross offenders might, and did frequently, escape punishment: for the rule of the civil law is, how reasonably I shall not at present enquire, that no judgment of death can be given against offenders, without proof by two witnesses, or a confession of the fact by themselves. This was always a great offence to the English nation: and therefore in the eighth year of Henry VI a remedy was endeavoured to be applied in parli-

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\( \text{Duck de authorit. jur. dv.} \)

\( \text{h 4 Inst. 134. 147.} \)
ament; but it miscarried for want of the royal assent. However, by the statute 28 Hen. VIII. c. 15. it was enacted, that these offences should be tried by commissioners, nominated by the lord chancellor; namely, the admiral, or his deputy, and three or four more; (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: and that the course of proceedings should be according to the law of the land. 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.

THESE five courts may be held in any part of the kingdom, and their jurisdiction extends over crimes that arise throughout the whole of it, from one end to the other. What follow are also of a general nature, and universally diffused over the nation, but yet are of a local jurisdiction, and confined to particular districts. Of which species is,

6. THE court of oyer and terminer, and general gaol delivery: which is held before the king's commissioners, among whom are usually two judges of the courts at Westminster, twice in every year in every county of the kingdom; except the four northern ones, where it is held only once, and London and Middlesex wherein it is held eight times. This was slightly mentioned in the preceding book. We then observed, that, at what is usually called the assises, the judges sit by virtue of five several authorities: two of which, the commission of assise and its attendant jurisdiction of nisi prius, being principally of a civil nature, were then explained at large; to which I shall only add, that these justices have, by virtue of several statutes, a criminal jurisdiction also, in certain special cases. The third,

which is the commission of the peace, was also treated of in a former volumen, when we enquired into the nature and office of a justice of the peace. I shall only add, that all the justices of the peace of any county, wherein the assises are held, are bound by law to attend them, or else are liable to a fine; in order to return recognizances, &c, and to assist the
judges in such matters as lie within their knowledge and jurisdiction, and
in which some of them have probably been concerned, by way of previous
examination. But the fourth authority is the commission of oyer and
terminer, to hear and determine all treasons, felonies, and
misdemeanors. This is directed to the judges and several others; but the
judges only are of the quorum, so that the rest cannot act without them.
The words of the commission are, to enquire, hear, and determine. So that
by virtue of this commission they can only proceed upon 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 petit jury. Therefore they have besides, fifthly, a
commission of general gaol delivery, which empowers them to try and
deliver every prisoner, who shall be in the gaol when the judges arrive at
the circuit town, whenever indicted, or for whatever crime committed. It
was anciently the course to issue special writs of gaol delivery for each
particular prisoner, which were called the writs de bono et malo: but,
these being found inconvenient and oppressive, a general commission for
all the prisoners has long been established in their stead. So that, one way
or other, the gaols are cleared, and all offenders tried, punished, or
delivered, twice in every year: a constitution of singular use and
excellence. 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
inquiry and punishment: upon which the course of proceeding is the
same, as upon general and ordinary commissions. Formerly it was held,

\[m\] See Vol. I. pag. 351.

\[n\] See appendix, 1.

\[o\] Ibid.

\[p\] 2 Inst. 43.

in pursuance of the statutes 8 Ric. II. c. 2. and 33 Hen. VIII. c. 4. that no
judge or other lawyer could act in the commission of oyer and terminer, or
in that of gaol delivery, within his own county, where he was born or
inhabited; in like manner as they are prohibited from being judges of
assise and determining civil causes. But that local partiality, which the
jealousy of our ancestors was careful to prevent, being judged less likely to
operate in the trial of crimes and misdemeanors, than in matters of
property and disputes between party and party, it was thought proper by
the statute 12 Geo. II. c. 27. to allow any man to be a justice of oyer and
terminer and general gaol delivery within any county of England.

7. THE court of general quarter sessions of the peaceq is a court that must
be held in every county once in every quarter of a year; which by statute 2
Hen. V. c. 4. is appointed to be in the first week after michaelmas-day; the
first week after the epiphany; the first week after the close of easter; and in
the week after the translation of saint Thomas a Becket, or the seventh of
July. It is held before two or more justices of the peace, one of which must
be of the quorum. The jurisdiction of this court by statute 34 Edw. III. 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 arises, 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 assise. And therefore murders, and other
capital felonies, are usually remitted for a more solemn trial to the assises.
They cannot also try any new-created offence, without express power given
given them by the statute which creates it. But there are many offences, and
particular matters, which by particular statutes belong properly to this
jurisdiction, and ought to be prosecuted in this

r 4 Mod. 379. Salk. Lord Raym. 1144.

court: as, the smaller misdemeanors against the public or commonwealth,
not amounting ot felony; and especially offences relating to the game,
highways, alehouses, bastard children, the settlement and provision for
the poor, vagrants, servants wages, apprentices, and popish recusantsf .
Some of these are proceeded upon by indictment; and others in a
summary way by motion and order thereupon; which order may for the
most part, unless guarded against by particular statutes, be removed into
the court of king's bench, by writ of certiorari facias, and be there either
quashed or confirmed. The records or rolls of the sessions are committed
to the custody of a special officer denominated the custos rotulorum, who is
always a justice of the quorum; and among them of the quorum (saith
Lambards ) a man for the most part especially picked out, either for
wisdom, countenance, or credit. The nomination of the custos rotulorum
(who is the principal civil officer in the county, as the lord lieutenant is the
chief in military command) is by the king's sign manual: and to him the
nomination of the clerk of the peace belongs; which office he is expressly forbidden to sell for moneyt.

IN most corporation towns there are quarter sessions kept before justices of their own, within their respective limits: which have exactly the same authority as the general quarter sessions of the county, except in a very few instances; one of the most considerable of which is the matter of appeals from orders of removal of the poor, which, though they be from the orders of corporation justices, must be to the sessions of the county, by statute 8 & 9 W. III. c. 30. In both corporations and counties at large, there is sometimes kept a special or petty session, by a few justices, for dispatching smaller business in the neighbourhood alehouses, passing the accounts of parish officers, and the like.

f See Lambard's cirenarcha, and Burn's justice.
s b. 4. c. 3.

8. THE sheriff’s turnu, 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 hundredw. this therefore is the great court-leet of the county, as the county court is the court-baron: for out of this, for the ease of the sheriff, was taken

9. THE court-leet, or view of frankpledges, which is a court of record, held oncein the year and not oftenery, within a particular hundred, lordship, or manor, before the steward of the leet; being the king's court granted by charter to the lords of those hundreds or manors. Its original intent was to view the frank pledges, that is, the freemen within the liberty; who (we may remember) according to the institution of the great Alfred, were all mutually pledges for the good behaviour of each other. Besides this, the preservation of the peace, and the chastisement of divers minute offences against the public good, are the objects both of the court-leet and the sheriff’s turn: which have exactly the same jurisdiction, one being only a larger species of the other; extending over more territory, but not over more causes. All freeholders within the precinct are obliged to attend them, and all persons commorant therein; which commorancy consists in usually lying there: a regulation, which owes its original to the laws of king Canutea. But persons under twelve and above sixty years old, peers,
clergymen, women, and the king's tenants in ancient demesne, are excused from attendance there: all others being bound to appear upon the jury, if required, and make their due presentments. It was also anciently the custom to summon all the king's subjects, as they respectively grew to years of discretion and strength, to come to

the court-leet, and there take the oath of allegiance to the king. The other general business of the leet and turn, was to present by jury all crimes whatsoever that happened within their jurisdiction; and not only to present, but also to punish, all trivial misdemesnors, as all trivial debts were recoverable in the court-baron, and county court: justice, in these minuter matters of both kinds, being brought home to the doors of every man by our ancient constitution. Thus in the Gothic constitution, the haereda, which answered to our court-leet, de omnibus quidem cognoscit, non tamen de omnibus judicat. The objects of their jurisdiction are therefore unavoidably very numerous: being such as in some degree, either less or more, affect the public weal, or good governance of the district in which they arise; from common nuisances and other material offences against the king's peace and public trade, down to eaves-dropping, waifs, and irregularities in public commons. But both the turn and the leet have been for a long time in a declining way: a circumstance, owing in part to the discharge granted by the statute of Marlbridge, 52 Hen. III. c. 10. to all prelates, peers, and clergymen from their attendance upon these courts; which occasioned them to grow into disrepute. And hence it is that their business hath for the most part gradually devolved upon the quarter sessions: which it is particularly directed to do in some cases by statute 1 Edw. IV. c. 2.

10. THE court of the coroner is also a court of record, to enquire, when any one dies in prison, or comes to a violent or sudden death, by what manner he came to his end. And this he is only entitled to do super visum corporis. Of the coroner and his office we treated at large in a former volumed, among the public officers and ministers of the kingdom; and
therefore shall not here repeat our enquiries: only mentioning his court, by way of regularity, among the criminal courts of the nation.

b Stiernh. de jur. Goth. l. 1. c. 2.
d See Vol. I. pag. 349.

11. THE court of the clerk of the markete is incident to every fair and market in the kingdom, to punish misdemeanors therein; as a court of pie poudre is, to determine all disputes relating to private or civil property. The object of this jurisdiction is principally the cognizance of weights and measures, to try whether they be according to the true standard thereof, or no: which standard was anciently committed to the custody of the bishop, who appointed some clerk under him to inspect the abuse of them more narrowly; and hence this officer, though now usually a layman, is called the clerk of the market. If they be not according to the standard, then, besides the punishment of the party by fine, the weights and measures themselves ought to be burnt. This is the most inferior court of criminal jurisdiction in the kingdom; though the objects of its coercion were esteemed among the Romans of such importance to the public, that they were committed to the care of some of their most dignified magistrates, the curule aediles.

II. THERE are a few other criminal courts of greater dignity than many of these, but of a more confined and partial jurisdiction; extending only to some particular places, which the royal favour, confirmed by act of parliament, has distinguished by the privilege of having peculiar courts of their own, for the punishment of crimes and misdemeanors arising within the bounds of their cognizance; These, not being universally dispersed, or of general use, as the former, but confined to one spot, as well as to a determinate species of causes, may be denominated private or special courts of criminal jurisdiction.

I SPEAK not here of ecclesiastical courts; which punish spiritual sins, rather than temporal crimes, by penance, contrition, and excommunication, pro salute animae: or, which is looked upon as equivalent to all the rest, by a sum of money to the of-
e 4 Inst. 273.
f See stat. 17 Car. 11. c. 19. 22 Car. II. c. 8. 23. Car. II. c. 12.
ficers of the court by way of commutation of penance. Of these we discoursed sufficiently in the preceding book. I am now speaking of such courts as proceed according to the course of the common law; which is a stranger to such unaccountable barterings of public justice.

1. AND, first, the court of the lord steward, treasurer, or comptroller of the king's household, was instituted by statute 3 Hen. VII. c. 14. to enquire of felony by any of the king's sworn servants, in the cheque roll of the household, under the degree of a lord, in confederating, compassing, conspiring, and imagining the death or destruction of the king, or any lord or other of his majesty's privy council, or the lord steward, treasurer, or comptroller of the king's house. The enquiry, and trial thereupon, must be by a jury according to the course of the common law, consisting of twelve sad men (that is, sober and discreet persons) of the king's household.

2. THE court of the lord steward of the king's household, or (in his absence) of the treasurer, comptroller, and steward of the marshalseak, was created by statute 33 Hen. VIII. c. 12. with a jurisdiction to enquire of, hear, and determine, all treasons, misprisons of treason, murders, manslaughters, bloodshed, and other malicious strikings; whereby blood shall be shed in any of the palaces and houses of the king, or in any other house where the royal person shall abide. The proceedings are also by jury, both a grant and a petit one, as at common law, taken out of the officers and sworn servants of the king's household. The form and solemnity of the process, particularly with regard to the execution of the sentence for cutting off the hand, which is part of the punishment for shedding blood in the king's court, is very minutely set forth in the said statute 33 Hen. VIII. and the several offices of the servants so the household in and about such execution are de-

h See V. 4. III. pag. C. 1.
i 4 Inst. 132.
j Ibid. 2 Hal. P. C. 7.

scribed; from the serjeant of the wood-yard, who furnishes the chopping-block, to the serjeant farrier, who brings hot irons to sear the stump.
3. As in the preceding book, we mentioned the courts of the two universities, or their chancellor's courts, for the redress of civil injuries; it will not be improper now to add a short work concerning the jurisdiction of their criminal courts, which is equally large and extensive. The chancellor's court of Oxford (with which university the author hath been chiefly conversant, though probably that of Cambridge hath also a similar jurisdiction) hath authority to determine all causes of property, wherein a privileged person is one of the parties, except only causes of freehold; and also all criminal offences or misdemeans, under the degree of treason, felony, or mayhem. The prohibition of meddling with freehold still continues: but the trial of treason, felony, and mayhem, by a particular charter is committed to the university jurisdiction in another court, namely, the court of the lord high steward of the university.

FOR by the charter of 7 Jun. 2 Hen. IV. (confirmed, among the rest, by the statute 13 Eliz. c. 29.) cognizance is granted to the university of Oxford of all indictments of treasons, insurrections, felony, and mayhem, which shall be found in any of the king's courts against a scholar or privileged person; and they are to be tried before the high steward of the university, or his deputy, who is to be nominated by the chancellor of the university for the time being. But, when his office is called forth into action, such high steward must be approved by the lord high chancellor of England; and a special commission under the great seal is given to him, and others, to try the indictment then depending, according to the law of the land and the privileges of the said university. When therefore an indictment is found at the assises, or elsewhere, against any scholar of the university, or other privileged person, the vice-chancellor may claim the cognizance of it; and (when claimed in due time and manner) it ought to be allowed him by the judges of assise: and then it 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 I take it that the high steward cannot proceed originally ad inquirendum; but only, after inquest in the common law courts, ad audiendum et determinandum. Much in the same manner, as, when a peer is to be tried in the court of the lord high steward of Great Britain, the indictment must first be found at the assises, or in the court of king's bench, and then (in consequence of a writ of certiorari) transmitted
to be finally heard and determined before his grace the lord high steward
and the peers.

WHEN the cognizance is so allowed, if the offence be inter minora
crimina, or a misdemesnor 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, and
then only, to be determined before the high steward, under the king's
special commission to try the same. The process of the trial is this. The
high steward issues one precept to the sheriff of the county, who
thereupon returns a panel of eighteen freeholders; and another precept to
the bedells of the university, who thereupon return a panel of eighteen
matriculated laymen, laicos privilegio universitatis gaudentes: and by a
jury formed de medietate, half of freeholders, and half of matriculated
persons, is the indictment to be tried; that in the guildhall of the city of
Oxford. And if execution be necessary to be awarded, in consequence of
finding the party guilty, the sheriff of the county must execute the
university process; to which he is annually bound by an oath.

I HAVE been the more minute in describing these proceedings, as there
has happily been no occasion to reduce them into practice for more than a
century past; though it is not a right that merely rests in scriptis or theory,
but has formerly often been carried into execution. There are many
instances, one in the reign of queen Elizabeth, two in that of James the
first, and two in that of Charles the first, where indictments for murder
have been challenged by the vice-chancellor at the assises, and afterwards
tried before the high steward by jury. The commissions under the great
seal, the sheriff's and bedell's panels, and all the other proceedings on the
trial of the several indictments, are still extant in the archives of that
university.

CHAPTER THE TWENTIETH.
OF SUMMARY CONVICTIONS.

WE are next, according to the plan I have laid down, to take into
consideration the proceedings in the courts of criminal jurisdiction, in
order to the punishment of offences. These are plain, easy, and regular;
the law not admitting any fictions, as in civil causes, to take place where
the life, the liberty, and the safety of the subject are more immediately
brought into jeopardy. And these proceedings are divisible into two kinds; summary, and regular: of the former of which I shall briefly speak, before we enter upon the latter, which will require a more thorough and particular examination.

BY a summary proceeding I mean principally such as is directed by several acts of parliament (for the common law is a stranger to it, unless in the case of contempts) for the conviction of offenders, and the inflicting of certain penalties created by those acts of parliament. In these there is no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only, as the statute has appointed for his judge. An institution designed professedly for the greater ease of the subject, by doing him speedy justice, and by not harrassing the freeholders with frequent and troublesome attendances to try every minute offence. But it has of late been so far extended, as, if a check be not timely given, to threaten the disuse of our admirable and truly English trial by jury, unless only in capital cases. For,

I. OF this summary nature are all trials of offences and frauds contrary to the laws of the excise, and other branches of the revenue: which are to be enquired into and determined by the commissioners of the respective departments, or by justices of the peace in the country; officers, who are all of them appointed and removeable at the discretion of the crown. And though such convictions are absolutely necessary for the due collection of the public money, and are a species of mercy to the delinquents, who would be ruined by the expense and delay of frequent prosecutions by indictment; and though such has usually been the conduct of the commissioners, as seldom (if ever) to afford just grounds to complain of oppression; yet when we again consider the various and almost innumerable branches of this revenue, which may be in their turns the subjects of fraud, or at least complaints of fraud, and of course the objects of this summary and arbitrary jurisdiction; we shall find that the power of these officers of the crown over the property of the people is increased to a very formidable height.

II. ANOTHER branch of summary proceedings is that before justices of the peace, in order to inflict divers petty pecuniary mulcts, and corporal penalties, denounced by act of parliament for many disorderly offences;
such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others, for which I must refer the student to the justice-books formerly cited b, and which used to be formerly punished by the verdict of a jury in the court-leet. This change in the administration of justice hath however had some mischiefous effects; as, 1. The almost entire disuse and contempt of the court-leet, and sheriff's turn, the king's ancient courts of common law, formerly much rever-

a See Vol. I. pag. 318, & c.
b Lambard and Burn.

ed and respected. 2. The burdensome increase of the business of a justice of the peace, which discourages so many gentlemen of rank and character from acting in the commission; from an apprehension that the duty of their office would take up too much of that time, which they are unwilling to spare from the necessary concerns of their families, the improvement of their understandings, and their engagements in other services of the public. Though if all gentlemen of fortune had it both in their power, and inclinations, to act in this capacity, the business of a justice of the peace would be more divided, and fall the less heavy upon individuals: which would remove what in the present scarcity of magistrates is really an objection so formidable, that the country is greatly obliged to any gentleman of figure, who will undertake to perform that duty, which in consequence of his rank in life he owes more peculiarly to his country. However, this backwardness to act as magistrates, arising greatly from this increase of summary jurisdiction, is productive of, 3. A third mischief: which is, that this trust, when slighted by gentlemen, falls of course into the hands of those who are not so; but the mere tools of office. And then the extensive power of a justice of the peace, which even in the hands of men of honour is highly formidable, will be prostituted to mean and scandalous purposes, to the law ends of selfish ambition, avarice, or personal resentment. And from these ill consequences we may collect the prudent foresight of our ancient lawgivers, who suffered neither the property nor the punishment of the subject to be determined by the opinion of any one or two men; and we may also observe the necessity of not deviating any farther from our ancient constitution, by ordaining new penalties to be inflicted upon summary convictions.

THE process of these summary convictions, it must be owned, is extremely speedy. Though the courts of common law have thrown in one check upon
them, by making it necessary to summon the party accused before he is condemned. This is now held to be an indispensable requisite: though the justices long struggled the point; forgetting that rule of natural reason expressed by Seneca,

Sui statuit aliquid, parte inaudita altera,
Aequom licet statuerit, baud aequus suit?

A rule, to which all municipal laws, that are founded on the principles of justice, have strictly conformed: the Roman law requiring a citation at the least; and our own common law never suffering any fact (either civil or criminal) to be tried, till it has previously compelled an appearance by the party concerned. After this summons, the magistrate, in summary proceedings, may go on to examine one or more witnesses, as the statute may require, upon oath; and then make his conviction of the offender, in writing: upon which he usually issues his warrant, either to apprehend the offender, in case corporal punishment is to be inflicted on him; or else to levy the penalty incurred, by distress and sale of his goods. This is, in general, the method of summary proceedings before a justice or justices of the peace: but for particulars we must have recourse to the several statutes, which create the offence, or inflict the punishment; and which usually chalk out the method by which offenders are to be convicted. Otherwise they fall of course under the general rule, and can only be convicted by indictment or information at the common law.

III. To this head, of summary proceedings, may also be properly referred the method, immemorially used by the superior courts of justice, of punishing contempts by attachment, and the subsequent proceedings thereon.

THE contempts, that are thus punished, are either direct, which openly insult or resist the powers of the courts, or the persons of the judges who preside there; or else are consequential,

Salk. 181. 2 Lord Raym. 1405.

which (without such gross insolence or direct opposition) plainly tend to create an universal disregard of their authority. The principal instances, of either sort, that have been usually d punished by attachment, are chiefly of
the following kinds. 1. Those committed by inferior judges and magistrates: by acting unjustly, oppressively, or irregularly, in administering those portions of justice which are intrusted to their distribution; or by disobeying the king's writs issuing out of the superior courts, by proceeding in a cause after it is put a stop to or removed by writ of prohibition, certiorari, error, supersedeas, and the like. For, as the king's superior courts (and especially the court of king's bench) have a general super-intendence over all inferior jurisdictions, any corrupt or iniquitous practices of subordinate judges are contempts of that super-intending authority, whose duty it is to keep them within the bounds of justice. 2. Those committed by sheriffs, bailiffs, gaolers, and other officers of the court: by abusing the process of the law, or deceiving the parties, by any acts of oppression, extortion, collusive behaviour, or culpable neglect of duty. 3. Those committed by attorneys and solicitors, who are also officers of the respective courts: by gross instances of fraud and corruption, injustice to their clients, or other dishonest practice. For the mal-practice of the officers reflects some dishonour on their employers: and, if frequent or unpunished, creates among the people a disgust against the courts themselves. 4. Those committed by jurymen, in collateral matters relating to the discharge of their office: such as making default, when summoned; refusing to be sworn, or to give any verdict; eating or drinking without the leave of the court, and especially at the cost of either party; and other misbehaviours or irregularities of a similar kind: but not in the mere exercise of their judicial capacities, as by giving a false or erroneous verdict. 5. Those committed by witnesses: by making default when summoned, refusing to be sworn or examined, or prevaricating in their evidence when sworn. 6. Those committed by parties to any suit or proceeding before the court: as by disobedience to any rule or order, made in the progress of a cause; by non-payment of costs awarded by the court upon a motion; or by non-observance of awards duly made by arbitrators or umpires, after having entered into a rule for submitting to such determination e. 7. Those committed by any other persons, under the degree of a peer: and even by peers themselves, when enormous and accompanied with violence, such as forcible rescous and the like f; or when they import a disobedience to the king's great prerogative writs, of prohibition, habeas corpus g, and the rest. Some of these contempts may arise in the face of the court; as by rude and contumelious behaviour; by
obstinacy, perverseness, or prevarication; by breach of the peace, or any wilful disturbance whatever; others in the absence of the party; as by disobeying or treating with disrespect the king's writ, or the rules or process of the court; by perverting such writ or process to the purposes of private malice, extortion, or injustice; by speaking or writing contemptuously of the court, or judges, acting in their judicial capacity; by printing false accounts (or even true ones without proper permission) of causes then depending in judgment; and by any thing in short that demonstrates a gross want of the regard and respect, which when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people.

THE process of attachment, for these and the like contempts, must necessarily be as ancient as the laws themselves. For laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power therefore in the supreme courts of justice to suppress such contempts, by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal.

e See Vol. III. pag. 17.
f Styl. 277. 2 Hawk. P. C. 152.
g 4 Burr. 632. Lords Journ. 7 Febr. 8 Jun 1757.

Accordingly we find it actually exercised, as early as the annals of our law extend. And, though a very learned author h seems inclinable to derive this process from the statute of Westm. 2. 13 Edw. I. c. 39. (which ordains, that in case the process of the king's courts be resisted by the power of any great man, the sheriff shall chastise the resister by imprisonment, a quo non deliberentur sine speciali praecepto domini regis: and if the sheriff himself be resisted, he shall certify to the court the names of the principal offenders, their aiders, consenters, commanders and favourers, and by a special writ judicial they shall be attached by their bodies to appear before the court, and if they be convicted thereof they shall be punished at the king's pleasure, without any interfering by any other person whatsoever) yet he afterwards more justly concludes, that it is a part of the law of the land; and, as such, is confirmed by the statute of magna carta.

IF the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges,
without any farther proof or examination. But in matters that arise at a
distance, and of which the court cannot have so perfect a knowledge,
unless by the confession of the party or the testimony of others, if the
judges upon affidavit see sufficient ground to suspect that a contempt has
been committed, they either make a rule on the suspected party to shew
cause why an attachment should not issue against him i ; or, in very
flagrant instances of contempt, the attachment issues in the first instance
k ; as it also does, if no sufficient cause be shewn to discharge, and
thereupon the court confirms and makes absolute, the original rule. This
process of attachment is merely intended to bring the party into court :
and, when there, he must either stand committed. or put in bail, in order
to answer upon oath to such interrogatories as shall be administered to
him, for the better information of the court with respect to the cir-

i Styl. 277.
k Salk. 84. Stra. 185.

cumstances of the contempt. These interrogatories are in the nature of a
charge or accusation, and must by the course of the court be exhibited
within the first four days l : and, if any of the interrogatories is improper,
the defendant may refuse to answer it, and move the court to have it struck
out m. If the party can clear himself upon oath, he is discharged ; but, if
perjured, may be prosecuted for the perjury n. If he confesses the
contempt, the court will proceed to correct him by fine, or imprisonment,
or both, and sometimes by a corporal or infamous punishment o. If the
contempt be of such a nature, that, when the fact i

IT cannot have escaped the attention of the reader, that this method, of
making the defendant answer upon oath to a criminal charge, is not
agreeable to the genius of the common law in any other instance q ; and
seems indeed to have been derived to the courts of king's bench and
common pleas through the medium of the courts of equity. For the whole process of the courts of equity, in the several stages of a cause, and finally to enforce their decrees, was, till the introduction of sequestrations, in the nature of a process of contempt; acting only in personam and not in rem. And there, after the party in contempt has answered the interrogatories, such his answer may be contradicted and disproved by affidavits of the adverse party: whereas in the courts of law, the admission of the party to purge himself by oath is more favourable to his liberty,

1 6 Mod. 73.
m Stra. 444.
n 6 Mod. 73.
o Cro. Car. 146.
p The king v. Elkins. M. 8 Geo. III. B. R.
q See Vol. III. pag. 100, 101.

though perhaps not less dangerous to his conscience; for, if he clears himself by his answers, the complaint is totally dismissed. And, with regard to this singular mode of trial, thus admitted in this one particular instance, I shall only for the present observe; that as the process by attachment in general appears to be extremely ancient r, and has since the restoration been confirmed by an express act of parliament s, so the method of examining the delinquent himself upon oath, with regard to the contempt alleged, is at least of as high antiquity t, and by long and immemorial usage is now become the law of the land.

r Yearb. 22 Edw. IV. 29.
s Stat. 13 Car. II. ft. 2. c. 2. 4.
t M. 5 Edw. IV. rot. 75. cited in Raft. Ent. 268. pl. 5.

CHAPTER THE TWENTY FIRST.
OF ARRESTS.

WE are now to consider the regular and ordinary method of proceeding in the courts of criminal jurisdiction; which may be distributed under twelve general heads, following each other in a progressive order: viz. 1. Arrest; 2. Commitment, and bail; 3. Prosecution; 4. Process; 5. Arraignment, and its incidents; 6. Plea, and issue; 7. Trial, and conviction; 8. Clergy; 9. Judgment, and its consequence; 10. Reversal of judgment; 11. Reprieve,
or pardon; 12. Execution: all which will be discussed in the subsequent part of this book.

FIRST then, of an arrest: which is the apprehending or restraining of one’s person, in order to be forthcoming to answer an alleged or suspected crime. To this arrest all persons whatsoever are, without distinction, equally liable to all criminal cases: but no man is to be arrested, unless charged with such a crime, as will at least justify holding him to bail, when taken. And, in general, an arrest may be made four ways: 1. By warrant: 2. By an officer without warrant: 3. By a private person also without warrant: 4. By an hue and cry.

1. A WARRANT may be granted in extraordinary cases by the privy council, or secretaries of state; but ordinarily by justices of the peace. This they may do in any cases where they have a jurisdiction over the offence; in order to compel the person accused to appear before them: for it would be absurd to give them power to examine an offender, unless they had also a power to compel him to attend, and submit to such examination. And this extends undoubtedly to all treasons, felonies, and breaches of the peace; and also to all such offences as they have power to punish by statute. Sir Edward Coke indeed hath laid it down, that a justice of the peace cannot issue a warrant to apprehend a felon upon bare suspicion; no, not even till an indictment be actually found: and the contrary practice is by others held to be grounded rather upon connivance, than the express rule of law; though now by long custom established. A doctrine, which would in most cases give a loose to felons to escape without punishment; and therefore sir Matthew Hale hath combated it with invincible authority, and strength of reason: maintaining, 1. That a justice of peace hath power to issue a warrant to apprehend a person accused of felony, though not yet indicted; and 2. That he may also issue a warrant to apprehend a person suspected of felony, though the original suspicion be not in himself, but in the party that prays his warrant; because he is a competent judge of the probability offered to him of such suspicion. But in both cases it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there is a felony or other crime actually committed, without which no warrant should be granted; as also to prove the cause and probability of suspecting the party, against whom the warrant is prayed. This warrant ought to be under the hand and seal of the justice, should set forth the time and place of making, and the cause for which it is made,
and should be directed to the constable, or other peace officer, requiring
him to bring the party either generally before any justice of the peace for
the county, or only before the justice who granted it; the warrant in the
latter case being called a special warrant. A general warrant to
apprehend all persons suspected, without naming or particularly
describing any person in special, is illegal and void for its uncertainty;
for it is the duty of the magistrate, and ought not be left to the officer, to
judge of the ground of suspicion. And a warrant to apprehend all persons
guilty of a crime therein specified, is no legal warrant: for the point, upon
which its authority rests, is a fact to be decided on a subsequent trial;
namely, whether the person apprehended thereupon be really guilty or
not. It is therefore in fact no warrant at all: for it will not justify the officer
who acts under it; whereas a lawful warrant will at all events indemnify
the officer, who executes the same ministerially. When a warrant is
received by the officer, he is bound to execute it, so far as the jurisdiction
of the magistrate and himself extends. A warrant from the chief, or other,
justice of the court of king's bench extends all over the kingdom: and is
teste'd, or dated, England: not Oxfordshire, Berks, or other particular
county. But the warrant of a justice of the peace in one county, as
Yorkshire, must be backed, that is, signed by a justice of the peace in
another, as Middlesex, before it can be executed there. Formerly, regularly
speaking, there ought to have been a fresh

\[2\] Hawk. P. C. 85.
\[1\] Hal. P. C. 580. 2 Hawk. P. C. 82.

A practice had obtained in the secretaries office ever since the
restoration, grounded on some clauses in the acts for regulating the prefs,
of issuing general warrants to take up (without naming any person in
particular) the authors, printers and publishers of such obfcene or
feditious libels, as were particularly specified in the warrant. When those
acts expired in 1694, the same practice was inadvertently continued, in
every reign and under every administration, except the four last years of
queen Anne, down to the year 1763: when such a warrant being issued to apprehend the authors, printers and publishers of a certain seditious libel, its validity was disputed; and the warrant was adjudged by the whole court of king's bench to be void, in the case of Money v. Leach. Trin. 5 Geo. III. B. R. After which the issuing of such general warrants was declared illegal by a vote of the house of commons. (Com. Journ. 22 Apr. 1766.)

warrant in every fresh county; but the practice of backing warrants had long prevailed without law, and was at last authorized by statutes 23 Geo. II. c. 26. and 24 Geo. II. c. 55.

2. ARRESTS by officers, without warrant, may be executed, 1. By a justice of the peace; who may himself apprehend, or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence k. 2. The sheriff, and 3. The coroner, may apprehend any felon within the county without warrant. 4. The constable, of whose office we formerly spoke l, hath great original and inherent authority with regard to arrests. He may, without warrant, arrest any one for a breach of the peace, and carry him before a justice of the peace. And, in case of felony actually committed, or a dangerous wounding whereby felony is like to ensue, he may upon probable suspicion arrest the felon; and for that purpose is authorized (as upon a justice's warrant) to break open doors, and even to kill the felon if he cannot otherwise be taken; and, if he or his assistants be killed in attempting such arrest, it is murder in all concerned m. 5. Watchmen, either those appointed by the statute of Winchester, 13. Edw. I. c. 4. to keep watch and ward in all towns from sunsetting to sunrising, or such as are mere assistants to the constable, may virtute officii arrest all offenders, and particularly nightwalkers, and commit them to custody till the morning n.

3. ANY private person (and a fortiori a peace officer) that is present when any felony is committed, is bound by the law to arrest the felon; on pain of fine and imprisonment, if he escapes through the negligence of the standers by o. And they may justify breaking open doors upon following such felon: and if they kill him, provided he cannot be otherwise taken, it is justifiable; though if they are killed in endeavouring to make such arrest, it is

k 1 Hal. P. C. 86.
murder. Upon probable suspicion also a private person may arrest the felon, or other person so suspected, but the cannot justify breaking open doors to do it; and if either party kill the other in the attempt, it is manslaughter, and no more. It is no more, because there is no malicious design to kill; but it amounts to so much, because it would be of most pernicious consequence, if, under pretence of suspecting felony, any private person might break open a house, or kill another; and also because such arrest upon suspicion is barely permitted by the law, and not enjoined, as in the case of those who are present when a felony is committed.

4. THERE is yet another species of arrest, wherein both officers and private men are concerned, and that is upon an hue and cry raised upon a felony committed. An hue (from buer, to shout) and cry, hutefium et clamor, is the old common law process of pursuing, with horn and with voice, all felons, and such as have dangerously wounded another. It is also mentioned by statute Westm. 1. 3 Edw. I. c. 9. and 4 Edw. I. de officio coronatoris. But the principal statute, relative to this matter, is that of Winchester, 13 Edw. I. c. 1 & 4. which directs, that from thenceforth every country shall be so well kept, that, immediately upon robberies and felonies committed, fresh suit shall be made from town to town, and from county to county; and that hue and cry shall be raised upon the felons, and they that keep the town shall follow with hue and cry, with all the town and the towns near; and so hue and cry shall be made from town to town, until they be taken and delivered to the sheriff. And, that such hue and cry may more effectually be made, the hundred is bound by the same statute, c. 3. to answer for all robberies therein committed, unless they take the felon; which is the foundation of an action against the

p 2 Hal. P. C. 77.
q Stat. 30 Geo. II. c. 24.
r 2 Hal. P. C. 82, 83.
s Bracton. l. 3. tr. 2. c. 1. 1. Mirr. c. 2. 6.

Hundred t, in case of any loss by robbery. By statute 27 Eliz. c. 13. no hue and cry is sufficient, unless made with both horsemen and footmen. And
by statute 8 Geo. II. c. 16. the constable or like officer refusing or neglecting to make hue and cry, forfeits 5 l: and the whole vill or district is still in strictness liable to be amerced, according to the law of Alfred, if any felony be committed therein and the felon escapes. An institution, which hath long prevailed in many of the eastern countries, and hath in part been introduced even into the Mogul empire, about the beginning of the last century; which is said to have effectually delivered that vast territory from the plague of robbers, by making in some places the villages, in others the officers of justice, responsible for all the robberies committed within their respective districts u. Hue and cry w may be raised either by precept of a justice of the peace, or by a peace officer, or by any private man that knows of a felony. The party raising it must acquaint the constable of the vill with all the circumstances which he knows of the felony, and the person of the felon; and thereupon the constable is to search his own town, and raise all the neighbouring villis, and make pursuit with horse and foot: and in the prosecution of such hue and cry, the constable and his attendants have the same powers, protection, and indemnification, as if acting under the warrant of a justice of the peace. But if a man wantonly or maliciously raises a hue and cry, without cause, he shall be severely punished as a disturber of the public peace x.

IN order to encourage farther the apprehending of certain felons, rewards and immunities are bestowed on such as bring them to justice, by divers acts of parliament. The statute 4 & 5 W. & M. c. 8. enacts, that such as apprehend a highwayman, and prosecute him to conviction, shall receive a reward of 40 l. from the public; to be paid to them (or, if killed in the endeavour to take him, their executors) by the sheriff of the county: to which the statute 8 Geo. II. c. 16. superadds 10 l. to be paid by the hundred indemnified by such taking. By statute 10 & 11 W. III. c. 23. any person apprehending and prosecuting to conviction a felon guilty of burglary or private larceny to the value of 5 s. from any shop, warehouse, coach-house, or stable, shall be excused from all parish offices. And by statute 5 Ann. c. 31 any person so apprehending and prosecuting a burglar,
or felonious housebreaker, (or, if killed in the attempt, his executors) shall be entitled to a reward of 40 l.

CHAPTER THE TWENTY SECOND.
OF COMMITMENT AND BAIL.

WHEN a delinquent is arrested by any of the means mentioned in the preceding chapter, he ought regularly to be carried before a justice of the peace. And how he is there to be treated, I shall next shew, under the second head, of commitment and bail.

THE justice, before whom such prisoner is brought, is bound immediately to examine the circumstances of the crime alleged: and to this end by statute 2 & 3 Ph. & M. c. 10. he is to take in writing the examination of such prisoner, and the information of those who bring him: which, Mr Lambard observes, was the first warrant given for the examination of a felon in the English law. For, at the common law, nemo tenebatur prodere seipsum; and his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men. If upon this enquiry it manifestly appears, either that no such crime was committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him. Otherwise he must either be committed to prison, or give bail; that is, put in securities for his appearance, to answer a Eirenarch. b. 2. c. 7.

the charge against him. This commitment therefore being only for safe custody, wherever bail will answer the same intention, it ought to be taken; as in most of the inferior crimes: but in felonies, and other offences of a capital nature, no bail can be a security equivalent to the actual custody of the person. For what is there that a man may not be induced to forfeit, to save his own life and what satisfaction or indemnity is it to the public, to seize the effects of them who have bailed a murderer, if the murderer himself be suffered to escape with impunity? Upon a principle similar to which, the Athenian magistrates, when they took a solemn oath, never to keep a citizen in bonds that could give three sureties of the same quality with himself, did it with an exception to such as had embezzled the public money, or been guilty of treasonable practises b. What the nature of bail is,
hath been shewn in the preceding book c; viz. a delivery, or bailment, of a person to his sureties, upon their giving (together with himself) sufficient security for his appearance: he being supposed to continue in their friendly custody, instead of going to gaol. In civil cases we have seen that every defendant is bailable; but in criminal matters it is otherwise. Let us therefore enquire, in what cases the party accused ought, or ought not, to be admitted to bail.

AND, first, to refuse or delay to bail any person bailable, is an offence against the liberty of the subject, in any magistrate, by the common law d; as well as by the statute Westm. 1. 3 Edw. I. c. 15. and the habeas corpus act, 31 Car. II. c. 2. And lest the intention of the law should be frustrated by the justices requiring bail to a greater amount than the nature of the case demands, it is expressly declared by statute 1 W. & M. ft. 2. c. 1. that excessive bail ought not to be required: though what bail shall be called excessive, must be left to the courts, on considering the circumstances of the case, to determine. And on the other hand, if the magistrate takes insufficient bail, he is liable to be fined, if the criminal doth not appear e. Bail may be taken either in court, or in some particular cases by the sheriff, coroner, or other magistrate; but most usually by the justices of the peace. Regularly, in all offences either against the common law or act of parliament, that are below felony, the offender ought to be admitted to bail, unless it be prohibited by some special act of parliament f. In order therefore more precisely to ascertain what offences are bailable.

LET us next see, who may not be admitted to bail, or, what offences are not bailable. And here I shall not consider any one of those cases in which bail is ousted by statute, from prisoners convicted of particular offences; for then such imprisonment without bail is part of their sentence and punishment. But, where the imprisonment is only for safe custody before the conviction, and not for punishment afterwards, in such cases bail is ousted or taken away, wherever the offence is of a very enormous nature: for then the public is entitled to demand nothing less than the highest security that can be given; viz. the body of the accused, in order to ensure

b Pott. Antiq. b. 1. c. 18.
c See Vol. III. pag. 290.
d 2 Hawk. P. C. 90.

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that justice shall be done upon him, if guilty. Such persons therefore, as
the author of the mirror observes, have no other sureties but the four
walls of the prison. By the ancient common law, before h and since i the
conquest, all felonies were bailable, till murder was excepted by statute:
so that persons might be admitted to bail before conviction almost in every
case. But the statute Westm. 1. 3 Edw. I. c. 15. takes away the power of
bailing in treason, and in divers instances of felony. The statute 1 & 2 Ph. &
Mar. c. 13. gives farther regulations in this matter: and upon the whole we
may collect k, that no justices of the peace can bail, 1. Upon an accusation
of treason: nor, 2. Of murder: nor,

3. In case of manslaughter, if the prisoner be clearly the slayer, and not
barely suspected to be so; or if any indictment be found against him: nor,
4. Such as, being committed for felony, have broken prison; 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 shall speak in a subsequent chapter, and persons
by them accused: 8. Persons taken with the mainour, or in the fact of
felony: 9. Persons charged with arson: 10. Excommunicated persons,
taken by writ de excommunicato capiendo: all which are clearly not
admissible to bail. 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 same: and 13. Accessories to
felony, that labour under the same want of reputation. These seem to be in
the discretion of the justices, whether bailable or not. The last class are
such as must be bailed upon offering sufficient surety; as, 14. Persons of
good same, 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 accessory to any felony.
Lastly, it is agreed that the court of king's bench (or any judge thereof in
time of vacation) may bail for any crime whatsoever, be it treason l,
murder, or any other offence, according to the circumstances of the case. And herein the wisdom of the law is very manifest. To allow bail to be taken commonly for such enormous crimes, would greatly tend to elude the public justice: and yet there are cases, though they rarely happen, in which it would be hard and unjust to confine a man in prison, though accused even of the greatest offence. The law has therefore provided one court, and only one, which has a discretionary power of bailing in any case: except only, even to this high jurisdiction, and of course to all inferior ones, such persons as

1 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 Anderf. 298.)

are committed by either house of parliament, so long as the session lasts; or such as are committed for contempts by any of the king's superior courts of justice.

UPON the whole, if the offence be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the mittimus of the justice, or warrant under his hand and seal, containing the cause of his commitment; there to abide till delivered by due course of law m. But this imprisonment, as has been said, is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only: though what are so requisite, must too often be left to the discretion of the gaolers; who are frequently a merciless race of men, and, by being conversant in scenes of misery, steeled against any tender sensation. Yet the law will not justify them in fettering a prisoner, unless where he is unruly, or has attempted an escape n: this being the humane language of our ancient lawgivers o,custodes poenam sibi commisso rum non augeant, nec eos torqueant; sed omni faevitia remota, pietateque adhibita, judicia debite exequantur.

m 2 Hal. P. C. 122.
n 2 Inst. 381. 3 Inst. 34.
o Flet. l. 1. c. 26.
CHAPTER THE TWENTY THIRD.
OF THE SEVERAL MODES OF PROSECUTION.

THE next Step towards the punishment of offenders is their prosecution, or the manner of their formal accusation. And this is either upon a previous finding of the fact by an inquest or grand jury; or without such previous finding. The former way is either by presentment, or indictment.

I. A presentment, generally taken, is a very comprehenSive term; including not only presentments properly so called, but also inquisitions of office, and indictments by a grand jury. A presentment, properly speaking, is the notice taken by a grand jury of any offence from their own knowledge or observationa, without any bill of indictment laid before them at the suit of the king. As, the presentment of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment, before the party presented as the author can be put to answer it. An inquisition of office is the act of a jury, summoned by the proper officer to enquire of matters relating to the crown, upon evidence laid before them. Some of these are in themselves convictions, and cannot afterwards be traverSed or denied; and therefore the inquest, or jury, ought to hear all a Lamb. Eirenarch. 1. 4. c. 5.

that can be alleged on both sides. Of this nature are all inquisitions of felo de se; of slight in persons accused of felony; of deodands, and the like; and presentments of petty offences in the sheriff's turn or court-leet, whereupon the presiding officer may set a fine. Other inquisitions may be afterwards traversed and examined; as particularly the coroner's inquisition of the death of a man, when it finds any one guilty of homicide: for in such cases the offender so presented must be arraigned upon this inquisition, and may dispute the truth of it; which brings it to a kind of indictment, the most usual and effectual means of prosecution, and into which we will therefore enquire a little more minutely.

II. AN indictment b is a written accusation of one or more persons of a crime or misdemesnor, preferred to, and presented upon oath by, a grand jury. To this end the sheriff of every county is bound to return to every session of the peace, and every commission of oyer and terminer, and of general gaol delivery, twenty four good and lawful men of the county,
some out of every hundred, to enquire, present, do, and execute all those things, which on the part of our lord the king shall then and there be commanded them c. They ought to be freeholders, but to what amount is uncertain d: which seems to be casus omissus, and as proper to be supplied by the legislature as the qualifications of the petit jury; which were formerly equally vague and uncertain, but are now settled by several acts of parliament. However, they are usually gentlemen of the best figure in the county. As many as appear upon this panel, are sworn upon the grand jury, to the amount of twelve at the least, and not more than twenty three; that twelve may be a majority. Which number, as well as the constitution itself, we find exactly described, so early as the laws of king Ethelred e. Exeants eniores duodecim thani, et praefectus cum eis, et jurent super sanctuariun quod eis in manus datur, quod nolint ullum innocentem

b See appendix.1.
d Ibid. 155.
e Wilk. LL. Angl. Sax. 117.

accusare, nec aliquem noxium celare. In the time of king Richard the first (according to Hoveden) the process of electing the grand jury, ordained by that prince, was as follows: four knights were to be taken from the county at large, who chose two more out of every hundred; which two associated to themselves ten other principal freemen, and those twelve were to answer concerning all particulars relating to their own district. This number was probably found too large and inconvenient; but the traces of this institution still remain, in that some of the jury must be summoned out of every hundred. This grand jury are previously instructed in the articles of their enquiry, by a charge from the judge who presides upon the bench. They then withdraw, to sit and receive indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor; and they are only to hear evidence on behalf of the prosecution: for the finding of an indictment is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to enquire upon their oaths, whether there be sufficient cause to call upon the party to answer it. A grand jury however ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not to rest satisfied merely with remote
probabilites: a doctrine, that might be applied to very oppressive purposes f.

THE grand jury are sworn to enquire, only for the body of the county, pro corpore comitatus; and therefore they cannot regularly enquire of a fact done out of that county for which they are sworn, unless particularly enabled by act of parliament. And to so high a nicety was this matter anciently carried, that where a man was wounded in one county, and died in another, the offender was at common law indictable in neither, because no complete act of felony was done in any one of them: but by statute 2 & 3 Edw. VI. c. 24. he is now indictable in the county where the party died. And so in some other cases: as particu-
f State Trials. IV. 183.

larly, where treason is committed out of the realm, it may be enquired of in any county within the realm, as the king shall direct, in pursuance of statutes 26 Hen. VIII. c. 13. 35 Hen. VIII. c. 2. and 5 & 6 Edw. VI. c. 11. But, in general, all offences must be enquired into as well as tried in the county where the fact is committed.

WHEN the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to endorse on the back of the bill, ignoramus; or, we know nothing of it; intimating, that though the facts might possibly be true, that truth did not appear to them: but now, they assert in English, more absolutely, not a true bill; and then are party is discharged without farther answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then endorse upon it, a true bill; ancienly, billa vera. The indictment is then said to be found, and the party stands indicted. But, to find a bill, there must at least twelve of the jury agree: for so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offence, unless by the unanimous voice of twenty four of his equals and neighbours: that is, by twelve at least of the grand jury, in the first place, assenting to the accusation; and afterwards, by the whole petit jury, of twelve more, finding him guilty upon his trial. But, if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree g. And the indictment, when so found, is publicly delivered into court.
INDICTMENTS must have a precise and sufficient certainty. By statute 1 Hen. V. c. 5. all indictments must set forth the christian name, firname, and addition of the state and degree, mystery, town, or place, and the county of the offender: and all this to identify his person. The time, and place, are also to be ascertained, by naming the day, and township, in which the fact was committed: though a mistake in these points is in general not held to be material, provided the time be laid previous to the finding of the indictment, and the place to be within the jurisdiction of the court. But sometimes the time may be very material, where there is any limitation in point of time assigned for the prosecution of offenders; as by the statute 7 Will. III. c. 3. which enacts, that no prosecution shall be had for any of the treasons or misprisons therein mentioned (except an assassination designed or attempted on the person of the king) unless the bill of indictment be found within three years after the offence committed: and, in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given. The offence itself must also be set forth with clearness and certainty: and in some crimes particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the offence, that no other words, however synonymous they may seem, are capable of doing it. Thus, in treason, the facts must be laid to be done, treasonably, and against his allegiance;? anciently proditorie et contra ligeantiae suae debitum:? else the indictment is void. In indictments for murder, it is necessary to say that the party indicted murdered,? not killed? or slew,? the other; which till the late statute was expressed in Latin by the word murdravit i. In all indictments for felonies, the adverb feloniously, felonice,? must be used; and for burglaries also, burglariter,? or in English, burglariously:? and all these to ascertain the intent. In rapes, the word rapuit,? or ravished,? is necessary, and must not be expressed by any periphrasis; in order to render the crime certain. So in larcenies also, the words felonice cepit et asportavit, feloniously took and carried away,? are necessary to every indictment; for these only can express the very offence. Also in indictments for murder, the length and depth of the wound should in general be expressed, in order that it may appear to the court to have been of a mortal nature: but if it goes through the body, then its dimensions are immaterial, for that is apparently sufficient to have been the cause of
the death. Also where a limb, or the like, is absolutely cut off, there such
description is impossible k. Lastly, in indictments the value of the thing,
which is the subject or instrument of the offence, must sometimes be
expressed. In indictments for larcenies this is necessary, that it may appear
whether it be grand or petit larceny; and whether entitled or not to the
benefit of clergy: in homicide of all sorts it is necessary; as the weapon,
with which it is committed, is forfeited to the king as a deodand.

THE remaining methods of prosecution are without any previous finding
by a jury, to fix the authoritative stamp of verisimilitude upon the
accusation. One of these, by the common law, was when a thief was taken
with the mainour, that is, with the thing stolen upon him, in manu. For he
might, when so detected flagrante delicto, be brought into court,
arraigned, and tried, without indictment: as by the Danish law he might
be taken and hanged upon the spot, without accusation or trial l. But this
proceeding was taken away by several statutes in the reign of Edward the
third m: though in Scotland a similar process remains to this day n. So
that the only species of proceeding at the suit of the king, without a
previous indictment or presentment by a grand jury, now seems to be that
of information.

III. INFORMATIONS are of two sorts; first, those which are partly at the
suit of the king, and partly at that of a subject; and secondly, such as are
only in the name of the king. The former are usually brought upon penal
statutes, which inflict a penalty upon conviction of the offender, one part
to the use of the king, and another to the use of the informer; and are a
sort of qui tam actions, (the nature of which was explained in a former
volume o) only carried on by a criminal inste. of a civil process: upon
which I shall therefore only observe, that

k 5 Rep. 122.
l Stierkh. de jure Sueon. L. 3. c. 5.
m 2 Hal. P. C. 149.
n Lord Kayms. I. 331.
by the statute 31 Eliz. c. 5. no prosecution upon any penal statute, the suit and benefit whereof are limited in part to the king and in part to the prosecutor, can be brought by any common informer after one year is expired since the commission of the offence; nor on behalf of the crown after the lapse of two years longer; nor, where the forfeiture is originally given only to the king, can such prosecution be had after the expiration of two years from the commission of the offence.

THE informations, that are exhibited in the name of the king alone, are also of two kinds: first, those which are truly and properly his own suits, and filed ex officio by his own immediate officer, the attorney general; secondly, those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person or common informer; and they are filed by the king's coroner and attorney in the court of king's bench, usually called the master of the crown-office, who is for this purpose the standing officer of the public. The objects of the king's own prosecutions, filed ex officio by his own attorney general, are properly such enormous misdemesnors, as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offences so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal. A power, so necessary, not only to the ease and safety but even to the very existence of the executive magistrate, was originally reserved in the great plan of the English constitution, which has wisely provided for the due preservation of all its parts. The objects of the other species of informations, filed by the master of the crown-office upon the complaint or relation of a private subject, are any gross and notorious misdemesnors, riots, batteries, libels, and other immoralities of an atrocious kind p, not peculiarly tending to disturb

p 2 Hawk. P. C. 260.

The government (for those are left to the care of the attorney general) but which, on account of their magnitude or pernicious example, deserve the most public animadversion. And when an information is filed, either thus, or by the attorney general ex officio, it must be tried by a petit jury of the county where the offence arises: after which, if the defendant be found guilty, they must resort to the court for his punishment.
THERE can be no doubt but that this mode of prosecution, by information (or suggestion) filed on record by the king’s attorney general, or by his coroner or master of the crown-office in the court of king’s bench, is as ancient as the common law itself q. For as the king was bound to prosecute, or at least to lend the sanction of his name to a prosecutor, whenever a grand jury informed him upon their oaths that there was a sufficient ground for instituting a criminal suit; so, when these his immediate officers were otherwise sufficiently assured that a man had committed a gross misdemeansnor, either personally against the king of his government, or against the public peace and good order, they were at liberty, without waiting for any farther intelligence, to convey that information to the court of king’s bench by a suggestion on record, and to carry on the prosecution in his majesty’s name. But these informations (of every kind) are confined by the constitutional law to mere misdemeanors only: for, wherever any capital offence is charged, the same law requires that the accusation be warranted by the oath of twelve men, before the party shall be put to answer it. And, as to those offences, in which informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, and were carried on in a legal and regular course in his majesty’s court of king’s bench, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment. But

q 1 Show. 118.

when the statute 3 Hen. VII. c. 1. had extended the jurisdiction of the court of star-chamber, the members of which were the sole judges of the law, the fact, and the penalty; and when the statute 11 Hen. VII. c. 3. had permitted informations to be brought by any informer upon any penal statute, not extending to life or member, at the assises or before the justices of the peace, who were to hear and determine the same according to their own discretion; then it was, that the legal and orderly jurisdiction of the court of king’s bench fell into disuse and oblivion, and Empson and Dudley (the wicked instruments of king Henry VII) by hunting out obsolete penalties, and this tyrannical mode of prosecution, with other oppressive devices r, continually harassed the subject and shamefully enriched the crown. The latter of these acts was soon indeed repealed by statute 1 Hen. VIII. c. 6. but the court of star-chamber continued in high
vigor, and daily increasing its authority, for more than a century longer; till finally abolished by statute 16 Car. I. c. 10.

UPON this dissolution the old common law's authority of the court of king's bench, as the custos morum of the nation, being found necessary to reside somewhere for the peace and good government of the kingdom, was again revived in practice. And it is observable, that, in the same act of parliament which abolished the court of star-chamber, a conviction by information is expressly reckoned up, as one of the legal modes of conviction of such persons, as should offend a third time against the provisions of that statute. It is true, sir Matthew Hale, who presided in this court soon after the time of such revival, is said to have been no friend to this method of prosecution: and, if so, the reason of such his dislike was probably the ill use, which the master of the crown-office then made of his authority, by permitting the subject to be harassed with vexatious informations,

r 1 And. 157.
s 5 Mod. 464.
u Stat. 16 Car. I. c. 10. 6.
w 5 Mod. 460.

whenever applied to by any malicious or revengeful prosecutor; rather than his doubt of their legality, or propriety upon urgent occasions. For the power of filing informations, without any control, then resided in the breast of the master: and, being filed in the name of the king, they subjected the prosecutor to no costs, though on trial they proved to be groundless. This oppressive use of them, in the times preceding the revolution, occasioned a struggle, soon after the accession of king William, to procure a declaration of their illegality by the judgment of the court of king's bench. But sir John Holt, who then presided there, and all the judges, were clearly of opinion, that this proceeding was grounded on the common law, and could not be then impeached. And, in a few years afterwards, a more temperate remedy was applied in parliament, by statute 4 & 5 W. & M. c. 18. which enacts, that the clerk of the crown shall not file any information without express direction from the court of king's bench: and that every prosecutor, permitted to promote such information, shall give security by a recognizance of twenty pounds (which now seems
to be too small a sum) to prosecute the same with effect; and to pay costs to the defendant, in case he be acquitted thereon, unless the judge, who tries the information, shall certify there was reasonable cause for filing it; and, at all events, to pay costs, unless the information shall be tried within a year after issue joined. But there is a proviso in this act, that it shall not extend to any other informations, than those which are exhibited by the master of the crown-office: and, consequently, informations at the king's own suit, filed by his attorney general, are no way restrained thereby.

THERE is one species of informations, still farther regulated by statute 9 Ann. c. 20. viz. those in the nature of a writ of quo warranto; which was shewn in the preceding volume, to be a remedy given to the crown against such as had usurped or intruded into any office or franchise. The modern information

x 1 Saund. 301. 1 Sid. 174.
z See Vol. III. pag. 262.

tends to the same purpose as the antiend writ, being generally made use of to try the civil rights of such franchises; though it is commenced in the same manner as other informations are, by leave of the court, or at the will of the attorney-general: being properly a criminal prosecution, in order to fine the defendant for his usurpation, as well as to oust him from his office; yet usually considered at present as merely a civil proceeding.

THESE are all the methods of prosecution at the suit of the king. There yet remains another, which is merely at the suit of the subject, and is called an appeal.

IV. AN appeal, in the sense wherein it is here used, does not signify any complaint to a superior court of an injustice done by an inferior one, which is the general use of the word; but it here means an original suit, at the time of its first commencement. An appeal therefore, when spoken of as a criminal prosecution, denotes an accusation by a private subject against another, for some heinous crime; demanding punishment on account of the particular injury suffered, rather than for the offence against the public. As this method of prosecution is still in force, I cannot omit to mention it: but, as it is very little in use, on account of the great nicety
required in conducting it, I shall treat of it very briefly; referring the student for more particulars to other voluminous compilations b.

THIS private process, for the punishment of public crimes, had probably its original in those times, when a private pecuniary satisfaction, called a weregild, was constantly paid to the party injured, or his relations, to expiate enormous offences. This was a custom derived to us, in common with other northern nations c, from our ancestors, the ancient Germans; among

a It is derived from the French, appeller, the verb active, which signifies to call upon, summon, or challenge one; and not the verb neuter, which signifies the same as the ordinary sense of appeal? in English.
b 2 Hawk. P. C. ch. 23.
c Stiernh. de jure Suean. l. 3. c. 4.

whom according to Tacitus d, luitur homicidium certo armentorum ac pecorum numero; recipitque satisfactionem universa domus e. In the same manner by the Irish Brehon law, in case of murder, the Brehon or judge was used to compound between the murderer, and the friends of the deceased who prosecuted him, by causing the malefactor to give unto them, or to the child or wife of him that was slain, a recompense which they called an eriachf. And thus we find in our Saxon laws (particularly those of king Athelstan g) the several weregilds, for homicide established in progressive order, from the death of the ceorl or peasant, up to that of the king himself h. And in the laws of king Henry I i, we have an account of what other offences were then redeemable by weregild, and what were not so k. As therefore, during the continuance of this custom, a process was certainly given, for recovering the weregild by the party to whom it was due; it seems that, when these offences by degrees grew no longer redeemable, the private process was still continued, in order to insure the infliction of punishment upon the offender, though the party injured was allowed no pecuniary compensation for the offence.

BUT, though appeals were thus in the nature of prosecutions for some atrocious injury committed more immediately against an individual, yet it also was anciently permitted, that any sub-

d d de M. G. c. 21.
And in another place, (c. 12.) Delictis, pro modu poenarum, equorum pecorumque numera convicti multantur. Pars multae regi vel civitati; pars ipsi qui vindicatur, vel propinquis ejus, exsolvitur.

Spenser's state of Ireland, pag. 1513. edit. Hughes.

The weregild of a ceorl was 266 thrymfas, that of the king 30000; each thrymfa being equal to about a shilling of our present money. The weregild of a subject was paid entirely to the relations of the party slain; but that of the king was divided; one half being paid to the public, the other to the royal family.

c. 12.

In Turkey this principle is still carried so far, that even murder is never prosecuted by the officers of the government, as with us. It is the business of the next relations, and them only to revenge the slaughter of their kinsmen; and if they rather choose (as they generally do) to compound the matter for money, nothing more is said about it. (Lady M. W. Montague. Lett. 42.)

ject might appeal another subject of high-treason, either in the courts of common law, or in parliament, or (for treasons committed beyond the seas) in the court of the high constable and marshal. The cognizance of appeals in the latter still continues in force; and so late as 1631 there was a trial by battle awarded in the court of chivalry, on such an appeal of treason: but the first was virtually abolished by the statutes 5 Edw. III. c. 9. and 25 Edw. III. c. 24. and the second expressly by statute 1 Hen. IV. c. 14. So that the only appeals now in force, for things done within the realm, are appeals of felony and mayhem.

AN appeal of felony may be brought for crimes committed either against the parties themselves, or their relations. The crimes against the parties themselves are larceny, rape, and arson. And for these, as well as for mayhem, the persons robbed, ravished, maimed, or whose houses are burnt, may institute this private process. The only crime against one's relation, for which an appeal can be brought, is that of killing him, by either murder or manslaughter. But this cannot be brought by every relation: but only by the wife for the death of her husband, or by the heir male for the death of his ancestor; which heirship was also confined, by an ordinance of king Henry the first, to the four nearest degrees of blood. It is given to the wife, on account of the loss of her husband: therefore, if she marries again, before or pending her appeal, it is lost and gone; or, if she
marries after judgment, she shall not demand execution. The heir, as was said, must also be heir male, and such a one as was the next heir by the course of the common law, at the time of the killing of the ancestor. But this rule has three exceptions: 1. If the person killed leaves an innocent wife, she only, and not the heir, shall have the appeal; 2. If there be no wife, and the heir be accused of the murder, the person, who next to him would have been heir male, shall bring the appeal; 3. If the

1 Brit. c. 22.
m By Donald lord Rea against David Ramfey. (Rafhw. Vol. 2. Part. 2. pag. 122.)

n 1 Hal. P. C. 349.
o Mirr. C. 2. 7.

wife kills her husband, the heir may appeal her of the death. And, by the statute of Gloucester, 6 Edw. I. c. 9. all appeals of death must be sued within a year and a day after the completion of the felony by the death of the party: which seems to be only declaratory of the old common law; for in the Gothic constitutions we find the same praescriptio annalis, quae currit adversus actorem, si de homicida ei non constat intra annum a caede facta, nec quenquam interea arguat et accuset p.

THESE appeals may be brought, previous to any indictment; and, if the appellee be acquitted thereon, he cannot be afterwards indicted for the same offence. In like manner as by the old Gothic constitution, if any offender gained a verdict in his favour, when prosecuted by the party injured, he was also understood to be acquitted of any crown prosecution for the same offence q: but, on the contrary, if he made his peace with the king, still he might be prosecuted at the suit of the party. And so, with us, if a man be acquitted on an indictment of murder, or found guilty, and pardoned by the king, still he may, by virtue of statute 3 Hen. VII. c. 1. be prosecuted by appeal for the same felony, not having as yet been punished for it: though, if he hath been found guilty of manslaughter on an indictment, and hath had the benefit of clergy, and suffered the judgment of the law, he cannot afterwards be appealed. For it is a maxim of law, that memores punitur pro eodem delicto.

IF the appellee be found guilty, he shall suffer the same judgment, as if he had been convicted by indictment: but with this remarkable difference; that on an indictment, which is at the suit of the king, the king may pardon
and remit the execution; on an appeal, which is at the suit of a private subject, to make an atonement for the private wrong, the king can no more pardon it, than he can remit the damages recovered on an action of battery. In like manner as, while the weregild continued to

p Strinr. de jure Goth. l. 3. c. 4.
q Ibid. l. 1. c. 5.
r 2 Hawk. P. C. 392.

be paid as a fine for homicide, it could not be remitted by the king's authority s. And the ancient usage was, so late as Henry the fourth's time, that all the relations of the slain should drag the appellee to the place of execution t: a custom, founded upon that savage spirit of family resentment, which prevailed universally through Europe, after the eruption of the northern nations, and is peculiarly attended to in their several codes of law; and which prevails even now among the wild and untutored inhabitants of America: as if the finger of nature had pointed it out to mankind, in their rude and uncultivated state. However, the punishment of the offender may be remitted and discharged by the concurrence of all parties interested; and as the king by his pardon may frustrate an indictment, so the appellant by his release may discharge an appeal u: nam quilibet potest renunciarejuri, pro se introducto.

THESE are the several methods of prosecution instituted by the laws of England for the punishment of offences; of which that by indictment is the most general. I shall therefore confine my subsequent observations principally to this method of prosecution; remarking by the way the most material variations that may arise, from the method of proceeding by either information or appeal.

a LL. Edm. 3.
t M. 11 Hen. IV. 12. 3 Inst. 131.
u 1 Hal. P. C. 9.

CHAPTER THE TWENTY FOURTH.
OF PROCESS UPON AN INDICTMENT.

WE are next, in the fourth place, to enquire into the manner of issuing process, after indictment found, to bring in the accused to answer it. We
have hitherto supposed the offender to be in custody before the finding of
the indictment; in which case he is immediately to be arraigned thereon.
But if he hath fled, or secretes himself, in capital cases; or hath not, in
smaller misdemesnors, been bound over to appear at the assises or
sessions, still an indictment may be preferred against him in his absence;
since, were he present, he could not be heard before the grand jury against
it. And, if it be found, then process must issue to bring him into court; for
the indictment cannot be tried, unless he personally appears: according
to the rules of equity in all, and the express provision of statute 28 Edw. III.
c. 3. in capital, cases; that no man shall be put to death, without being
brought to answer by due process of law.

THE proper process on an indictment for any petty misdemesnor, or on a
penal statute, is a writ of venire facias, which is in the nature of a
summons to cause the party to appear. And if by the return to such venire
it appears, that the party hath lands in the county whereby he may be
distreined, then a distress infinite shall be issued from time to time till he
appears.

But if the sheriff returns that he hath no lands in his bailiwick, then (upon
his non-appearance) a writ of capias shall issue, which commands the
sheriff to take his body, and have him at the next assises; and if he cannot
be taken upon the first capias, a second, and a third shall issue, called an
alias, and a pluries capias. But, on indictments for treason or felony, a
capias is the first process: and, for treason or homicide, only one shall be
allowed to issue a, or two in the case of other felonies, by statute 25 Edw.
III. c. 14. though the usage is to issue only one in any felony; the
provisions of this statute being in most cases found impracticable. And
so, in the case of misdemesnors, it is now the usual practice for any judge
of the court of king’s bench, upon certificate of an indictment found, to
award a writ of capias immediately, in order to bring in the defendant. But
if he absconds, and it is thought proper to pursue him to an outlawry, then
a greater exactness is necessary. For, in such case, after the several writs
have issued in a regular number, according to the nature of the respective
crimes, without any effect, the offender shall be put in the exigent in order
to his outlawry: that is, he shall be exacted, proclaimed, or required to
surrender, at five county courts; and if he be returned quinto exactus, and
does not appear at the fifth exaction or requisition, then he is adjudged to
be outlawed, or put out of the protection of the law; so that he is incapable
of taking the benefit of it in any respect, either by bringing actions or otherwise.

THE punishment for outlawries upon indictments for misdemeanors, is the same as for outlawries upon civil actions; (of which, and the previous process by writs of capias, exigi facias, and proclamation, we spoke in the preceding book c) viz. forfeiture of goods and chattels. But an outlawry in treason or felony amounts to a conviction and attainer of the offence charged in the indictment, as much as if he had been found guilty by his country. His life is however still under the protection of

the law, as hath formerly been observed e: and though anciently an outlawed felon was said to have caput lupinum, and might be knocked on the head like a wolf, by any one that should meet him f; because, having renounced all law, he was to be dealt with as in a state of nature, when every one that should find him might slay him: yet now, to avoid such inhumanity, it is holden that no man is intitled to kill him wantonly or wilfully; but in so doing is guilty of murder g, unless it happens in the endeavour to apprehend him h. For any person may arrest an outlaw on a criminal prosecution, either of his own head, or by writ or warrant of capias utlagatum, in order to bring him to execution. But such outlawry may be frequently reversed by writ of error; the proceedings therein being (as it is fit they should be) exceedingly nice and circumstantial; and, if any single minute point be omitted or misconducted, the whole outlawry is illegal, and may be reversed: upon which reversal the party accused is admitted to plead to, and defend himself against, the indictment.

THUS much for process to bring in the offender after indictment found; during which stage of the prosecution it is, that writs of certiorari facias are usually had though they may be had at any time before trial, to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction into the court of king's bench; which is the sovereign ordinary court of justice in causes criminal. And this is frequently done for one of these four purposes; either, 1. To consider and determine the validity of appeals or indictments and the proceedings
thereon: and to quash or confirm them as there is cause: or, 2. Where it is surmised that a partial or insufficient trial will probably be had in the court below, the indictment is removed, in order to have the prisoner or defendant tried at the bar of the court of king's bench, or before the justices of nisi prius: or, 3. It is so removed, in order to plead the king's pardon there: or, 4. To issue process of outlawry against the offender, in those countries or places where the process of the inferior judges will not reach him i. Such writ of certiorari, when issued and delivered to the inferior court for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior court, and makes all subsequent proceedings therein entirely erroneous and illegal; unless the court of king's bench remands the record to the court below, to be there tried and determined. A certiorari may be granted at the instance of either the prosecutor or the defendant: the former as a matter of right, the latter as a matter of discretion; and therefore it is seldom granted to remove indictments from the justices of gaol delivery, or after issue joined or confession of the fact in any of the courts below k.

AT this stage of prosecution also it is, that indictments found by the grand jury against a peer must in consequence of a writ of certiorari be certified and transmitted into the court of parliament, or into that of the lord high steward of Great Britain; and that, in places of exclusive jurisdiction, as the two universities, indictments must be delivered (upon challenge and claim of cognizance) to the courts therein established by charter, and confirmed by act of parliament, to be there respectively tried and determined.

k 2 Hawk. P. C. 287. 4 Burr. 749.

CHAPTER THE TWENTY FIFTH.  
OF ARRAIGNMENT, AND ITS INCIDENTS.
WHEN the offender either appears voluntarily to an indictment, or was before in custody, or is brought in upon criminal process to answer it in the proper court, he is immediately to be arraigned thereon; which is the fifth stage of criminal prosecution.

TO arraign, is nothing else but to call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment a. The prisoner is to be called to the bar by his name; and it is laid down in our ancient books b, that, though under an indictment of the highest nature, he must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape, and then he may be secured with irons. But yet in Layer’s case, A. D. 1722. a difference was taken between the time of arraignment, and the time of trial; and accordingly the prisoner stood at the bar in chains during the time of his arraignment c.

a 2 Hal. P. C. 216.  
c State Trials. VI. 230.

WHEN he is brought to the bar, he is called upon by name to hold up his hand: which, though it may seem a trifling circumstance, yet is of this importance, that by the holding up of his hand constat de persona, and he owns himself to be of that name by which he is called d. However it is not an indispensable ceremony; for, being calculated merely for the purpose of identifying the person, any other acknowledgement will answer the purpose as well: therefore, if the prisoner obstinately and contumaciously refuses to hold up his hand, but confesses he is the person named, it is fully sufficient e.

THEN the indictment is to be read to him distinctly in the English tongue (which was law, even while all other proceedings were in Latin) that he may fully understand his charge. After which it is to be demanded of him, whether he be guilty of the crime, whereof he stands indicted, or not guilty. By the old common law the accessory could not be arraigned till the principal was attainted; and therefore, if the principal had never been indicted at all, had stood mute, had challenged above thirty five jurors

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peremptorily, had claimed the benefit of clergy, had obtained a pardon, or had died before attainder; the accessory in any of these cases could not be arraigned: for non conflitit whether any felony was committed or no, till the principal was attained; and it might so happe that the accessory should be convicted one day, and the principal acquitted the next, which would be absurd. However, this absurdity could only happen, where it was possible, that a trial of the principal might be had, subsequent to that of the accessory: and therefore the law still continues, that the accessory shall not be tried, so long as the principal remains liable to be tried hereafter.

But by statute 1 Ann. c. 9. if the principal be once convicted, and before attainder, (that is, before he receives judgment of death or outlawry) he is delivered by pardon, the benefit of clergy, or otherwise; or if the principal stands mute, or challengers peremptorily

e Raym. 408.

above the legal number of jurors, so as never to be convicted at all; in any of these cases, in which no subsequent trial can be had of the principal, the accessory may be proceeded against, as if the principal felon had been attainted; for there is no danger of future contradiction. And upon the trial of the accessory, as well after as before the conviction of the principal, it seems to be the better opinion, and founded on the true spirit of justice f, that the accessory is at liberty (if he can) to controvert the guilt of his supposed principal, and to prove him innocent of the charge, as well in point of fact as in point of law.

WHEN a criminal is arraigned, he either stands mute, or confesses the fact; which circumstances we may call incidents to the arraignment: or else he pleads to the indictment, which is to be considered as the next stage of proceedings. But, first, let us observe these incidents to the arraignment, of standing mute,

I. REGULARLY a prisoner is said to stand mute, when, being arraigned for treason or felony, he either, 1. Makes no answer at all: or, 2. Answers foreign to the purpose, or with such matter as is not allowable; and will not answer otherwise: or, 3 Upon having pleaded not guilty, refuses to put himself upon the country g. If he says nothing, the court ought ex officio to impanel a jury, to enquire whether he stands obstinately mute, or whether he be dumb ex visitatione Dei. If the latter appears to be the case, the
judges of the court (who are to be of counsel for the prisoner, and to see that he hath law and justice) shall proceed to the trial, and examine all points as if he had pleaded not guilty. But whether judgment of death can be given against such a prisoner, who hath never pleaded, and can say nothing in arrest of judgment, is a point yet undetermined.

f Foster. 365, & c.
g 2 Hal. P. C. 316.
h 2 Hawk. P. C. 327.
i I 2 Hal. P. C. 317.

IF he be found to be obstinately mute, (which a prisoner hath been held to be, that hath cut out his own tongue,) then, if it be on an indictment of high treason, it is clearly settled that standing mute is equivalent to a conviction, and he shall receive the same judgment and execution. And as in this the highest crime, so also in the lowest species of felony, viz. in petit larceny, and in all misdemeanors, standing mute is equivalent to conviction. But upon appeals or indictments for other felonies, or petit treason, he shall not be looked upon as convicted, so as to receive judgment for the felony; but shall, for his obstinacy, receive the terrible sentence of penance, or peine forte et dure.

BEFORE this is pronounced the prisoner ought to have not only trina admonitio, but also a convenient respite of a few hours, and the sentence should be distinctly read to him, that he may know his danger: and, after all, if he continues obstinate, and his offence is clergyable, he shall have the benefit of his clergy allowed him; even though he is too stubborn to pray it. Thus tender has the modern law been of inflicting this dreadful punishment: but if no other means will prevail, and the prisoner (when charged with a capital felony) continues stubbornly mute, the judgment is then given against him, without any distinction of sex or degree. A judgment, which the law has purposely ordained to be exquisitely severe, that by that very means it might rarely be put in execution.

THE rack, or question, to extort a confession from criminals, is a practice of a different nature: this being only used to compel a man to put himself upon his trial; that being a species of trial in itself. And the trial by rack is utterly unknown to the law of England; though once when the dukes of
Exeter and Suffolk, and other ministers of Henry VI, had laid a design to introduce the civil law into this kingdom as the rule of govern-

k 3 Inst. 178.
m 2 Hal. P. C. 320.

ment, for a beginning thereof they erected a rack for torture; which was called in derision the duke of Exeter's daughter, and still remains in the tower of London o: where it was occasionally used as an engine of state, not of law, more than once in the reign of queen Elizabeth p; but when, upon the assassination of Villiers duke of Buckingham by Felton, it was proposed in the privy council to put the assassin to the rack, in order to discover his accomplices; the judges, being consulted, declared unanimously, to their own honour and the honour of the English law, that no such proceeding was allowable by the laws of England q. It seems astonishing that this usage, of administering the torture, should be said to arise from a tenderness to the lives of men: and yet this is the reason given for its introduction in the civil law, and its subsequent adoption by the French and other foreign nation r: viz. because the laws cannot endure that any man should die upon the evidence of a false, or even a single, witness; and therefore contrived this method that innocence should manifest itself by a stout denial, or guilt by a plain confession. Thus rating a man's virtue by the hardiness of his constitution, and his guilt by the sensibility of his nerves! But there needs only to state accurately s, in order most effectually to expose, this inhuman species of mercy: the uncertainty of which, as a test and criterion of truth, was long ago very elegantly pointed out by Tully; though he lived in a state wherein it was usual to torture slaves in order to furnish evidence: tamen, says he, illa tormenta gubernat dolor, moderatur natura cujusque tum animi tum corporis, regit quaesitor, flectit libido, corrumpit fpes, infirmat metus; ut in tot rerum angustiis nihil veritati loci relinquatur t.

o 3 Inst. 35.
p Barr. 69. 385.
q Rufhw. Coll. i. 638.
r Cod. l. 9. t. 41. l. 8. & t. 47. l. 16. Fortesc. de LL. Angl. c. 22.
s The marquis Beccaria, (ch. 16.) in an exquisite piece of raillery, has proposed this problem. with a gravity and precision that are truly
mathematical: the force of the muscles and the sensibility of the nerves of an innocent person being given, it is required to find the degree of pain, necessary to make him confess himself guilty of a given crime. Pro Sulla. 28.

THE English judgment of penance for standing mute v is as follows: that the prisoner shall be remanded to the prison from whence he come; and put into a low, dark chamber; and there be laid on his back, on the bare floor, naked, unless where decency forbids; that there be placed upon his body as great a weight of iron as he can bear, and more; that he shall have no sustenance, save only, on the first day, three morsels of the worst bread; and, on the second day, three draughts of standing water, that shall be nearest to the prison door; and in this situation this shall be alternately his daily diet, till he dies, as the judgment now runs, though formerly it was, till he answered u.

IT hath been doubted whether this punishment subsisted at the common law w, or was introduced in consequence of the statute Westm. 1. 3 Edw. I. c. 12./xwhich seems to be the better opinion. For not a word of it is mentioned in Glanvil or Bracton, or in any ancient author, case, or record, (that hath yet been produced) previous to the reign of Edward I: but there are instances on record in the reign of Edward I: but there are instances on record in the reign of Henry III y, where persons accused of felony, and standing mute, were tried in a particular manner, by two successive juries, and convicted; and it is asserted by the judges in 8 Hen. IV. that, by the common law before the statute, standing mute on an appeal amounted to a conviction of the felony z. This statute of Edward I directs such persons, as will not put themselves upon inquests of felonies before the judges at the suit of the king, to be put into hard and strong prison (foient mys en la prisone fort et dure) as those which refuse to be at the common law of the land. And, immediately after this statute, the form of the judgment appears in Fleta and Britton to have been only a very strait con-

u Britton. c. 4. & 22. Flet. l. 1. c. 34. 33.
y Emlyn on 2 Hal. P. C. 322.
z Al common ley, avant le statute de West. 1. c. 12. si afcxn uft estre appeal, et uft estre mute, il ferra convict de felony. (M. 8 Hen. IV. 2.)
finement in prison, with hardly any degree of sustenance; but no weight is
directed to be laid upon the body, so as to hasten the death of the
miserable sufferer: and indeed any surcharge of punishment on persons
adjudged to penance, so as to shorten their lives, is reckoned by Horne in
the mirror a as a species of criminal homicide: to which we may add, that
the record of 35 Edw. I. (cited by a learned author b) most clearly proves,
that the prisoner might then possibly subsist for forty days under this
lingering punishment. I should therefore imagine that the practice of
loading him with weights, or, as it is usually called, pressing him to death,
was gradually introduced between the reign of Edward I and 8 Hen. IV,
when it first appears upon our books c; and was intended as a species of
mercy to the delinquent, by delivering him the sooner from his torment:
and hence I presume it also was, that the duration of the penance was then
first d altered; and instead of continuing till he answered, it was directed
to continue till he died, which must very soon happen under an enormous
pressure.

THE uncertainty of its original, the doubts that may be conceived of its
legality, and the repugnance of its theory (for it rarely is carried into
practice) to the humanity of the laws of England, all seem to require a
legislative abolition of this cruel process, and a restitution of the ancient
common law; whereby the standing mute in felony, as well as in treason
and in trespass, amounted to a confession of the charge. Or, if the
corruption of the blood and the consequent escheat in felony were
removed, the peine forte et dure might still remain, as a monument of the
savage rapacity, with which the lordly tyrants of feodal antiquity hunted
after escheats and forfeitures; but no man would ever be tempted to
undergo such a horrid alternative. For the law is, that by standing mute,
and suffering this heavy penance, the judgment, and of course the
corruption of the blood and escheat of the lands, are saved in felony and
petit treason;

ch. 1.  9.
Barr. 62.
b Yearb. 8 Hen. IV. 1.
c Et suit dit, que le contrarie avoit etire fait devant ces heures. (Ibid. 2)

though not the forfeiture of the goods: and therefore this lingering
punishment was probably introduced, in order to extort a plea; without
which it was held that no judgment of death could being given, and so the lord lost his escheat. But notwithstanding these terrors, some hardy delinquents, conscious of their guilt, and yet touched with a tender regard for their children, have rather chosen to submit to this painful death, than the easier judgment upon conviction, which might expose their offspring not only to present want, but to future incapacities of inheritance. But in high treason, as standing mute is equivalent to a conviction, the same judgment, the same corruption of blood, and the same forfeitures attend it, as in other cases of conviction e. And thus much for the demesnor of a prisoner upon his arraignment, by standing mute.

II. THE other incident to arraignments, exclusive of the plea, is the prisoner's confession of the indictment. Upon a simple and plain confession, the court hath nothing to do but to award judgment: but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it, and plead to the indictmentf. BUT there is another species of confession, which we read much of in our ancient books, of a far more complicated kind, which is called approvement. And that is when a person, indicted of treason or felony, and arraigned for the same, doth confess the fact before plea pleaded; and appeals or accuses others, his accomplices, of the same crime, in order to obtain his pardon. In this case he is called an approver or prover, probator, and the party appealed or accused is called the appellee. Such approvement can only be in capital offences; and it is, as it were, equivalent to an indictment, since the appellee is equally called upon to answer it: and if he hath no reasonable and legal exceptions to make to the person of the approver, which indeed

e 2 Hawk. P. C. 331.
f 2 Hal. P. C. 225.

are very numerous, he must put himself upon his trial, either by battle, or by the country; and, if vanquished or found guilty, must suffer the judgment of the law, and the approver shall have his pardon, ex debito justitiae. On the other hand, if the appellee be conqueror, or acquitted by the jury, the approver shall receive judgment to be hanged, upon his own confession of the indictment; for the condition of his pardon has failed,
viz. the convicting of some other person, and therefore his conviction remains absolute.

BUT it is purely in the discretion of the court to permit the approver thus to appeal, or not; and, in fact, this course of admitting approvements hath been long disused: for the truth was, as sir Matthew Hale observes, that more mischief hath arisen to good men by these king of approvements, upon false and malicious accusations of desperate villains, than benefit to the public by the discovery and conviction of real offenders. And therefore, in the times when such appeals were more frequently admitted, great strictness and nicety were held therein g: though, since their discontinuance, the doctrine of approvements is become a matter of more curiosity than use. I shall only observe, that all the good, whatever it be, that can be expected from this method of approvement, is fully provided for in the cases of robbery, burglary, housebreaking, and larceny to the value of five shillings from shops, warehouses, stables, and coachhouses, by statutes 4 & 5 W. M. c. 8. 10 & 11 W. III. c. 23. and 5 Ann. c. 31. which enact, that, if any such felon, being out of prison, shall discover two or more persons, who have committed the like felonies, so as they may be convicted thereof; he shall in most cases receive a reward of 40 l, and in general be entitled a pardon of all capital offences, excepting only murder and treason. And if any such person, having feloniously stolen any lead, iron, or other metals, shall discover and convict two offenders of having illegally bought or received the same he shall by virtue of statute 29 Geo. II. c. 30 be pardoned for all such felonies committed before such discovery.


CHAPTER THE TWENTY SIXTH.
OF PLEA, AND ISSUE.

WE are now to consider the plea of the prisoner, or defensive matter alleged by him on his arraignment, if he does not confess, or stand mute. This is either, 1. A plea to the jurisdiction ; 2. A demurrer ; 3. A. plea in abatement ; 4. A special plea in bar; or, 5. The general issue.

FORMERLY there was another plea, now abrogated, that of sanctuary; which is however necessary to be lightly touched upon as it may give some
light to many parts of our ancient law: it being introduced and continued
during the superstitious veneration, that was paid to consecrated ground
in the times of popery. First then, it is to be observed, that if a person
accused of any crime (except treason, wherein the crown, and sacrilege,
wherein the church, was too nearly concerned) had fled to any church or
church-yard, and within forty days after went in sackcloth and confessed
himself guilty before the coroner, and declared all the particular
circumstances of the offence; and thereupon took the oath in that case
provided, viz. that he abjured the realm, and would depart from thence
forthwith at the port that should be assigned him, and would never return
without leave from the king; he by this means saved his life, if he observed
the conditions of the oath, by going with a cross in his hand and with

all convenient speed, to the port assigned, and embarking. For it, during
this forty days privilege of sanctuary, or in his road to the sea side, he was
apprehended and arraigned in any court for this felony, he might plead the
privilege of sanctuary, and had a right to be remanded, if taken out against
his will a. But by this abjuration his blood was attainted, and he forfeited
all his goods and chattels b. The immunity of these privileged places was
very much abridged by the statutes 27 Hen. VIII. c. 19. and 32 Hen. VIII. c.
12. And now, by the statute 21 Jac. I. c. 28. all privilege of sanctuary, and
abjuration consequent thereupon, is utterly taken away and abolished.

FORMERLY also the benefit of clergy used to be pleaded before trial or
conviction, and was called a declinatory plea; which was the name also
given to that of sanctuary c. But, as the prisoner upon a trial has a chance
to be acquitted, and totally discharged; and, if convicted of a clergyable
felony, is entitled equally to his clergy after as before conviction; this
course is extremely disadvantageous: and therefore the benefit of clergy is
now very rarely pleaded; but, if found requisite, is prayed by the convict
before judgment is passed upon him.

I PROCEED therefore to the five species of pleas, beforementioned.

I. A PLEA to the jurisdiction, is where an indictment is taken before a
court, that hath no cognizance of the offence; as if a man be indicted for a
rape at the sheriff's turn, or for treason at the quarter sessions: in these or
similar cases, he may except to the jurisdiction of the court, without
answering at all to the crime alleged d.
II. A DEMURRER to the indictment. This is incident to criminal cases, as well as civil, when the fact as alleged is allowed

a Mirr. c. 1. 13. 2 hawk. P. C. 335.
b 2 Hawk. P. C. 52.
c 2 Hal. P. C. 236.
d Ibid. 256.

to be true, but the prisoner joins issue upon some point of law in the indictment, by which he insists that the fact, as stated, is no felony, treason, or whatever the crime is alleged to be. Thus, if a man be indicted for feloniously stealing a greyhound: which is an animal in which no valuable property can be had, and therefore it is not felony, but only a civil trespass, to steal it: in this case the party indicted may demur to the indictment; denying it to be felony, though he confesses the act of taking it. Some have held e, that if, on demurrer, the point of law be adjudged against the prisoner, he shall have judgment and execution, as if convicted by verdict. But this is denied by others f, who hold, that in such case he shall be directed and received to plead the general issue, not guilty, after a demurrer determined against him. Which appears the more reasonable, because it is clear, that if the prisoner freely discovers the fact in court, and refers it to the opinion of the court, whether it be felony, or no; and upon the fact thus shewn in appears to be felony; the court will nor record the confession, but admit him afterwards to plead not guilty g. And this seems to be a case of the same nature, being for the most part a mistake in point of law, and in the conduct of his pleading; and, though a man by mispleading may in some cases lose his property, yet the law will not suffer him by such niceties to lose his life. However, upon this doubt, demurrers to indictments are seldom used: since the same advantages may be taken upon a plea of not guilty; or afterwards, in arrest of judgment, when the verdict has established the fact.

III. A PLEA in abatement is principally for a misnomer, a wrong name, or a false addition to the prisoner. As, if James Allen, gentleman, is indicted by the name of John Allen, esquire, he may plead that he has the name of James, and not of John; and that he is a gentleman, and not an esquire. And, if either fact is found by a jury, then the indictment shall be abated, as

e 2 Hal. P. C. 257.
writs or declarations may be in civil actions; of which we spoke at large, in the preceding volumeh. But, in the end, there is little advantage accruing to the prisoner by means of these dilatory pleas; because if the exception be allowed, a new bill of indictment may be framed, according to what the prisoner is his plea avers to be his true name and addition. For it is a rule, upon all pleas in abatement, that he, who takes advantage of a flaw, must at the same time shew how it may be amended. Let us therefore next consider a more substantial kind of plea, viz.

IV. SPECIAL pleas in bar; which go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged. These are of four kinds: a former acquittal, a former conviction, a former attainder, or a pardon. There are many other pleas, which may be pleaded in bar of an appeali: but these are applicable to both appeals and indictments.

1. FIRST, the plea of auterfoits 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 hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, he may plead such acquittal in bar of any subsequent accusation for the same crime. Therefore an acquittal on an appeal is a good bar to an indictment of the same offence. And so also was an acquittal on an indictment a good bar to an appeal, by the common law: and therefore, in favour of appeals, a general practice was introduced, not to try any person on an indictment of homicide, till after the year and day, within which appeals may be brought, were past; by which time it often happened that the witnesses died, or the whole was forgotten. To remedy which inconvenience, the statute 3 Hen. VII. c. 1. enacts,

h See Vol. III. pag. 302.
i 2 Hawk. P. C. ch. 23.
k Ibid. 373.

that indictments shall be proceeded on, immediately, at the king's suit, for the death of a man, without waiting for bringing an appeal; and that the
plea, of auterfoits acquit on an indictment, shall be no bar to the
prosecuting of any appeal.

2. SECONDLY, the plea of auterfoits convict, or a former conviction for the
same identical crime, though no judgment was ever given, or perhaps will be (being suspended by the benefit of clergy or other causes) is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crimel. Hereupon it has been held, that a conviction of manslaughter, on an appeal, is a bar even in another appeal, and much more in an indictment, of murder; for the fact prosecuted is the same in both, though the offences differ in colouring and in degree. It is to be observed, that the pleas of auterfoits acquit, and auterfoits convict, or a former acquittal, and former conviction, must be upon a prosecution for the same identical act and crime. But the case is otherwise, in

3. THIRDLY, the plea of auterfoits attaint, or a former attainder; which is a good plea in bar, whether it be for the same or any other felony. For wherever a man is attainted of felony, by judgment of death either upon a verdict or confession, by outlawry, or heretofore by adjuration; and whether upon an appeal or an indictment; he may plead such attainder in bar to any subsequent indictment or appeal, for the same or for any other felonym. And this because, generally, such proceeding on a second prosecution cannot be to any purpose; for the prisoner is dead in law by the first attainder, his blood is already corrupted, and he hath forfeited all that he had: so that it is absurd and superfluous to endeavour to attain him a second time. But to this general rule however, as to all others, there are some exceptions; wherein, cessante ratione, cessat et ipsa lex. As, 1. Where the former attainder is reversed for error, for then it

1 2 Hawk. P. C. 377.
m Ibid. 375.

is the same as if it had never been. And the same reason holds, where the attainder is reversed by parliament, or the judgment vacated by the king's pardon, with regard to felonies committed afterwards. 2. Where the attainder was upon indictment, such attainder is no bar to an appeal: for the prior sentence is pardonable by the king; and if that might be pleaded in bar of the appeal, the king might in the end defeat the suit of the subject, by suffering the prior sentence to stop the prosecution of a second, and
then, when the time of appealing is elapsed, granting the delinquent a pardon. 3. An attainder in felony is no bar to an indictment of treason: because not only the judgment and manner of death are different, but the forfeiture is more extensive, and the land goes to different persons. 4. Where a person attainted of one felony, as robbery, is afterwards, indicted as principal in another, as murder, to which there are also accessories, prosecuted at the same time; in this case it is held, that the plea of auterfoits attaint is no bar, but he shall be compelled to take his trial, for the sake of public justice: because the accessories to such second felony cannot be convicted till after the conviction of the principal. And from these instances we may collect that the plea of auterfoits attaint is never good, but when a second trial would be quite superfluous.

4. LASTLY, a pardon may be pleaded in bar; as at once destroying the end and purpose of the indictment, by remitting that punishment, which the prosecution is calculated to inflict. There is one advantage that attends pleading a pardon in bar, or in arrest of judgment, before sentence is past; which gives it by much the preference to pleading it after sentence or attainder. This is, that by stopping the judgment it stops the attainder, and prevents the corruption of the blood: which, when once corrupted by attainder, cannot afterwards be restored, otherwise than by act of parliament. But, as the title of pardons is applicable to other stages of prosecution; and they have their respective force and efficacy, as well after as before conviction, outlawry, or attainder; I shall therefore reserve the more minute consideration of them, till I have gone through every other title, except only that of execution.

BEFORE I conclude this head of special pleas in bar, it will be necessary once more to observe; that, though in civil actions when a man has his election what plea in bar to make, he is concluded by that plea, and cannot resort to another if that be determined against him; (as, if on an action of debt the defendant against him; (as, if on an action of debt the defendant pleads a general release, and no such release can be proved, he cannot afterwards plead the general issue, nil debet, as he might at first: for he has made his election what plea to abide by, and it was his own folly to choose a rotten defence) though, I say, this strictness is observed in civil actions, quia interest reipublicae ut sit finis litium: yet in criminal prosecutions, in favorem vitae, as well upon appeal as indictment, when a prisoner's plea in bar is found against him upon issue tried by a jury, or adjudged against him in point of law by the court; still he shall not be
concluded or convicted thereon, but shall have judgment of respondeat ouster, and may plead over to the felony the general issue, not guilty n. For the law allows many pleas by which a prisoner may escape death; but only one plea, in consequence whereof it can be inflicted; viz. on the general issue, after an impartial examination and decision of the facts, by the unanimous verdict of a jury. It remains therefore that I consider,

V. THE general issue, or plea of not guilty o, upon which plea alone the prisoner can receive his final judgment of death. In case of an indictment of felony or treason, there can be no special justification put in by way of plea. As, on an indictment for murder, a man cannot plead that it was in his own defence against a robber on the highway, or a burglar; but he must plead the general issue, not guilty, and give this special matter in evidence. For (besides that these pleas do in effect amount to the general issue; since, if true, the prisoner is most clearly not guilty) as the facts in treason are laid to be done pro-

n 2 Hal. P. C. 239.  
o See appendix, 1.

ditorie et contra ligenatiae suae debitum; and, in felony, that the killing was done felonice; these charges, of a traitorous or felonious intent, are the points and very gist of the indictment, and must be answered directly, by the general negative, not guilty; and the jury upon the evidence will take notice of any defensive matter, and give their verdict accordingly, as effectually as if it were, or could be, specially pleaded. So that this is, upon all accounts, the most advantageous plea for the prisoner p.

WHEN the prisoner hath thus pleaded not guilty, non culpabilis, or nient culpable; which was formerly used to be abbreviated upon the minutes, thus,non (or nient) cul. the clerk of the assise, or clerk of the arraigns, on behalf of the crown replies, that the prisoner is guilty, and that he is ready to prove him so. This is done by two monosyllables in the same spirit of abbreviation,cul. prit. which signifies first that the prisoner is guilty, (cul. culpable, or culpabilis) and then that the king is ready to prove him so; prit, praesto sum, or paratus verificare. This is therefore a replication on behalf to the king viva voce at the bar; which was formerly the course in all pleadings, as well in civil as in criminal causes. And that was done in the concisest manner: for when the pleader intended to demur, he expressed his demurrer in a single word, judgment;? signifying that he demanded
judgment whether the writ, declaration, plea, &c, either in form or matter, were sufficiently good in law; and in he meant to rest on the truth of the facts pleaded, he expressed that also in a single syllable, prit; signifying that he was ready to prove his assertions; as may be observed from the yearbooks and other ancient repositories of law q. By this replication the king and the prisoner are therefore at issue: for we may remember, in our strictures upon pleadings in the preceding book r, it was observed, that when the parties come to a fact, which is affirmed on one side and denied on the other, then they are said to be at issue in point of fact: which is evidently

p 2 Hal. P. C. 258.
q North’s life of lord Guilford. 98.
r See Vol. III. pag. 312.

the case here, in the plea of non cul. by the prisoner; and the replication of cul. by the clerk. And we may also remember, that the usual conclusion of all affirmative pleadings, as this of cul. or guilty is, was by an averment in these words, and this he is ready to verify; et hoc paratus est verificare: which same thing is here expressed by the single word, prit.

HOW our courts came to express a matter of this importance in so odd and obscure a manner, rem tantam tam negligentem, can hardly be pronounced with certainty. It may perhaps, however, be accounted for by supposing, that these were at first short notes, to help the memory of the clerk, and remind him what he was to reply; or else it was the short method of taking down in court, upon the minutes, the replication and averment; cul. prit: which afterwards the ignorance of succeeding clerks adopted for the very words to be by them spoken s.

BUT however it may have arisen, the joining of issue (which, though now usually entered on the record t, is no otherwise joined u in any part of the proceedings) seems to be clearly the meaning of this obscure expression w; which has puzzled our most ingenious etymologists, and is commonly understood as if the clerk of the arraigns, immediately on plea pleaded, had fixed an opprobrious name on the prisoner, by asking him, culprit, how wilt thou be tried for immediately upon issue joined it is enquired of the prisoner, by what trial he will make his innocence appear. This form has at present reference to appeal and approvements only, wherein the
appellee has his choice, either to try the accusation by battle or by jury. But upon in-

s Of this ignorance we may see daily instances, in the abuse of two legal terms of ancient French; one, the prologue to all proclamations, oyez, or hear ye,? which is generally pronounced most unmeaningly O yes:? the other, a more pardonable mistake, viz. when a jury are all sworn, the officer bids the crier number them, for which the word in law-french is, countez;? but we now hear it pronounced in very good English, count these.

t See appendix, 1.
u 2 Hawk. P. C. 399.
w 2 Hal. P. C. 258.

dictments, since the abolition of ordeal, there can be no other trial but that by jury, per pais, or by the country: and therefore, if the prisoner refuses to put himself upon the inquist in the usual form, that is, to answer that he will be tried by God and the country x, if a commoner; and, if a peer, by God and his peers y; the indictment, if in treason, is taken pro confesso: and the prisoner, in cases of felony, is adjudged to stand mute, and, if he perseveres in his obstinacy, shall be condemned to the peine fort et dure.

WHEN the prisoner has thus put himself upon his trial, clerk answers in the humane language of the law, which always hopes that the party's innocence rather than his guilt may appear, God send thee a good deliverance. And then they proceed, as soon as conveniently may be, to the trial; the manner of which will be considered at large in the next chapter.

x A learned author, who is very seldom mistaken in his conjectures, has observed that the proper answer is by God or the country,? that is, either by ordeal or by jury; because the question supposes an option in the prisoner. And certainly it gives some countenance to this observation, that the trial by ordeal used formerly to be called judicium Dei. But it should seem, that when the question gives the prisoner an option, his answer must be positive; and not in the disjunctive, which returns the option back to the prosecutor.
y Kelyngc. 57. State Trials, passim

CHAPTER THE TWENTY SEVENTH.
OF TRIAL, AND CONVICTION.

THE several methods of trial and conviction of offenders, established by the laws of England, were formerly more numerous than at present, though the superstition of our Saxon ancestors: who, like other northern nations, were extremely addicted to divination; a character, which Tacitus observes of the ancient Germans a. They therefore invented a considerable number of methods of purgation or trial, to preserve innocence from the danger of false witnesses, and in consequence of a notion that God would always interpose miraculously, to vindicate the guiltless.

I. THE most ancient species of trial was that by ordeal; which was peculiarly distinguished by the appellation of judicium Dei; and sometimes vulgaris purgation, to distinguish it from the canonical purgation, which was by the oath of the party. This was of two sorts b, either fire-ordeal, or water-ordeal; the former being confined to persons of higher rank, the latter to the common people c. Both these might be performed by deputy:

a de mor. Germ. 10.
b Mirr. c. 3. 23.
c Tenetur fe purgare is qui accusatr, per Dei judicium; scilicet, per calidum ferrum, vel per aquam, pro diversitate conditionis hominum: per ferrum calidum, si suerit home liber; per aquam, si suerit rusticus. (Glanv. l. 14. c. 1.)

but the principal was to answer for the success of the trial; the deputy only venturing some corporal pain, for hire, or perhaps for friendship d. Fire-ordeal was performed either by taking up in the hand, unhurt, a piece of red hot iron, of one, two or three pounds weight; or else by walking, barefoot, and blindfold, over nine redhot plowshares, laid lengthwise at unequal distances: and if the party escaped being hurt, he was adjudged innocent; but if it happened otherwise, as without collusion it usually did, he was then condemned as guilty. However, by this latter method queen Emma, the mother of Edward the confessor, is mentioned to have cleared her character, when suspected of familiarity with Alwyn bishop of Winchester e.

WATER-ordeal was performed, either by plunging the bare arm up to the elbow in boiling water, and escaping unhurt thereby: or by casting the
person suspected into a river or pond of cold water: and, if he floated therein without any action of swimming, it was deemed an evidence of his guilt; but, if he sunk, he was acquitted. It is easy to trace out the traditional relics of this water-ordeal, in the ignorant barbarity still practised in many countries to discover witches, by casting them into a pool of water, and drowning them to prove their innocence. And in the Eastern empire the fire-ordeal was used to the same purpose by the emperor Theodore Lascaris; who, attributing his sickness to magic, caused all those whom he suspected to handle the hot iron: thus joining (as has been well remarked) to the most dubious crime in the world, the most dubious proof of innocence.

AND indeed this purgation by ordeal seems to have been very ancient, and very universal, in the times of superstitious barbarity. It was known to the ancient Greeks: for in the Antigone of

d This is still expressed in that common form of speech, of going through fire and water to serve another.
f Sp. L. b. 12 c. 5.

Sophocles g, a person, suspected by Creon of a misdeemsnor, declares himself ready to handle hot iron and to walk over fire, in order to manifest his innocence; which, the scholiast tells us, was then a very usual purgation. And Grotiush gives us many instances of water-ordeal in Bithynia, Sardinia, and other places. There is also a very peculiar species of water-ordeal, said to prevail among the Indians on the coast of Malabar; where a person accused of any enormous crime is obliged to swim over a large river abounding with crocodiles, and, if he escapes unhurt, he is reputed innocent. As in Siam, besides the usual methods of fire and water ordeal, both parties are sometimes exposed to the fury of a tiger let loose for that purpose: and, if the beast spares either, that person is accounted innocent; if neither, both are held to be guilty; but if he spares both, the trial is incomplete, and they proceed to a more certain criterion.

ONE cannot but be astonished at the folly and impiety of pronouncing a man guilty, unless he was cleared by a miracle; and of expecting that all the powers of nature should be suspended, by an immediate interposition of providence to save the innocent, whenever it was presumptuously required. And yet in England, so late as king John’s time, we find grants to
the bishops and clergy to use the judicium ferri, aquae, et ignis. And, both in England and Sweden, the clergy presided at this trial, and it was only performed in the churches or in other consecrated ground: for which Stiernhookl gives the reason; non desuit illis operae et laboris pretium; semper enim ab ejusmodi judicio aliquid lucrī facerdotibus obveniebat. But, to give it its due praise, we find the canon law very early declaring against trial by ordeal, or vulgaris purgatio, as being the fabric of the devil, cum sit contra praeceptum Domini, non tentabis Dominum Deum tuum. Upon this authority, though the

g v. 270.
h On Numb. v. 17.
i Mod. Univ. Hist. vii. 266.
k Spelm. Gloff. 435.
l de jure Suconum, l. 1. c. 8.
m Decret. part. 2. cauf. 2. qu. 5. dift. 7. Decretal. lib. 3. tit. 50. c. 9. & Gloff. ibid.

canons themselves were of no validity in England, it was thought proper (as had been done in Denmark above a century before n) to disuse and abolish this trial entirely in our courts of justice, by an act of parliament in 3 Hen III. according to sir Edward Cokeo, or rather by an order of the king in council p.

II. ANOTHER species of purgation, somewhat similar to the former, but probably sprung from a presumptuous abuse of revelation in the ages of dark superstition, was the corsned, or morsel of execration: being a piece of cheese or bread, of about an ounce in weight, which was consecrated with a form of exorcism; desiring of the Almighty that it might cause convulsions and paleness, and find no passage, if the man was really guilty; but might turn to health and nourishment, if he was innocent q: as the water of jealousy among the Jews was, by God's especial appointment, to cause the belly to swell and the thigh to rot, if the woman was guilty of adultery. This corsned was then given to the suspected person; who at the same time also received the holy sacraments: if indeed the corsned was not, as some have suspected, the sacramental bread itself; till the subsequent invention of transubstantiation preserved it from profane uses with a more profound respect than formerly. Our historians assure us, that Godwyn, earl of Kent in the reign of king Edward the confessor, abjuring the death of the king's brother, at last appealed to his
corsned, per buccellam deglutiendam abjuravitt, which stuck in his throat and killed him. This custom has been long since gradually abolished, though the remembrance of it still subsists in certain phrases of abjuration retained among the common people.

o 9 Rep. 32.
q Spekn. Gl. 439.
r Numb. ch. v.
s LL. Canut. c. 6.
t Ingulph.
u As, I will take the facrament upon it; may this morfel be by last; and the like.

HOWEVER we cannot but remark, that though in European countries this custom most probably arose from an abuse of revealed religion, yet credulity and superstition will, in all ages and in all climates, produce the same or similar effects. And therefore we shall not be surprized to find, that in the kingdom of Pegu there still subsists a trial by the corsned, very similar to that of our ancestors, only substituting raw rice instead of bread.
w. And, in the kingdom of Monomopata, they have a method of deciding lawsuits equally whimsical and uncertain. The witness for the plaintiff chews the bark of a tree, endued with an emetic quality, which, being sufficiently masticated, is then infused in water, which is given to the defendant to drink. If his stomach rejects it, he is condemned: if it stays with him, he is absolved, unless the plaintiff will drink some of the same water; and, if it stays with him also, the suit is left undermined.
x.

THESE two antiquated methods of trial were principally in use among our Saxon ancestors. The next, which still remains in force, though very rarely in use, owes its introduction among us to the princes of the Norman line.

And that is

III. THE trial by battle, duel, or single combat: which was another species of presumptuous appeals to providence, under an expectation that heaven would unquestionably give the victory to the innocent or injured party. The nature of this trial in cases of civil injury, upon issue joined in a writ of right, was fully discussed in the preceding book: to which I have only to
add, that the trial by battle may be demanded at the election of the appellee, in either an appeal or an approvement; and that it is carried on with equal solemnity as that on a writ of right: but with this difference, that there each party might hire a champion, but here they must fight in their proper persons. And therefore if the appellant or approver be a woman, a priest, an infant, or

w Mod. Univ. Hist. vii 129.
x Ibid. xv. 464.
y See Vol. III. pag. 337.
of the age of sixty, or lame, or blind, he or she may counterplead and refuse the wager of battle; and compel the appellee to put himself upon the country. Also peers of the realm, bringing an appeal, shall not be challenged to wage battle, on account of the dignity of their persons; nor the citizens of London, by special charter, because fighting seems foreign to their education and employment. So likewise if the crime be notorious; as if the thief be taken with the mainour, or the murderer in the room with a bloody knife, the appellant may refuse the tender of battle from the appelleez; for it is unreasonable that an innocent man should stake his life against one who is already half-convicted.

THE form and manner of waging battle upon appeals are much the same as upon a writ of right; only the oaths of the two combatants are vastly more striking and solemna. The appellee, when appealed of felony, pleads not guilty, and throws down his glove, and declares he will defend the same by his body: the appellant takes up the glove, and replies that he is ready to make good the appeal, body for body. And thereupon the appellee, taking the book in his right hand, and in his left the right hand of his antagonist, swears to his effect.Hoc audi, homo, quem per manum teneo,? &c: hear this, O man whom I hold by the hand, who callest thyself John by the name of baptism, that I, who call myself Thomas by the name of baptism, did not feloniously murder thy father, William by name, nor am any way guilty of the said felony. So help me God, and the saints; and this I will defend against thee by my body, as this court shall award. To which the appellant replies, holding the bible and his antagonist's hand in the same manner as the other: hear this, O man whom I hold by the hand, who callest thyself Thomas by the name of baptism, that thou art perjured; and therefore perjured, because that thou art perjured; and therefore
perjured, because that thou feloniously didst murder my father, William
by name. So help me God and the saints; and this I will prove

z 2 Hawk. P. C. 427.
a Flet. l. 1. c. 34. 2 Hawk. P. C. 426.

against thee by my body, as this court shall awardb. The battle is then to be
fought with the same weapons, viz. batons, the same solemnity, and the
same oath against amulets and sorcery, that are used in the civil combat:
and if the appellee by so far vanquished, that he cannot or will not fight
any longer, he shall be adjudged to be hanged immediately; and then, as
well as if he be killed in battle, providence is deemed to have determined
in favour of the truth, and his blood shall be attained. But if he kills the
appellant, or can maintain the fight from sunrising till the stars appear in
the evening, he shall be acquitted. So also if the appellant becomes
recreant, and pronounces the horrible word of craven, he shall lose his
liberam legem, and become infamous; and the appellee shall recover his
damages, and also be for ever quit, not only of the appeal, but of all
indictments likewise for the same offence.

IV. THE fourth method of trial used in criminal cases is that by the peers
of Great Britain, in the court of parliament, or the court of the lord high
steward, when a peer is capitally indicted. Of this enough has been said in
a former chapter c; to which I shall now only add, that, in the method and
regulations of its proceedings, it differs little from the trial per patriam, or
by jury: except that the peers need not all agree in their verdict; but the
greater number, consisting of twelve at the least, will conclude, and bind
the minority d.

V. THE trial by jury, or the country, per patriam, is also that trial by the
peers, of every Englishman, which, as the grand bulwark of his liberties, is
secured to him by the great

b There is a striking resemblance between this process, and that of the
court of Areopagus at Athens, for murder; wherein the prosecutor and
prisoner were both sworn in the most solemn manner: the prosecutor, that
he was related to the deceased (for none but near relations were permitted
to prosecute in that court) and that the prisoner was the e of his death; the
prisoner, that he was innocent of the charge against him. (Pott. Antiqu. b.
1. c. 19.)
chartere, nullus liber homo capiatur, vel imprisonetur, aut exulet, aut aliquo alio modo destruatur, nisi per legale judicium parium suorum, vel per legem terrae.

THE antiquity and excellence of this trial, for the settling of the civil property, has before been explained at large. And it will hold much stronger in criminal cases; since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has therefore wisely placed this strong and two-sold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of oyer and terminer occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure. But the founders of the English laws have with excellent forecast contrived, that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury: and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion. So that the liberties of England cannot but subsist, so long as this palladium remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first, (as doubtless all arbitrary
powers, well executed, are the most convenient) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.

WHAT was said of juries in general, and the trial thereby, in civil cases, will greatly shorten our present remarks, with regard to the trial of criminal suits; indictments, informations, and appeals: which trial I shall consider in the same method that I did the former; by following the order and course of the proceedings themselves, as the most clear and perspicuous way of treating it.

WHEN therefore a prisoner on his arraignment has pleaded not guilty, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, liberos et legales hominess, de vicineto; that is, freeholders, without just exception, and of the visne or neighbourhood; which is interpreted to be of the county where the fact is committed. If the proceedings are before the court of king’s bench, there is time allowed, between the arraignment and the trial, for a jury to be impaneled by writ of venire facias to the sheriff, as in civil causes: and the trial in case of a misdemesnor is had at nisi prius, unless it be of such consequence as to merit a trial at bar; which is always invariably had when the prisoner is tried for any capital offence. But, before commissioners of oyer and terminer and gaol delivery, the sheriff by virtue of a general precept directed to him beforehand, returns


to the court a panel of forty eight jurors, to try all felons that may be called upon their trial at that session: and therefore it is there usual to try all felons immediately, or soon, after their arraignment. But it is not customary, nor agreeable to the general course of proceedings, unless by consent of parties, to try persons indicted of smaller misdemeanors at the same court in which they have pleaded not guilty, or traversed the indictment. But they usually give security to the court, to appear at the
next assises or session, and then and there to try the traverse, giving notice to the prosecutor of the same.

IN cases of high treason, whereby corruption of blood may ensue, or misprison of such treason, it is enacted by statute 7 W. III. c. 3. first, that no person shall be tried for any such treason, except an attempt to assassinate the king, unless the indictment be bound within three years after the offence committed: next, that the prisoner shall have a copy of the indictment, but not the names of the witnesses, five days at least before the trial; that is, upon the true construction of the act, before his arraignment; for then is his time to take any exceptions thereto, by way of plea or demurrer: thirdly, that he shall also have a copy of the panel of jurors two days before his trial: and, lastly, that he shall have the same compulsive process to bring in is witnesses for him, as was usual to compel their appearance against him. And, by statute 7 Ann. c. 21. (which did not take place till after the decease of the late pretender) all persons, indicted for high treason or misprison thereof, shall have not only a copy of the indictment, but a list of all the witnesses to be produced, and of the jurors impaneled, with their professions and places of abode, delivered to him ten days before the trial, and in the presence of two witnesses; the better to prepare him to make his challenges and defence. But this last act, so far as it affected indictments for the inferior species of high treason, respecting the coin and the royal seals, is repealed by the statute 6 Geo. III. c. 53. else in had been im-

h Fost. 230.

possibel to have tried those offences in the same circuit in which they are indicted: for ten clear days, between the finding and the trial of the indictment, will exceed the time usually allotted for any session of oyer and termineri. And no person indicted for felony is, or (as the law stands) ever can be, entitled to such copies, before the time of his trial k.

WHEN the trial is called on, the jurors are to be sworn, as they appear, to the number of twelve, unless they are challenged by the party.

CHALLENGES may here be made, either on the part of the king, or on that of the prisoner; and either to the whole array, or to the separate polls, for the very same reasons that they may be made in civil causes l. For it is here at least as necessary, as there, that the sheriff or returning officer be totally
indifferent; that where an alien is indicted, the jury should be de
demietate, or half foreigners; (which does not indeed hold in treasons m,
aliens being very improper judges of the branch of allegiance to the king)
that on every panel there should be a competent number of hundredors;
and that the particular jurors should be omni exceptione majores; not
liable to objection either propter honoris respectum, propter defectum,
propter affectum, or propter delictum.

CHALLENGES upon any of the foregoing accounts are styled challenges
for cause; which may be without stint in both criminal and civil trials. But
in criminal cases, or at least in capital ones, there is, in favorem vitae,
allowed to the prisoner an arbitrary and capricious species of challenge to
a certain number of jurors, without shewing any cause at all; which is
called a peremptory challenge: a provision full of that tenderness and
humanity to prisoners, for which our English laws are justly famous. This
is grounded on two reasons. 1. As every one

i Fost. 250.
k 2 Hawk. P. C. 410.
l See Vol. III. pag. 359.

must be sensible, what sudden impressions and unaccountable prejudices
we are apt to conceive upon the bare looks and gestures of another; and
how necessary it is, that a prisoner (when put to defend his life) should
have a good opinion of his jury, the want of which might totally disconcert
him; the law wills not that he should be tried by any one man against
whom he has conceived a prejudice, even without being able to assign a
reason for such his dislike. 2. Because, upon challenges for cause shewn, if
the reason assigned prove insufficient to set aside the juror, perhaps the
bare questioning his indifference may sometimes provoke a resentment; to
prevent all ill consequences from which, the prisoner is still at liberty, if he
pleases, peremptorily to set him aside.

THIS privilege, of peremptory challenges, though granted to the prisoner,
is denied to the king by the statute 33 Edw. I. ft. 4. which enacts, that the
king shall challenge no jurors without assigning a cause certain, to be tried
and approved by the court. However it is held, that the king need not
assign his cause of challenge, till all the panel is gone through, and unless
there cannot be a full jury without the persons so challenged. And then,
and not sooner, the king's counsel must shew the cause: otherwise the juror shall be sworn.

THE peremptory challenges of the prisoner must however have some reasonable boundary; otherwise he might never be tried. This reasonable boundary is settled by the common law to be the number of thirty five; that is, one under the number of three full juries. For the law judges that five and thirty are fully sufficient to allow the most timorous man to challenge through mere caprice; and that he who peremptorily challenges a greater number, or three full juries, has no intention to be tried at all. And therefore it dealt with one, who peremptorily challenges above thirty five, and will not retract his challenge, as with one who stands mute or refuses his trial; by sentencing him to the

n 2 Hawk. C. P. 413. 2 Hal. P. C. 271.

peine forte et dure in felony, and by attainting him in treasono. And so the law stands at this day with regard to treason, of any kind.

BUT by statute 22 Hen. VIII. c. 14. (which, with regard to felonies, stands unrepealed by statute 1 & 2 Ph. & Mar. c. 10.) by this statute, I say, no person, arraigned for felony, can be admitted to make any more than twenty peremptory challenges. But how if the prisoner will peremptorily challenge twenty one? what shall be done? The old opinion was, that judgment of peine forte et dure should be given, as where he challenged thirty six at the common lawp: but the better opinion seems to beq, that such challenge shall only be disregarded and overruled. Because, first, the common law doth not inflict the judgment of penance for challenging twenty one, neither doth the statute inflict it; and so heavy a judgment shall not be imposed by implication. Secondly, the words of the statute are, that he be no admitted to challenge more than twenty;? the evident construction of which is, that any farther challenge shall be disallowed or prevented: and therefore, being null from the beginning, and never in fact a challenge, it can subject the prisoner to no punishment; but the juror shall be regularly sworn.

IF, by reason of challenges or the default of the jurors, a sufficient number cannot be had of the original panel, a tales may be awarded as in civil causesr, till the number of twelve is sworn, well and truly to try, and true deliverance make, between our sovereign lord the king, and the prisoner
whom they have in charge; and a true verdict to give, according to their evidence.

WHEN the jury is sworn, if it be a cause of any consequence, the indictment is usually opened, and the evidence marshalled, examined, and enforced by the counsel for the crown, or prose-

o 2 Hal. P. C. 268.
p 2 Hawk. P. C. 414.
q 3 Inst. 227. 2 Hal. P. C. 270.
r See Vol. III. pag. 364.
cution. But it is a settled rule at common law, that no counsel shall be allowed a prisoner upon his trial, upon the general issue, in any capital crime, unless some point of law shall arise proper to be debateds. A rule, which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regulart) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass? Nor indeed is it strictly speaking a part of out ancient law: for the mirrouru, having observed the necessity of counsel in civil suits, who know how to forward and defend the cause, by the rules of law and customs of the realm, immediately afterwards subjoins; and more necessary are they for defence upon indictments and appeals of felony, than upon other venial causes w. And, to say the truth, the judges themselves are so sensible of this defect in our modern practice, that they seldom scruple to allow a prisoner counsel to stand by

s 2 Hawk. P. C. 400.
t Sir Edward Coke (3 Inst. 137.) gives another additional reason for this refusal, because the evidence to convict a prisoner should be so manifest, as it could not be contradicted. It was therefore thought too dangerous an experiment, to let an advocate try, whether it could be contradicted or no.
u c. 3. 1.
w Father Parsons the jesuit, and after him bishop Ellys, (of English liberty, ii. 26.) have imagined, that the benefit of counsel to plead for them was first denied to prisoners by a law of Henry I, meaning (I presume)
chapters 47 and 48 of the code which is usually attributed to that prince. De caufis criminalibus vel capitalibus nemo quaetat confilium; quin implacitatus ftatim perntget, fine omni petitione confilii. Inaliis omnibus potefr et debet uti confilio. But this confilium, I conceive, signifies only an imparlance, and the petitio confilii is craving leave to impart: (See Vol. III. pag. 298.) which is not allowable in any criminal prosecution. This will be manifest by comparing this law with a co-temporary passage in the grand coustumier of Normandy, (ch. 85.) which speaks of imparlances in personal actions. Apres ce, eft tenu le querelle a respondre; et aura congie de foy confeiller, s’il le demande: et, quand il fera confeille, it peut nyer le faict dont il eft accuse. Or, as it stands in the Latin text, (edit. 1539.) Querelatus autem poftea tenetur refpondere; et habebit licentiam confulendi, fi requirat: habito autem confilio, debet factum negare quo accusatus eft.

him at the bar, and instruct him what questions to ask, or even to ask questions for him, with respect to matters of fact: for as to matters of law, arising on the trial, they are intitled to the assistance of counsel. But still this is a matter of too much importance to be left to the good pleasure of any judge, and is worthy the interposition of the legislature; which has shewn its inclination to indulge prisoners with this reasonable assistance, by enacting in statute 7 W. III. c. 3. that persons indicted for such high treason, as works a corruption of the blood, or misprison thereof, may make their full defence by counsel, no exceeding two, to be named by the prisoner and assigned by the court or judge: and this indulgence, by statute 20 Geo. II. c. 30. is extended to parliamentary impeachments for high treason, which were excepted in the former act.

THE doctrine of evidence upon pleas of the crown is, in most respects, the same as that upon civil actions. There are however a few leading points, wherein, by several statutes and resolutions, a difference is made between civil and criminal evidence.

FIRST, in all cases of high treason, petit treason, and misprison of treason, by statutes 1 Edw. VI. c. 11. and 1 & 2 Ph. & Mar. c. 10. two lawful witnesses are required to convict a prisoner; except in cases of coining x, and counterfeiting the seals; or unless the party shall willingly and without violence confess the same. By statute 7 W. III. c. 3. in prosecutions for those treasons to which that act extends, the same rule is again enforced, with this addition, that the confession of the prisoner, which shall
countervail the necessity of such proof, must be in open court; and it is declared that both witnesses must be to the same overt act of treason, or one to one overt act, and the other to another overt act of the same species of treasony, and not of distinct heads or kings: and no evidence shall be admitted to prove any overt act not expressly laid in the

x 1 Hal. P. C. 297.
y See St. Tr. II. 144. Foster. 235.

indictment. And therefore in sir John Fenwick's case, in king William's time, where there was but one witness, an act of parliament/zwas made on purpose to attain him of treason, and he was executed a. But in almost every other accusation one positive witness is suffient. Baron Montesquieu lays it down for a rule b, that those laws which condemn a man to death in any case on the deposition of a single witness, are fatal to liberty: and he adds this reason, that the witness who affirms, and the accused who denies, makes an equal balance; there is a necessity therefore to call in a third man to incline the scale. But this seems to be carrying matters too far: for there are some crimes, in which the very privacy of their nature excludes the possibility of having more than one witness: must these therefore escape unpunished? Neither indeed is the bare denial of the person accused equivalent to the positive oath of a disinterested witness. In cases of indictments for perjury, this doctrine is better founded; and there our law adopts it: for one witness is not allowed to convict a man indicted for perjury; because then there is only one oath against another d. In cases of treason also there is the accused's oath of allegiance, to counterpoise the information of a single witness; and that may perhaps be one reason why the law requires a double testimony to convict him: though the principal reason, undoubtedly, is to secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages.

SECONDLY, though from the reversal of colonel Sidney's attainder by act of parliament in 1689e it may be collected f, that the mere similitude of hand-writing in two papers shewn to a jury, without other concurrent testimony, is no evidence that both were written by the same person; yet undoubtedly the testimony of witnesses, well acquainted with the party's

z Stat. 8 W. III. c. 4
a St. Tr. V. 40.
hand, that they believe the paper in question to have been written by him, is evidence to be left to a jury g.

THIRDLY, by the statute 21 Jac. I. c. 27. a mother of a bastard child, concealing its death, must prove by one witness that the child was born dead; otherwise such concealment shall be evidence of her having murdered it h.

FOURTHLY, all presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer. And sir Matthew Hale in particular j lays down two rules, most prudent and necessary to be observed: 1. Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods: and, 2. Never to convict any person of murder or manslaughter, till at least the body be found dead; on account of two instances he mentions, where persons were executed for the murder of others, who were then alive, but missing.

LASTLY, it was a ancient and commonly received practice i, (derived from the civil law, and which also to this day obtains in the kingdom of France k) that, as counsel was not allowed to any prisoner accused of a capital crime, so neither should he be suffered to exculpate himself by the testimony of any witnesses. And therefore it deserves to be remembered, to the honour of Mary I, (whose early sentiments, till her marriage with Philip of Spain, seem to have been humane and generous l) that when she appointed sir Richard Morgan chief justice of the common-pleas, she enjoined him, that notwithstanding the old error,

h See pag. 198.
j 2 Hal. P. C. 290.
which did not admit any witness to speak, or any other matter to be heard, in favour of the adversary, her majesty being party; her highness' pleasure was, that whatsoever could be brought in favour of the subject should be admitted to be heard: and moreover, that the justices should not persuade themselves to sit in judgment otherwise for her highness than for her subject m. Afterwards, in one particular instance (when embezzling the queen's military stores was made felony by statute 31 Eliz. c. 4.) it was provided that any person, impeached for such felony, should be received and admitted to make any lawful proof that he could, by lawful witness or otherwise, for his discharge and defence: and in general the courts grew so heartily ashamed of a doctrine so unreasonable and oppressive, that a practice was gradually introduced of examining witnesses for the prisoner, but not upon oath n: the consequence of which still was, that the jury gave less credit to the prisoner's evidence, than to that produced by the crown. Sir Edward Coke o protests very strongly against this tyrannical practice: declaring that he never read in any act of parliament, book-case, or record, that in criminal cases the party accused should not have witnesses sworn for him; and therefore there was not so much as scintilla juris against it p. And the house of commons were so sensible of this absurdity, that, in the bill for abolishing hostilities between England and Scotland q, when felonies committed by Englishmen in Scotland were ordered to be tried in one of the three northern countries, they insisted on a clause, and carried it r against the efforts of both the crown and the house of lords, against the practice of the courts in England, and the express law of Scotland s, that in all such trials, for the better discovery of the truth, and the better information of the consciences of the jury and justices, there shall be allowed to the

m Holingfh. 1112. St. Tr. I. 72.


o 3 Inst. 79.

p See also 2 Hal. P. C. 283. and his summary. 264.


s Ibid. 4 Jun. 1607.
party arraigned the benefit of such credible witnesses, to be examined upon oath, as can be produced for his clearing and justification. At length by the statute 7 W. III. c. 3. the same measure of justice was established throughout all the realm, in cases of treason within the act: and it was afterwards declared by statute 1 Ann. st. 2. c. 9. that in all cases of treason and felony, all witnesses for the prisoner should be examined upon oath, in like manner as the witnesses against him.

WHEN the evidence on both sides is closed, the jury cannot be discharged till they have given in their verdict; but are to consider of it, and deliver it in, with the same forms, as upon civil causes: only they cannot, in a criminal case, give a privy verdict. But an open verdict may be either general, guilty, or not guilty; or special, setting forth all the circumstances of the case, and praying the judgment of the court, whether, for instance, on the facts stated, it be murder, manslaughter or no crime at all. This is where they doubt the matter of law, and therefore choose to leave it to the determination so the court; though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a breach of their oaths: and, if their verdict be notoriously wrong, they may be punished and the verdict set aside by attainant at the suit of the king; but not at the suit of the prisoner. But the practice, heretofore in use, of fining, imprisoning, or otherwise punishing jurors, merely at the discretion of the court, for finding their verdict contrary to the direction of the judge, was arbitrary, unconstitutional and illegal: and is treated as such by sir Thomas Smith, two hundred years ago; who accounted such doings to be very violent, tyrannical, and contrary to the liberty and custom of the realm of England. For, as sir Matthew Hale well observes, it would be a most unhappy case for the judge himself, if the prisoner's sate depended upon his directions: --- unhappy also for the prisoner; for, if the judge's opinion must rule the verdict, the trial by jury would be useless. Yet in many instances, where contrary to evidence the jury have found the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted by the court of king's bench; for in such case, as hath been said, it
cannot be set right by attaint. But there hath yet been no instance of granting a new trial, where the prisoner was acquitted upon the first z.

IF the jury therefore find the prisoner not guilty, he is then for ever quit and discharged of the accusation a; except he be appealed of felony within the time limited by law. But if the jury find him guilty b, he is then said to be convicted of the crime whereof he stands indicted. Which conviction may accrue two ways; either by his confessing the offence and pleading guilty; or by his being found so by the verdict of his country.

WHEN the offender is thus convicted, there are two collateral circumstances that immediately arise. 1. On a conviction, in general, for any felony, the reasonable expenses of prosecution are by statute 25 Geo. II. c. 36. to be allowed to the prosecutor out of the county stock, if he petitions the judge for that purpose; and by statute 27 Geo. II. c. 3. poor persons, bound over to give evidence, are likewise entitled to be paid their charges, as well without conviction as with it. 2. On a conviction of larceny in particular, the prosecutor shall have restitution of his goods, by virtue of the statute 21 Hen. VIII. c. 11. For by the common law there was no restitution of goods upon an indictment, because it is at the suit of the king only; and therefore the party was enforced to bring an appeal of rob-

y 1 Lev. 9. T. Jones. 163. St. Tr. X. 416.  
z 2 Hawk. P. C. 442.  
a The civil law in such case only discharges him from the same accuser, but not from from the same accusation. (Ff. 48. 2. 7.  2.)  
b In the Roman republic, when the prisoner was convicted of any capital offence by his judges, the form of pronouncing that conviction was something peculiarly delicate: not that he was guilty, but that he had not been enough upon his guard; parum caviffe videtur. (Feftus. 325.)

bery, in order to have his goods again c. But, it being considered that the party, prosecuting the offender by indictment, deserves to the full as much encouragement as he who prosecutes by appeal, this statute was made, which enacts, that if any person be convicted of larceny by the evidence of the party robbed, he shall have full restitution of his money, goods, and chattels; or the value of them out of the offender's goods, if has any, by a writ to be granted by the justice. And this writ of restitution shall reach the goods so stolen, notwithstanding the property d of them is endeavoured to be altered by sale in market overt e. And, though this may seem somewhat
hard upon buyer, yet the rule of law is that spoliatus debet, ante omnia, restitui;? especially when he has used all the diligence in his power to convict the felon. And, since the case is reduced to this hard necessity, that either the owner or the buyer must suffer; the law prefers the right of the owner, who has done a meritorious act by pursuing a felon to consign punishment, to the right of the buyer, whose merit is only negative, that he has been guilty of no unfair transaction. Or else, secondly, without such writ of restitution, the party may peaceably retake his goods, wherever he happens to find them f, unless a new property be fairly acquired therein. Or, lastly, if the felon be convicted and pardoned, or be allowed his clergy, the party robbed may bring his action of trover against him for his goods; and recover a satisfaction in damages. But such action lies not, before prosecution; for so felonies would be made up and healed g: and also recaption is unlawful, if it be done with intention to smother or compound the larceny; it then becoming the heinous offence of theft-bote, as was mentioned in a former chapter h.

IT is not uncommon, when a person is convicted of a misdemesnor, which principally and more immediately affects some individual, as a battery, imprisonment, or the like, for the court

c 3 Inst. 242.
d See Vol. II. pag. 450.
e 1 Hal. P. C. 543.
f See Vol. III. pag. 4.
g 1 Hal. P. C. 546.
h See pag. 133.

to permit the defendant to speak with the prosecutor, before any judgment is pronounced; and, if the prosecutor declares himself satisfied, to inflict but a trivial punishment. This is done, to reimburse the prosecutor his expenses, and make him some private amends, without the trouble and circuity of a civil action. But it surely is a dangerous practice: and, though it may be intrusted to the prudence and discretion of the judges in the superior courts of record, it ought never to be allowed in local or inferior jurisdictions, such as the quarter-sessions; where prosecutions for assaults are by this means too frequently commenced, rather for private lucre than for the great ends of public justice. Above all, it should never be suffered, where the testimony of the prosecutor himself is necessary to convict the defendant: for by this means, the rules of evidence are entirely subverted;
the prosecutor becomes in effect a plaintiff, and yet is suffered to bear witness for himself. Nay even a voluntary forgiveness, by the party injured, ought not in true policy to intercept the stroke of justice. This, says an elegant writer (who pleads with equal strength for the certainty as for the lenity of punishment) may be an act of good-nature and humanity, but it is contrary to the good of the public. For, although a private citizen may dispense with satisfaction for his private injury, he cannot remove the necessity of public example. The right of punishing belongs not to any one individual in particular, but to the society in general, or the sovereign who represents that society: and a man may renounce his own portion of this right, but he cannot give up that of others.

i Becc. ch. 46.

CHAPTER THE TWENTY EIGHTH.
OF THE BENEFIT OF CLERGY.

AFTER trial and conviction, the judgment of the court regularly follows, unless suspended or arrested by some intervening circumstance; of which the principal is the benefit of clergy: a title of no small curiosity as well as use; and concerning which I shall therefore enquire, 1. Into its original, and the various mutations which this privilege of clergy has sustained. 2. To what persons it is to be allowed at this day. 3. In what cases. 4. The consequences of allowing it.

I. CLERGY, the privilegium clerical, or in common speech the benefit of clergy, had its original from the pious regard paid by christian princes to the church in its infant state; and the ill use which the popish ecclesiastics soon made of that pious regard. The exemptions, which they granted to the church, were principally of two kinds: 1. Exemption of places, consecrated to religious duties, from criminal arrests, which was the foundation of sanctuaries: 2. Exemption of the persons of clergymen from criminal process before the secular judge in a few particular cases, which was the true original and meaning of the privilegium clericae.

BUT the clergy, encreasing in wealth, power, honour, number, and interest, began soon to set up for themselves: and that which they obtained by the favour of the civil government, they now claimed as their inherent right; and as a right of the highest nature, indefeasible, and jure divinoa.
By their canons therefore and constitutions they endeavoured at, and where they met with easy princes obtained, a vast extension of these exemptions: as well in regard to the crimes themselves, of which the life became quite universal; as in regard to the persons exempted, among whom were at length comprehended not only every little subordinate officer belonging to the church or clergy, but even many that were totally laymen.

IN England however, although the usurpations of the pope were very many and grievous, till Henry the eighth entirely exterminated his supremacy, yet a total exemption of the clergy from secular jurisdiction could never be thoroughly effected, though often endeavoured by the clergy: and therefore, though the ancient privilegium clericale was in some capital cases, yet it was not universally, allowed. And in those particular cases, the use was for the bishop or ordinary to demand his clerks to be remitted out of the king's courts, as soon as they were indicted: concerning the allowance of which demand there was for many years a great uncertainty: till at length it was finally settled in the reign of Henry the fixth, that the prisoner should first be arraigned; and might either then claim his benefit of clergy, by way of declinatory plea; or, after conviction, by way of arresting judgment. This latter way is most usually practiced, as it is more to the satisfaction of the court to have the crime previously ascertained by confession or the verdict of a jury; and also as it is more advantageous to the prisoner himself, who may

a The principal argument, upon which they founded this exemption, was that text of scripture; touch not mine anointed, and do my prophets no harm,? (Keilw. 181.)
b See Vol. III. pag. 62.
c Keilw. 180.

possibly be acquitted, and so need not the benefit of his clergy at all.

ORIGINALLY the law was held, that no man should be admitted to the privilege of clergy, but such as had the habitum et tonsuram clericaleme. But in process of time a much wider and more comprehensive criterion was established: every one that could read (a mark of great learning in those days of ignorance and her sister superstition) being accounted a clerk or clericus, and allowed the benefit of clerkship, though neither
initiated in holy orders, nor trimmed with the clerical tonsure. But when learning, by means of the invention of printing, and other concurrent causes, began to be more generally disseminated than formerly; and reading was no longer a competent proof of clerkship, or being in holy orders; it was found that as many laymen as advines were admitted to the privilegium clericale: and therefore by statute 4 Hen. VII. c. 13. a distinction was once more drawn between mere lay scholars, and clerks that were really in orders. And though it was thought reasonable still to mitigate the severity of the law with regard to the former, yet they were not put upon the same footing with actual clergy; being subjected to a slight degree of punishment, and not allowed to claim the clerical privilege more than once. Accordingly the statute directs, that no person, once admitted to the benefit of clergy, shall be admitted thereto a second time, unless he produces his orders: and, in order to distinguish their persons, all laymen who are allowed this privilege shall be burnt with a hot iron in the brawn of the left thumb. This distinction between learned lawmen, and real clerks in orders, was abolished for a time by the statutes 28 Hen. VIII. c. 1, and 32 Hen. VIII. c. 3. but is held to have been virtually restored by statute 1 Edw. VI. c. 12. which statute also enacts that lords of parliament, and peers of the realm, may have the benefit of their peerage, equivalent to that of clergy, for the first offence, (although they cannot read, and 

f Hob. 294.

without being burnt in the hand) for all offences then clergyable to commoners, and also for the crimes of housebreaking, highway robbery, horse-stealing, and robbing of churches.

AFTER this burning the laity, and before it the real clergy, were discharged from the sentence of the law in the king's courts, and delivered over to the ordinary, to be dealt with according to the ecclesiastical canons. Whereupon the ordinary, not satisfied with the proofs adduced in the profane secular court, set himself formally to work to make a purgation of the offender by a new canonical trial; although he had been previously convicted by his country, or perhaps by his own confession. This trial was held before the bishop in person, or his deputy; and by a jury of twelve clerks: and there, first, the party himself was required to make oath of his own innocence; next, there was to be the oath of twelve compurgators, who swore they believed he spoke the truth; then, witnesses were to be
examined upon oath, but on behalf of the prisoner only and, lastly, the jury were to bring in their verdict upon oath, which usually acquitted the prisoner: otherwise, if a clerk, he was degraded, or put to penance. A learned judge, in the beginning of the last century, remarks with much indignation the vast complication of perjury and subornation of perjury, in this solemn farce of a mock trial; the witnesses, the compurgators, and the jury, being all of them partakers in the guilt: the delinquent party also, though convicted before on the clearest evidence, and conscious of his own offence, yet was permitted evidence, and conscious of his own offence, yet was permitted and almost compelled to swear himself not guilty: nor was the good bishop himself, under whose countenance this scene of wickedness was daily transacted, by any means exempt from a share of it. and yet by this purgation the party was restored to his credit, his liberty, his lands, and his capacity of purchasing afresh, and was entirely made a new and an innocent man.

3 P. Wms. 447. Hob. 289.

h hon. 291

THIS scandalous prostitution of oaths, and the forms of justice, in the almost constant acquittal of felonious clerks by purgation, was the occasion, that, upon very heinous and notorious circumstances of guilt, the temporal courts would not trust the ordinary with the trial of the offender, but delivered over to him the convicted clerk, absque purgatione facienda: in which situation the clerk convict could not make purgation; but was to continue in prison during life, and was incapable of acquiring any personal property, or receiving the profits of his lands, unless the king should please to pardon him. Both these courses were in some degree exceptionable; the latter being perhaps too rigid, as the former was productive of the most abandoned perjury. As therefore these mock trials took their rise from factious and popish tenets, tending to exempt one part of the nation from the general municipal law; it became high time, when the reformation was thoroughly established, to abolish so vain and impious a ceremony.

Accordingly the statute 18. Elix. c. 7. enacts, that, for the avoiding of such perjuries and abuses, after the offender has been allowed his clergy, he shall not be delivered to the ordinary, as formerly; but, upon such allowance and burning in the hand, he shall forthwith be enlarged and delivered out of prison; with proviso, that the judge may, if he thinks fit,
continue the offender in gaol for any time not exceeding a year. And thus the law continued, for above a century, unaltered; except only that the statute 21 Jac. I. c. 6. allowed, that women convicted of simple larcenies under the value of ten shillings should, (not properly have the benefit of clergy, for they were not called upon to read; but) be burned in the hand, and whipped, stocked, or imprisoned for any time not exceeding a year. And a similar indulgence, by the statutes 3 & 4 W. & M. c. 9. and 4 & 5 W. & M. c. 24. was extended to women, guilty of any clergyable felony whatsoever; who were allowed to claim the benefit of the statute, in like manner as men might claim the benefit of clergy,

and to be discharged upon being burned in the hand, and imprisoned for any time not exceeding a year. All women, all peers, and all commoners who could read, were therefore discharged in such felonies; absolutely, if clerks in orders; and for the first offence, upon burning in the hand, if lay: yet all liable (excepting peers) if the judge saw occasion, to imprisonment not exceeding a year. And those men, who could not read, if under the degree of peerage, were hanged.

AFTERWARDS indeed it was considered, that education and learning were no extenuations of guilt, but quite the reverse: and that, if the punishment of death for simple felony was too severe for those who had been liberally instructed, it was, a fortiori, too severe for the ignorant also. And thereupon by statute 5 Ann. c. 6. it was enacted, that the benefit of clergy should be granted to all those who were intitled to ask it, without requiring them to read by way of conditional merit.

BUT a few years experience having shewn, that this universal lenity was frequently inconvenient, and an encouragement to commit the lower degrees of felony; and that, though capital punishments were too rigorous for these inferior offences, yet no punishment at all (or next to none, as branding or whipping) was as much too gentle; it was enacted by statutes 4 Geo. I. c. 11. and 6 Geo. I. c. 23. that when any persons shall be convicted of any larceny, either grand or petit, and shall be entitled to the benefit of clergy, or i liable only to the penalties of burn-

i The printed statute book reads and instead of or: and, if that be the true reading, it may be doubted, and, as the consequence may in some cases be capital, in deserves to be explained by the legislature, whether women, and persons convicted of petit larceny, are strictly within these statutes of
George the first; for the statutes, as printed, seem to extend only to such convicts as are entitled to the benefit of clergy, which no woman, or petit larciner, properly is. For, with regard to the female sex, the statutes of William and Mary (before referred to) very anxiously distinguish between the benefit of clergy, which extends only to men, and the benefit of the statute 3 & 4 W. & M. which is allowed to be claimed by women: and the statute of Anne (as is hereafter observed) doth not entitle any one to the benefit of clergy but such as were entitled before; as its whole operation is merely to dispense with their reading.

ing in the hand or whipping, the court in their discretion, instead of such burning in the hand or whipping, may direct such offenders to be transported to America for seven years: and, if they return within that time, it shall be felony without benefit of clergy.

IN this state does the benefit of clergy at present stand; very considerably different from its original institution: the wisdom of the English legislature having, in the course of a long and laborious process, extracted by a noble alchemy rich medicines out of poisonous ingredients; and converted, by gradual mutations, what was at first an unreasonable exemption of particular popish ecclesiastics, into a merciful mitigation of the general law, with respect to capital punishment.

FROM the whole of this detail we may collect, that, however in times of ignorance and superstition that monster in true policy may for a while subsist, of a body of men, residing in the bowels of a state, and yet independent of its laws; yet, when learning and rational religion have a little enlightened mens minds, society can no longer endure an absurdity so gross, as must destroy its very fundamentals. For, by the original contract of government, the price of protection by the united force of individuals is that of obedience to the united will of the community. This united will is declared in the laws of the land: and that united force in exerted in their due, and universal, execution.

II. I AM next to enquire, to what persons the benefit of clergy is to be allowed at this day: and this must be chiefly collected from what has been observed in the preceding article. For, upon the whole, we may pronounce, that all clerks in orders are, without any branding, and of course without nay transportation, (for that is only substituted in lieu of the other) to be
admitted to this privilege, and immediately discharged, or at most only confined for

one year: and this as often as they offend. Again, all lords of parliament and peers of the realm, by the statute 1 Edw. VI. c. 12. shall be discharged in all clergyable and other felonies, provided for by the act, without any burning in the hand, in the same manner, as real clerks convict: but this is only for the first offence. Lastly, all the commons of the realm, not in orders, whether male or female, shall for the first offence be discharged of the punishment for felonies, within the benefit of clergy; upon being burnt in the hand, imprisoned for a year, or less; or, in case of larceny, being transported for seven years, if the court shall think proper. It hath been said, that Jews, and other infidels and heretics, were not capable of the benefit of clergy, till after the statute 5 Ann. c. 6. as being under a legal incapacity for orders. But, with deference to such respectable authority, I much question whether this was ever ruled for law, since the re-introduction of the Jews into England, in the time of Oliver Cromwell. For, if that were the case, the Jews are still in the same predicament, which every day's experience will contradict: the statute of queen Anne having certainly made no alteration in this respect; it only dispensing with the necessity of reading in those persons, who, in case they could read, were before the act entitled to the benefit of their clergy.

III. THE third point to be considered is, for what crimes the privilegium clericale, or benefit of clergy, is to be allowed. And, it is to be observed, that neither in high treason, nor in petit larceny, nor in any mere misdemeanors, it was indulged at the common law; and therefore we may lay it down for a rule, that it was allowable only in petit treason and felonies: which for the most part became legally intitled to this indulgence by the statute de clero, 25 Edw. III. st. 3. c. 4. which provides, that clerks convict for treasons or felonies, touching other persons than the king himself or his royal majesty, shall have the privilege of holy

k 2 Hal. P. C. 375.
l See note i.

church. But yet it was not allowable in all felonies whatsoever: for in some it was denied even by the common law, viz. insidiatio viarum, or lying in wait for one on the highway; depopulatio agrorum, or destroying and
ravaging a country; and combustio domorum, or arson, that is, the burning of houses; all which are kind of hostile acts, and in some degree border upon treason. And farther, all these identical crimes, together with petit treason, and very many other acts of felony, are ousted of clergy by particular acts of parliament; which have in general been mentioned under the particular offences to which they belong, and therefore need not be here recapitulated. Of all which statutes for excluding clergy I shall only observe, that they are nothing else but the restoring of the law to the same rigor of capital punishment in the first offence, that in exerted before the privilegium clericale was at all indulged; and which it still exerts upon a second offence in almost all kinds of felonies, unless committed by clerks actually in orders. We may also remark, that by the marine law, as declared in statute 28 Hen. VIII. c. 15. the benefit of clergy is not allowed in any case whatsoever. And therefore when offences are committed within the admiralty-jurisdiction, which would be clergyable if committed by land, the constant course is to acquit and discharge the prisoner. And lastly, under this head of enquiry, we may observe the following rules: 1. That in all felonies, whether new created or by common law, clergy is now allowable, unless taken away by express words of an act of parliament. 2. That, where clergy is taken away from the principal, it is not of course taken away from the accessory, unless he be also particularly included in the words of the statute. 3. That, when the benefit of clergy is taken away from the offence, (as in case of murder, buggery, robbery, rape, and burglary) a principal in the second degree, aiding and abetting the crime, is as well excluded from his clergy as he that is principal in the first degree: but, 4. That, where it is only taken away from the person committing the offence, (as in the case of stabbing, or committing larceny in a dwelling house, or privately from the person) his aiders and abetters are not excluded; through the tenderness of the law, which hath determined that such statutes shall be taken literally.

IV. LASTLY, we are to enquire what the consequences are to the party, of allowing him this benefit of clergy. I speak not of the branding,
imprisonment, or transportation; which are rather concomitant conditions, than consequences of receiving this indulgence. The consequences are such as affect his present interest, and future credit and capacity: as having been once a felon, but now purged from that guilt by the privilege of clergy; which operates as a kind of statute pardon.

AND, we may observe, 1. That by his conviction be forfeits all his goods to the king; which, being once vested in the crown, shall not afterwards be restored to the offender t. 2. That, after conviction, and till he receives the judgment of the law, by branding or the like, or else is pardoned by the king, he is to all intents and purposes a felon, and subject to all the disabilities and other incidents of a felon u. 3. That, after burning or pardon, he is discharged for ever of that, and all other felonies before committed, within the benefit of clergy; but not of felonies from which such benefit is excluded: and this by statutes 8 Eliz. c. 4. and 18 Eliz. c. 7. 4. That by the burning, or pardon of it, he is restored to all capacities and credits, and the possession of his lands, as if he had never been convicted w. 5. That what is said with regard to the advantages of commoners and laymen, subsequent to the burning in the hand, is equally applicable to all peers and clergymen, although never branded at all. For they have the same privileges, without any burning, which others are intitled to after it x.

s 1 Hal. P. C. 529. Foster. 356.
t 2 Hal. P. C. 388.
u 2 P. Wms 487.
w 2 Hal. P. C. 389. 5 Rep. 110.
x 2 Hal. P. C. 389, 390.

CHAPTER THE TWENTY NINTH.
OF JUDGMENT, AND ITS CONSEQUENCES.

WE are now to consider the next stage of criminal prosecution, after trial and conviction are past, in such crimes and misdemeanors, as are either too high or too low to be included within the benefit of clergy: which is that of judgment. For when, upon a capital charge, 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 case the defendant be found guilty of a misdemeanor, (the trial of
which may, and does usually, happen in his absence, after he has once appeared) a capias is awarded and issued, to bring him in to receive his judgment; and, if he absconds, he may be prosecuted even to outlawry. But whenever he appears in person, upon either a capital or inferior conviction, he may at this period, as well as at his arraignment, offer any exceptions to the indictment, in arrest or stay of judgment: as for want of sufficient certainty in setting forth either the person, the time, the place, or the offence. And, if the objections be valid, the whole proceedings shall be set aside; but the party

may be indicted again a. And we may take notice, 1. That none of the statutes of jeofails b, for amendment of errors, extend to indictments or proceedings in criminal cases; and therefore a defective indictment is not aided by a verdict, as defective pleadings in civil cases are. 2. That, in favour of life, great strictness has at all times been observed, in every point of an indictment. Sir Matthew Hale indeed complains, that this strictness is grown to be a blemish and inconvenience in the law, and the administration thereof: for that more offenders escape by the over-easy ear given to exceptions in indictments, than by their own innocence; and many times gross murders, burglaries, robberies, and other heinous and crying offences, remain unpunished by these unseemly niceties; to the reproach of the law, to the shame of the government, to the encouragement of villany, and to the dishonour of God c. And yet, notwithstanding this laudable zeal, no man was more tender of life, than this truly excellent judge.

A PARDON also, as has been before said, may be pleaded in arrest of judgment: and it has the same advantage when pleaded here, as when pleaded upon arraignment; viz. the saving the attainder, and of course the corruption of blood: which nothing can restore but parliament, when a pardon is not pleaded till after sentence. And certainly, upon all accounts, when a man hath obtained a pardon, he is in the right to plead it is soon as possible.

PRAYING the benefit of clergy may also be ranked among the motions in arrest of judgment; of which we spoke largely in the preceding chapter.

IF all these resources fail, the court must pronounce that judgment, which the law hath annexed to the crime, and which hath been constantly mentioned, together with the crime itself,
in some or other of the former chapters. Of these some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead; though in very atrocious crimes other circumstances of terror, pain, or disgrace are superadded: as, in treasons of all kings, being drawn or dragged to the place of execution; in high treason affecting the king's person or government, emboweling alive, beheading, and quartering; and in murder, a public dissection. And, in case of any treason committed by a female, the judgment is to be burned alive. But the humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such part of these judgments as favour of torture or cruelty: a sledge or hurdle being usually allowed to such traitors as are condemned to be drawn; and there being very few instances (and those accidental or by negligence) of any person's being emboweled or burned, till previously deprived of sensation by strangling. Some punishments consist in exile or banishment, by abjuration of the realm, or transportation to the American colonies: others in loss of liberty, by perpetual or temporary imprisonment. Some extend to confiscation, by forfeiture of lands, or moveables, or both, or of the profits of lands, for life: others induce a disability, of holding offices or employments, being heirs, executors, and the like. Some, though rarely, occasion a mutilation or dismembering, by cutting off the hand or ears: others fix a lasting stigma on the offender, by slitting the nostrils, or branding in the hand or face. Some are merely pecuniary, by stated or discretionary fines: and lastly there are others, that consist principally in their ignominy, though most of them are mixed with some degree of corporal pain; and these are inflicted chiefly for crimes, which arise from indigence, or which render even opulence disgraceful. Such as whipping, hard labour in the house of correction, the pillory, the stocks, and the ducking-stool.

DISGUSTING as this catalogue may seem, it will afford pleasure to an English reader, and do honour to the English law, to compare it with that shocking apparatus of death and torment, to be met with in the criminal codes of almost every other nation in Europe. And it is moreover one of the glories of our English law, that the nature,
though not always the quantity or degree, of punishment is ascertained for every offence; and that it is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained, for every subject alike, without respect of persons. For, if judgments were to be the private opinions of the judge, men would then be slaves to their magistrates; and would live in society, without knowing exactly the conditions and obligations which it lays them under. And besides, as this prevents oppression on the one hand, so on the other it stifles all hopes of impunity or mitigation; with which an offender might flatter himself, if his punishment depended on the humour or discretion of the court. Whereas, where an established penalty is annexed to crimes, the criminal may read their certain consequence in that law, which ought to be the unvaried rule, as it is the inflexible judge, of his actions.

THE discretionary fines and discretionary length of imprisonment, which our courts are enabled to impose, may seem an exception to this rule. But the general nature of the punishment, viz. by fine or imprisonment, is in these cases fixed and determinate: though the duration and quantity of each must frequently vary, from the aggravations or otherwise of the offence, the quality and condition of the parties, and from innumerable other circumstances. The quantum, in particular, of pecuniary fines neither can, nor ought to be, ascertained by any invariable law. The value of money itself changes from a thousand causes; and, at all events, what is ruin to one man's fortune, may be matter of indifference, to another's. Thus the law of the twelve tables at Rome fined every person, that struck another, five and twenty denarii: this, in the more opulent days of the empire, grew to be a punishment of so little consideration, that Aulus Gellius tells a story of one Lucius Neratius, who made it his diversion to give a blow to whomever he pleased, and then tender them the legal forfeiture. Our statute law has not therefore often ascertained the quantity of fines, nor the common law ever; it directing such an offence to be punished by fine, in general, without specifying the certain sum: which is fully sufficient, when we consider, that however unlimited the power of the court may seem, it is far from being wholly arbitrary; but its discretion is regulated by law. For the bill of rights has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted: (which had a retrospect to some unprecedented proceedings is the court of king's bench, in the reign of king James the second) and the same statute farther declares, that all grants and promises
of fines and forfeitures of particular persons, before conviction, are illegal and void. Now the bill of rights was only declaratory, throughout, of the old constitutional law of the land: and accordingly we find it expressly holden, long before e, that all such previous grants are void; since thereby many times undue means, and more violent prosecution, would be used for private lucre, than the quiet and just proceeding of law would permit.

THE reasonableness of fines in criminal cases has also been usually regulated by the determination of magna carta f, concerning amercements for misbehaviour in matters of civil right. Liber homo non amercietur pro parvo delicto, nise fecundum modum ipsius delicti; et pro magno delicto, fecundum magnitudinem delicti; salvo contenemento suo: et mercator eodem modo, salva mercandisa sua; et villanus eodem modo amercietur, salvowainagio suo. A rule, that obtained even in Henry the second's time g, and means only, that no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear: saving to the landholder his contenement, or land; to the trader his merchandize; and to the countryman his wainage, or team and instruments of husbandry. In order
d Stat. 1 W. & M. ft. 2. c. 2.
e 2 Inst. 48.
f cap 14.
g Glanv. l. 9. c. 8 & 11.

to ascertain which, the great charter also directs, that the amercement, which is always inflicted in general terms (sit in miscricordia?) shall be set, ponacur, or reduced to a certainty, the oath of a jury. This method, of liquidating the amercement to a precise sum, is usually done in the court-leet and court-baron by affeerors, or jurors sworn to affeere, that is, tax and moderate, the general amercement according to the particular circumstances of the offence and the offender. In imitation of which, in courts superior to these, the ancient practice was to enquire by a jury, when a fine was imposed upon any man, quantum inderegi dare valeat per annum, salva sustentatione sua, et uxoris, et liberorum suorum h. And, since the disuse of such inquest, it is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelihood; but to inflict corporal punishment, or a stated imprisonment, which is better than an excessive fine, for that amounts to imprisonment for life. And this is the reason why fines in the king's court are frequently
denominated ransoms, because the penalty must otherwise fall upon a man's person, unless it be redeemed or ransomed by a pecuniary fine j: according to an ancient maxim, qui non habet in crumena luat in corpore. Yet, where any statute speaks both of fine and ransom, it is holden, that the ransom shall be treble to the fine at least i.

WHEN sentence of death, the most terrible and highest judgment in the laws of England, is pronounced, the immediate inseparable consequence by the common law is attainder. For when it is now clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him, puts him out of its protection, and takes no farther care of him than barely to see him executed. He is then called attaint, attinctus, stained, or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man: for, by an anticipation of his punishment, he is already dead in lawk. This is after judgment: for there is great difference between a man convicted, and attainted; though they are frequently through inaccuracy confounded together. After conviction only, a man is liable to none of these disabilities: for there is still in contemplation of law a possibility of his innocence. Something may be offered in arrest of judgment: the indictment may be erroneous, which will render his guilt uncertain, and thereupon the present conviction may be quashed: he may obtain a pardon, or be allowed the benefit of clergy; both which suppose some latent sparks of merit, which plead in extenuation of his fault. But when judgment is once pronounced, both law and fact conspire to prove him completely guilty; and there is not the remotest possibility left of any thing to be said in his favour. Upon judgment therefore of death, and not before, the attainder of a criminal commences: or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And therefore either upon judgment of outlawry, or of death, for treason or felony, a man shall be said to be attainted.
THE consequences of attainder are forfeiture, and corruption of blood.

I. FORFEITURE is twofold; of real, and personal, estates. First, as to real estates: by attainder in high treason a man forfeits to the king 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 held at the time of the offence committed, or at any time afterwards, to be for ever vested in the crown: 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. This forfeiture relates backwards to the time of the treason committed; so as to avoid all intermediate sales and incumbrances, but not those before the fact: and therefore a wife's jointure is not forfeitable for the treason of the husband; because settled upon her previous to the treason committed. But her dower is forfeited, by the express provision of statute 5 & 6 Edw. VI. c. 11. And yet the husband shall be tenant by the curtesy of the wife's lands, if the wife be attainted of treason: for that is not prohibited by the statute. But, though after attainder the forfeiture relates back to the time of the treason committed, yet it does not take effect unless an attainder be had, of which it is one of the fruits: and therefore, if a traitor dies before judgment pronounced, or is killed in open rebellion, or is hanged by martial law, it works no forfeiture of his lands; for he never was attainted of treason.

THE natural justice of forfeiture or confiscation of property, for treason, is founded in this consideration: that he who hath thus violated the fundamental principles of government, and broken his part of the original contract between king and people, hath abandoned his connexions with society; and hath no longer any right to those advantages, which before belonged to him purely as a member of the community: among which social advantages the right of transferring or transmitting property to others is one of the chief. Such forfeitures moreover, whereby his posterity must suffer as well as himself, will help to restrain a man, not only by the sense of his duty, and dread of personal punishment, but also by his passions and natural affections; and will interest every dependent and relation he has, to keep him from offending: according to that beautiful sentiment of Cicero, "nec vero me fugit quam sit acerbum, parentun"
fore Aulus Cascellius, a Roman lawyer in the time of the triumvirate, used to boast that he had two reasons for despising the power of the tyrants; his old age, and his want of children: for children are pledges to the prince of the father's obedience. Yet many nations have thought, that this posthumous punishment favours of hardship to the innocent; especially for crimes that do not strike at the very root and foundation of society, as treason against the government expressly does. And therefore, though confiscations were very frequent in the times of the earlier emperors, yet Arcadius and Honorius in every other instance but that of treason thought it more just, ibi esse poenam, ubi et noxa est; and ordered that peccata suos teneant auctores, nec ulterius progrediatur metus, quam reperiatur delictum and Justinian also made a law to restrain the punishment of relations; which directs the forfeiture to go, except in the case of crimen majestatis, to the next of kin to the delinquent. On the other hand the Macedonian laws extended even the capital punishment of treason, not only to the children but to all the relations of the delinquent; and of course their estates must be also forfeited, as no man was left to inherit them. And in Germany, by the famous golden bulle, (copied almost verbatim from Justinian's codex) the lives of the sons of such as conspire to kill an elector are spared, as it is expressed, by the emperor's particular bounty. But they are deprived of all their effects and rights of succession, and are rendered incapable of any honour ecclesiastical or civil: to the end that, being always poor and necessitous, they may for ever be accompanied by the infamy of their father; may languish in continual indigence; and may find (says this merciless edict) their punishment in living, and their relief in dying.

WITH us in England, forfeiture of lands and tenements to the crown for treason is by no means derived from the feodal

Gravin. 1. 68.
policy, (as has been already observed) but was antecedent to the establishment of that system in this island; being transmitted from our Saxon ancestors, and forming a part of the ancient Scandinavian constitution. But in some treasons relating to the coin, (which, as we formerly observed, seem rather a species of the crimen falsi, than the crimen laesae majestatis) it is provided by the several modern statutes which constitute the offence, that it shall work no forfeiture of lands. And, in order to abolish such hereditary punishment entirely, it was enacted by statute 7 Ann. c. 21. that, after the decease of the late pretender, no attainder for treason should extend to the disinheriting of any heir, nor to the prejudice of any person, other than the traitor himself. By which, the law of forfeitures for high treason would by this time have been at an end, had not a subsequent statute intervened to give them a longer duration.

The history of this matter is somewhat singular and worthy of observation. At the time of the union, the crime of treason in Scotland was, by the Scots law, in many respects different from that of treason in England; and particularly in its consequence of forfeitures of intailed estates, which was more peculiarly English: yet it seemed necessary, that a crime so nearly affecting government should, both in its essence and consequences, be put upon the same footing in both parts of the united kingdoms. In new-modelling these laws, the Scotch nation and the English house of commons struggled hard, partly to maintain, and partly to acquire, a total immunity from forfeiture and corruption of blood: which the house of lords as firmly resisted. At length a compromise was agree to, which is established by this statute, viz. that the same crimes, and no other, should be treason in Scotland that are so in England; and then cease throughout the whole of Great Britain: the lords artfully proposing this temporary clause, in

x See Vol. II. pag. 251.
y LL. Aetfr. c. 4. Canut. c. 54.
x Stiernh. de jure Goth. l. 2. c. 6. & l. 3. c. 3.
a Burnet's Hist. A. D. 1709.
hopes (it is said b) that the prudence of succeeding parliaments would make it perpetual c. This has partly been done by the statute 17 Geo. II. c. 39. (made in the year preceding the late rebellion) the operation of these indemnifying clauses being thereby still farther suspended, till the death of the sons of the pretender d.

IN petit treason and felony, the offender also 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 those in tail) to the crown, for a very short period of time: for the king shall have them for a year and a day, and may commit therein what waste he pleases; which is called the king's year, day, and waste e. Formerly the king had only a liberty of committing waste on the lands of felons, by pulling down their houses, extirpating their gardens, ploughing their meadows, and cutting down their woods. And a punishment of a similar spirit appears to have obtained in the oriental countries, from the decrees of Nebuchadnezzar and Cyrus in the books of Daniel f and Ezra g; which, besides the pain of death inflicted on the delinquents there specified, ordain, that their houses shall be made a dunghill. But this tending greatly to the prejudice of the public, it was agreed in the reign of Henry the first, in this kingdom, that the king should have the profits of the land for one year and a day, in lieu of the destruction he was otherwise at liberty to commit h: and therefore magna carta i provides, that the king shall only hold such lands for a year and day, and then restore them to the lord of the see; without any mention made of waste. But the statute 17 Edw. II. de praerogativa rigus, seems to suppose, that the king shall have his year, day, and waste; and not the year and day instead of waste. Which sir Edward Coke (and the author of the mirror, before him) very justly look

b Confid. on the law of forfeiture. 6.
c See Fost. 250.
d The justice and expediency of this provision were defended at the time, with much learning and strength of argument, in the considerations on the law of forfeiture, first published A. D. 1744. (See Vol. I. pag. 244)
e 2 Inst. 37.
f ch. iii. v. 29.
g ch. vi. v. 11.
h Mirr. c. 4. 16. Flet. l. 1. c. 28.
i 9 Hen. III. c. 22.

...
upon as an encroachment, though a very ancient one, of the royal prerogative. This year, day, and waste are now usually compounded for; but otherwise they regularly belong to the crown: and, after their expiration, the land would naturally have descended to the heir, (as in gavelkind tenure it still does) did not its feodal quality intercept such descent, and give it by way of escheat to the lord. These forfeitures for felony do also arise only upon attainder; and therefore a felo de se forfeits no lands of inheritance or free hold, for he never is attainted as a felon.

They likewise relate back to the time of the offence committed, as well as forfeitures for treason; so as to avoid all intermediate charges and conveyances. This may be hard upon such as have unwarily engaged with the offender: but the cruelty and reproach must lie on the part, not of the law, but of the criminal; who has thus knowingly and dishonestly involved others in his own calamities.

THESE are all the forfeitures of real estates, created by the common law, as consequential upon attainders by judgment of death or outlawry. I here omit the particular forfeitures created by the statutes of praemunire and others: because I look upon them rather as a part of the judgment and penalty, inflicted by the respective statutes, then as consequences of such judgment; as in treason and felony they are. But I shall just mention, under this division of real estates, the forfeiture of the profits of lands during life: which extends to two other instances, besides those already spoken of; misprison of treason, and striking in Westminster-hall, or drawing a weapon upon a judge there, sitting the king's courts of justice.

THE forfeiture of goods and chattels accrues in every one of the higher kinds of offence: in high treason or misprison thereof, petit treason, felonies of all sorts whether clergyable or not, self-murder or felony de se, petty larceny, standing mute, and the above-mentioned offence of striking in Westminster-hall. For slight also, on an accusation of treason, felony, or even petit larceny, whether the party be found guilty or acquitted, if the jury find the slight, the party shall forfeit

k Mirr. c. 5. 2. 2 Inst. 37.
l 3 Inst. 55.
m Ibid. 218.
n Ibid. 141.
his goods and chattels: for the very slight is an offence, carrying with it a strong presumption of guilt, and is at least an endeavour to elude and stifle the course of justice prescribed by the law. But the jury very seldom find the slight: forfeiture being looked upon, since the vast increase of personal property of late years, as rather too large a penalty for an offence, to which a man is prompted by the natural love of liberty.

THERE is a remarkable difference or two between the forfeiture of lands and of goods and chattels. 1. Lands are forfeited upon attainder, and not before: goods and chattels are forfeited by conviction. Because in many of the cases where goods are forfeited, there never is any attainder; which happens only where judgment of death or outlawry is given: therefore in those cases the forfeiture must be upon conviction, or not at all; and, being necessarily upon conviction in those, it is so ordered in all other cases, for the law loves uniformity. 2. In outlawries for treason or felony, lands are forfeited only by the judgment: but the goods and chattels are forfeited by a man’s being first put in the exigent, without staying till he is quinto exactus, or finally outlawed; for the secreting himself so long from justice, is construed a slight in law o. 3. The forfeiture of lands has relation to the time of the fact committed, so as to avoid all subsequent sales and incumbrances: but the forfeiture of goods and chattels has no relation backwards; so that those only which a man has at the time of conviction shall be forfeited. Therefore a traitor or felon may bona side sell any of his chattels, real or personal, for the sustenance of himself and family between the fact and conviction p: for personal property is of so fluctua-

0 3 Inst. 232.
p 2 Hawk. P. C. 454.

ning a nature, that it passes through many hands in a short time; and no buyer could be safe, if he were liable to return the goods which he had fairly bought, provided any of the prior vendors had committed a treason or felony. Yet if they be collusively and not bona fide parted with, merely to defraud the crown, the law (and particularly the statute 13 Eliz. c. 5.) will reach them; for they are all the while truly and substantially the goods of the offender: and as he, if acquitted, might recover them himself, as not parted with for a good consideration; so, in case he happens to be convicted, the law will recover them for the king.
II. ANOTHER immediate consequence of attainder is the corruption of blood, both upwards and downwards; so that an attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the see, subject to the king's superior right of forfeiture: and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor q.

THIS is one of those notions which our laws have adopted from the feodal constitutions, at the time of the Norman conquest; as appears from its being unknown in those tenures which are indisputably Saxon, or gavelkind: wherein, though by treason, according to the ancient Saxon laws, the land is forfeited to the king, yet no corruption of blood, no impediment of descents, ensues; and on judgment of mere felony no escheat accrues to the lord. And therefore, as every other oppressive mark of feodal tenure is now happily worn away in these kingdoms, it is to be hoped, that this corruption of blood, with all its connected consequences, not only of present escheat, but of future incapacities of inheritance even to the twentieth generation, may in process of time be abolished by act of parliament: as it stands upon a very different footing from the forfeiture of lands for

q See Vol. II. pag. 251.

high treason, affecting the king's person or government. And indeed the legislature has, from time to time, appeared very inclinable to give way to so equitable a provision; by enacting, that, in treasons respecting the papal supremacy r and counterfeiting the public coin s, and in many of the new-made felonies, created since the reign of Henry the eighth by act of parliament, corruption of blood shall be saved. But as in some of the acts for creating felonies (and those not of the most atrocious kind) this saving was neglected, or forgotten, to be made, it seems to be highly reasonable and expedient to antiques the whole of this doctrine by one undistinguishing law: especially as by the afore-mentioned statute of 7 Ann. c. 21. (the operation of which is postponed by statute 17 Geo. II. c. 39.) after the death of the sons of the late pretender, no attainder for treason will extend to the disinheriting any heir, nor the prejudice of any person, other than the offender himself; which virtually abolishes all
corruption of blood for treason, though (unless the legislature should interpose) it will still continue for many sorts of felony.

s Stat. 5 Eliz. c. 1.
t Stat. 5 Eliz. c. 11. 18 Eliz. c. 1. 8 & 9 W. III. c. 26. 15 & 16 Geo. II. c. 28.

CHAPTER THE THIRTIETH.
OF REVERSAL OF JUDGMENT.

WE are next to consider how judgments, with their several connected consequences, of attainder, forfeiture, and corruption of blood, may be set aside. There are two ways of doing this; either by falsifying or reversing the judgment, or else by reprieve or pardon.

A JUDGMENT may be falsified, reversed, or voided, in the first place, without a writ of error, for matters foreign to or debors the record, that is, not apparent upon the face of it; so that they cannot be assigned for error in the superior court, which can only judge from what appears in the record itself: and therefore, if the whole record be not certified, or not truly certified, by the inferior court; the party injured thereby (in both civil and criminal cases) may allege a diminution of the record, and cause it to be rectified. Thus, if any judgment whatever be given by persons, who had no good commission to proceed against the person condemned, it is void; and may be falsified by shewing the special matter, without writ of error. As, where a commission issues to A and B, and twelve others, or any two of them, of which A or B shall be one, to take and try indictments; and any of the other twelve proceed without the interposition or presence of either A, or B: in this case all proceedings, trials, convictions, and judgments are void for want of a proper authority in the commissioners, and may be falsified upon bare inspection without the trouble of a writ of error; it being a high misdemeanour in the judges so proceeding, and little (if any thing) short of murder in them all, in case the person so attainted be executed and suffer death. So likewise if a man purchases land of another; and afterwards the vendor is, either by outlawry, or his own confession, convicted and attainted of treason or felony previous to the sale or alienation; whereby such land becomes liable to forfeiture or escheat: now, upon any trial, the purchasor is at liberty, without bringing any writ of error, to falsify not only the time of the felony
or treason supposed, but the very point of the felony or treason itself; and
is not concluded by the confession or the outlawry of the vendor; though
the vendor himself is concluded, and not suffered now to deny the fact,
which he has by confession or slight acknowledged. But if such attainder of
the vendor was by verdict, on the oath of his peers, the alienee cannot be
received to falsify or contradict the fact of the crime committed; though he
is at limited after the alienation, and not before b.

SECONDLY, a judgment may be reversed, by writ of error: which lies from
all inferior criminal jurisdictions to the court of king's bench, and from the
king's bench to the house of peers; and may be brought for notorious
mistakes in the judgment or other parts of the record: as where a man is
found guilty of perjury and receives the judgment of felony, or for other
less palpable errors; such as any irregularity, omission, or want of form in
the process of outlawry, or proclamations; the want of a proper addition to
the defendant's name, according to the statute of additions; for not
properly naming the sheriff or other office of the court, or not duly
describing where his county court was held; for laying an offence,
committed in the time of

a 2 Hawk. P. C. 459.
b 3 Inst. 231. 1 Hal. P. C. 361.

the late king, to be done against the peace of the present; and for many
other similar causes, which (though allowed out of tenderness to life and
liberty) are not much to the credit or advancement of the national justice.
These writs of error, to reverse judgments in case of misdemeanors, are
not to be allowed of course, but on sufficient probable cause shewn to the
attorney-general; and then they are understood to be grantable of common
right, and ex debito justitiae. But writs of error to reverse attainders in
capital cases are only allowed ex gratia; and not without express warrant
under the king's sign manual, or at least by the consent of the attorney-
general c. These therefore can rarely be brought by the party himself,
especially where he is attainted for an offence against the state: but they
may be brought by his heir, or executor, after his death, in more
favourable times; which may be some consolation to his family. But the
easier, and more effectual way, is

LASTLY, to reverse the attainder by act of parliament. This may be and
hath been frequently done, upon motives of compassion, or perhaps the
zeal of the times, after a sudden revolution in the government, without examining too closely into the truth or validity of the errors assigned. And sometimes, though the crime be universally acknowledged and confessed, yet the merits of the criminal's family shall after his death obtain a restitution in blood, honours, and estate, or some, or one of the, by act of parliament; which (so far as it extends) has all the effect of reversing the attainder, without casting any reflections upon the justice of the preceding sentence.

THE effect of falsifying, or reversing, an outlawry is that the party shall be in the same plight as if he had appeared upon the capias: and, if it be before plea pleaded, he shall be put to plead to the indictment; if after conviction, he shall receive the sentence of the law: for all the other proceedings, except only the process of outlawry for his non-appearance, remain good and effectual as before. But when judgment, pronounced upon conviction, is falsified or reversed, all former proceedings are absolutely set aside, and the party stands as if he had never been at all accused; restored in his credit, his capacity, his blood, and his estates: with regard to which last, though they be granted away by the crown, yet the owner may enter upon the grantees, with as little ceremony as he might enter upon a disseisor d. But he still remains liable to another prosecution for the same offence: for, the first being erroneous, he never was in jeopardy thereby.

d 2 Hawk. P. C. 462.

CHAPTER THE THIRTY FIRST.
OF REPRIEVE, AND PARDON.

THE only other remaining ways of avoiding the execution of the judgment are by a reprieve, or a pardon; whereof the former is temporary only, the latter permanent.

I. A REPRIEVE, from reprendre, to take back, is the withdrawing of a sentence for an interval of time; whereby the execution is suspended. This may be, first, ex arbitrio judicis; either before or after judgment: as, where
the judge is not satisfied with the verdict, or the evidence is suspicious, or
the indictment is insufficient, or he is doubtful whether the offence be
within clergy; or sometimes if it be a small felony, or any favourable
circumstances appear in the criminal's character, in order to give room to
apply to the crown for either an absolute or conditional pardon. These
arbitrary reprieves may be granted or taken off by the justices of gaol
delivery, although their session be finished, and their commission expired:
but this rather by common usage, than of strict right. /a.

REPRIEVES may also be ex necessitate legis: as, where a woman is
capitally convicted, and pleads her pregnancy; though this is no cause to
stay the judgment, yet it is to respite the execution till she be delivered.
This is a mercy dictated by the

/a 2 Hal. P. C. 412.

law of nature, in favorem prolis; and therefore no part of the bloody
proceedings, in the reign of queen Mary, hath been more justly detested
than the cruelty, that was exercised in the island of Guernsey, of burning a
woman big with child: and, when through the violence of the flames the
infant sprang forth at the stake, and was preserved by the bystanders, after
some deliberation of the priests who assisted at the sacrifice, they cast it
again into the fire as a young heretic b. A barbarity which they never
learned from the laws of ancient Rome; which direct c, with the same
humanity as our own, quod praegnantismulieris damnatae poena
differatur, quoad pariat: which doctrine has also prevailed in England, as
early as the first memorials of our law will reach d. In case this plea be
made in stay of execution, the judge must direct a jury of twelve matrons
or discreet women to enquire the fact: and if they bring in their verdict
quick with child (for barely, with child, unless it be alive in the womb, is
not sufficient) execution shall be stayed generally till the next session; and
so from session to session, till either she is delivered, or proves by the
course of nature not to have been with child at all. But if she once hath had
the benefit of this reprieve, and been delivered, and afterwards becomes
pregnant again, she shall not be intitled to the benefit of a farther respite
for that cause e. For she may now be executed before the child is quick in
the womb; and shall not, by her own incontinence, evade the sentence of
justice.
ANOTHER cause of regular reprieve is, if the offender become non compos, between the judgment and the award of execution: /f for regularly, as was formerly g observed, though a man be compos when he commits a capital crime, yet if he becomes non compos after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for exe-

b Fox, Acts and Mon.  
c Ff. 48. 19. 3.  
d Flct. l. 1. c. 38.  
e 1 Hal. P. C. 369.  
f Ibid. 370.  
g See pag. 24.

cution: forfuriofus folo furore punitur, and the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings. It is therefore an invariable rule, when any time intervenes between the attainder and the award of execution, to demand of the prisoner what he hath to allege, why execution should not be awarded against him: and, if he appears to be insane, the judge in his discretion may and ought to reprieve him. Or, he may plead in bar of execution; which plea may be either pregnancy, the king's pardon, an act of grace, or diversity of person, viz. that he is not the same that was attainted, and the like. In this last case a jury shall be impaneled to try this collateral issue, namely, the identity of his person; and not whether guilty or innocent; for that has been decided before. And in these collateral issues the trial shall be instanter h, and no time allowed the prisoner to make his defence or produce his witnesses, unless he will make oath that he is not the person attainted I: neither shall any peremptory challenges of the jury be allowed the prisoner; /k though formerly such challenges were held to be allowable, whenever a man's life was in question.

II. IF neither pregnancy, insanity, non-identity, nor other plea will avail to avoid the judgment, and stay the execution consequent thereupon, the last and surest resort is in the king's most gracious pardon; the granting of which is the most amiable prerogative of the crown. Laws (says an able writer) cannot be framed on principles of compassion to guilt: yet justice, by the constitution of England, is bound to be administered in mercy: this is promised by the king in his coronation oath, and it is that act of his
government, which is the most personal, and most entirely his own m. The king himself condemns no man; that rugged task he leaves to his courts of justice: the great operation of his sceptre is mercy. His power of par-

\[h \text{ I Sid. 72.}\]
\[I \text{ Fost. 42.}\]
\[k \text{ I Lev. 61. Fost. 42. 46.}\]
\[m \text{ Law of Forfeit. 99.}\]

donning was said by our Saxon ancestors n too be derived a lege suae dignitatis: and it is declared in parliament, by statute 27 Hen. VIII. c. 24. that no other person hath power to pardon or remit any treason or felonies whatsoever; but that the king hath the whole and sole power thereof, united and knit to the imperial crown of this realm.

THIS is indeed one of the great advantages of monarchy in general, above any other form of government; that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigor of the general law, in such criminal cases as merit an exemption from punishment. Pardons (according to some theorists o) should be excluded in a perfect legislation, where punishments are mild but certain: for that the clemency of the prince seems a tacit disapprobation of the laws. but the exclusion of pardons must necessarily introduce a very dangerous power in the judge or jury, that of construing the criminal law by the spirit instead of the letter p; or else it must be holden, what no man will seriously avow, that the situation and circumstances of the offender (though they alter not the essence of the crime) ought to make no distinction in the punishment. In democracies, however, this power of pardon can never subsist; for there nothing higher is acknowledged than the magistrate who administers the laws: and it would be impolitic for the power of judging and of pardoning to center in one and the same person. This (as the president Montesquieu observes q) would oblige him very often to contradict himself, to make and to unmake his decisions: it would tend to confound all ideas of right among the mass of the people; as they would find it difficult to tell, whether a prisoner were discharged by his innocence, or obtained a pardon through favour. In Holland therefore, if there be no stadtholder, there is no power of pardoning lodged in any other member of the state. But in monarchies the king acts in
a superior sphere; and, though he regulates the whole government as the first mover, yet he does not appear in any of the disagreeable or invidious parts of it. Whenever the nation see him personally engaged, it is only in works of legislature, magnificence, or compassion. To him therefore the people look up as the fountain of nothing but bounty and grace; and these repeated acts of goodness, coming immediately from his own hand, endear the sovereign to his subjects, and contribute more than any thing to root in their hearts that filial affection, and personal loyalty, which are the sure establishment of a prince.

UNDER this head, of pardons, let us briefly consider, 1. The object of pardon: 2. The manner of pardoning: 3. The method of allowing a pardon: 4. The effect of such pardon, when allowed.

1. AND, first, the king may pardon all offences merely against the crown, or the public; excepting, 1. That, to preserve the liberty of the subject, the committing any man to prison out of the realm, is by the habeas corpus act, 31 Car. II. c. 2. made a praemunire, unpardonable even by the king. Nor, 2. Can the king pardon, where private justice is principally concerned in the prosecution of offenders: non potest rex gratiam facere cum injuria et damno aliorum r. Therefore in appeals of all kinds (which are the suit, not of the king, but of the party injured) the prosecutor may release, but the king cannot pardons. Neither can he pardon a common nuisance, while it remains unredressed, or so as to prevent an abatement of it; though afterwards he may remit the fine: because, though the prosecution is vested in the king to avoid multiplicity of suits, yet (during its continuance) this offence favours more of the nature of a private injury to each individual in the neighbourhood, than of a public wrong t. Neither, lastly, can the king pardon an offence against a popular or penal statute, after information brought:

/r 3 Inst. 236.
/s Ibid. 237.
/t 2 Hawk. P. C. 391.
for thereby the informer hath acquired a private property in his part of the penalty.

THERE is also a restriction of a peculiar nature, that affects the prerogative of pardoning, in case of parliamentary impeachments; viz. that the king's pardon cannot be pleaded to any such impeachment, so as to impede the inquiry, and stop the prosecution of great and notorious offenders. Therefore when, in the reign of Charles the second, the earl of Danby was impeached by the house of commons of high treason and other misdemesors and pleaded the king's pardon in bar of the same, the commons alleged that there was no precedent, that ever any pardon was granted to any person impeached by the commons of high treason, or other high crimes, depending the impeachment; and therefore resolved that the pardon so pleaded was illegal and void, and ought not to be allowed in bar of the impeachment of the commons of England: for which resolution they assigned this reason to the house of lords, that the setting up a pardon to be a bar of an impeachment defeats the whole use and effect of impeachments: for should this point be admitted, or stand doubted, it would totally discourage the exhibiting any for the future; whereby the chief institution for the preservation of the government would be destroyed. Soon after the revolution, the commons renewed the same claim, and voted that a pardon is not pleadable in bar of an impeachment. And, at length, it was enacted by the act of settlement, 12 & 13 W. III. c. 2. that no pardon under the great seal of England shall be pleadable to an impeachment by the commons in parliament. But, after the impeachment has been solemnly heard and determined, it is not understood that the king's royal grace is farther restrained or abridged: for, after the impeachment and attainder of the six rebel lords in 1715, three of them

3 Inst. 238.
Ibid. 5 May 1679.
Ibid. 26 May 1679.
Ibid. 6 Jun. 1689.

were from time to time reprieved by the crown, and at length received the benefit of the king's most gracious pardon.
2. AS to the manner of pardoning: it is a general rule, that, wherever it may reasonably be presumed the king is deceived, the pardon is void. Therefore any suppression of truth, or suggestion of falsehood, in a charter of pardon, will vitiate the whole; for the king was misinformed. General words have also a very imperfect effect in pardons. A pardon of all felonies will not pardon a conviction or attainder of felony; (for it is presumed the king knew not of those proceedings) but the conviction or attainer must be particularly mentioned. A pardon of all felonies will not include piracy; for that is no felony punishable at the common law. It is also enacted by statute 13 Ric. II. st. 2. c. 1. that no pardon for treason, murder, or rape, shall be allowed, unless the offence be particularly specified therein; and particularly in murder it shall be expressed, whether it was committed by lying in wait, assault, or malice prepense. Upon which sir Edward Coke observes, that it was not the intention of the parliament that the king should ever pardon murder under these aggravations; and therefore they prudently laid the pardon under these restrictions, because they did not conceive it possible that the king would ever excuse an offence by name, which was attended with such high aggravations. And it is remarkable enough, that there is no precedent of a pardon in the register for any other homicide, than that which happens se defendendo or per infortunium: to which two species the king's pardon was expressly confined by the statutes 2 Edw. III. c. 2. and 14 Edw. III. c. 15. which declare that no pardon of homicide shall be granted, but only where the king may do it by the oath of his crown; that is to say, where a man slayeth another in his own defence, or by misfortune. But the statute of Richard the second, before-mentioned, enlarges by implication the royal power; provided the king is not deceived in the intended object

a 2 Hawk. P. C. 383.
b 3 Inst. 238.
c 2 Hawk. P. C. 383.
d 1 Hawk. P. C. 99.
e 3 Inst. 236.

of his mercy. And therefore pardons of murder were always granted with a non obstante of the statute of king Richard, till the time of the revolution; when the doctrine of non obstante's ceasing, it was doubted whether murder could be pardoned generally: but it was determined by the court of king's bench, that the king may pardon on an indictment of murder, as well as a subject may discharge an appeal. Under these and a few other
restrictions, it is a general rule, that a pardon shall be taken most beneficially for the subject, and most strongly against the king.

A PARDON may also be conditional: that is, the king may extend his mercy upon what terms he pleases; and may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend: and this by the common lawg. Which prerogative is daily exerted in the pardon of felons, on condition of transportation to some foreign country (usually to some of his majesty's colonies and plantations in America) for life, or for a term of years; such transportation or banishment h being allowable and warranted by the habeas corpus act, 31 Car. II. c. 2. 14. and rendered more easy and effectual by statute 8 Geo. III. c. 15.

3. WITH regard to the manner of allowing pardons; we may observe, that a pardon by act of parliament is more beneficial than by the king's charter: for a man is not bound to plead it, but the court must ex officio take notice of it I; neither can he lose the benefit of it by his own laches or negligence, as he may of the king's charter of pardon k. The king's charter of pardon must be specially pleaded, and that at a proper time: for if a man is indicted, and has a pardon in his pocket, and afterwards puts himself upon his trial by pleading the general issue, he has waived the benefit of such pardon l. But, if a man avails himself

f Salk. 499.
g 2 Hawk. P. C. 394.
h Transportation is said (Barr. 352.) to have been first inflicted, as a punishment, by statute 39 Eliz. c. 4.
i Fost. 43.
k 2 Hawk. P. C. 397.
l Ibid. 396.

thereof as soon as by course of law he may, a pardon may either be pleaded upon arraignment, or in arrest of judgment, or in the present stage of proceedings, in bar of execution. Anciently, by statute 10 Edw. III. c. 2. no pardon of felony could be allowed, unless the party found sureties for the good behaviour before the sheriff and coroners of the county m. But that statute is repealed by the statute 5 & 6 W. & M. c. 13. which, instead thereof, gives the judges of the court a discretionary power to bind
the criminal, pleading such pardon, to his good behaviour, with two
sureties, for any term not exceeding seven years.

4. LASTLY, the effect of such pardon by the king, is to make the offender a
new man; to acquit him of all corporal penalties and forfeitures annexed to
that offence for which he obtains his pardon; and not so much to restore
his former, as to give him a new, credit and capacity. But nothing can
restore or purify the blood when once corrupted, if the pardon be not
allowed till after attainder, but the high and transcendent power of
parliament. Yet if a person attainted receives the king's pardon, and
afterwards hath a son, that son may be heir to his father; because the
father, being made a new man, might transmit new inheritable blood:
though, had he been born before the pardon, he could never have inherited
at all n.

m Balk. 499.

n See Vol. II. pag. 254.

CHAPTER THE THIRTY SECOND.
OF EXECUTION.

THERE now remains nothing to speak of, but execution; the completion of
human punishment. And this, in all cases, as well capital as otherwise,
must be performed by the legal officer, the sheriff or his deputy; whose
warrant for so doing was anciently by precept under the hand and seal of
the judge, as it is still practised in the court of the lord high steward, upon
the execution of a peer:/a though, in the court of the peers in parliament,
it is done by writ from the king b. Afterwards it was established c, that, in
case of life, the judge may command execution to be done without any
writ. And now the usage is, for the judge to sign the calendar, or list of all
the prisoners' names, with their separate judgments in the margin, which
is left with the sheriff. As, for a capital felony, it is written opposite to the
prisoner's name, hanged by the neck; formerly, in the days of Latin and
abbreviation d, sus. per coll. For suspendatur per collum. And this is the
only warrant that the sheriff has, for so material an act as taking away the
life of another e. It may certainly afford matter of speculation, that in civil
causes there should be such a variety of writs of execution to recover a
trifling debt, issued in the king's

/a 2 Hawk. P. C. 409.
name, and under the seal of the court, without which the sheriff cannot legally stir one step; and yet that the execution of a man, the most important and terrible task of any, should depend upon a marginal note.

THE sheriff, upon receipt of his warrant, is to do execution within a convenient time; which in the country is also left at large. In London indeed a more solemn and becoming exactness is used, both as to the warrant of execution, and the time of executing thereof: for the recorder, after reporting to the king in person the case of the several prisoners, and receiving his royal pleasure, that the law must take its course, issues his warrant to the sheriffs; directing them to do execution on the day and at the place assigned f. And, in the court of king’s bench, if the prisoner be tried at the bar, or brought there by habeas corpus, a rule is made for his execution; either specifying the time and place g, or leaving it to the discretion of the sheriff h. And, throughout the kingdom, by statute 25 Geo. II. c. 37. it is enacted that, in case of murder, the judge shall in his sentence direct execution to be performed on the next day but one after sentence passed i. It has been well observed k, that it is of great importance, that the punishment should follow the crime as early as possible; that the prospect of gratification or advantage, which tempts a man to commit the crime, should instantly awake the attendant idea of punishment. Delay of execution serves only to separate these ideas; and then the execution itself affects the minds of the spectators rather as a terrible sight, than as the necessary consequence of transgression.

THE sheriff cannot alter the manner of the execution by substituting one death for another, without being guilty of felony himself, as has been formerly said l. It is held also by sir Ed-

f See appendix, 4.
g St. Trials. VI. 332. Fost. 43.
h See appendix, 3.
k Beccar. ch. 19.
l See pag. 179.
ward Coke m and sir. Matthew Hale n, that even the king cannot change
the punishment of the law, by altering the hanging or burning into
beheading; though, when beheading is part of the sentence, the king may
remit the rest. And, notwithstanding some examples to the contrary, sir
Edward Coke stoutly maintains, that judicandum est legibus, non exemplis.
But others have thought o, and more justly, that this prerogative, being
founded in mercy and immemorially exercised by the crown, is part of the
common law. For hitherto, in every instance, all these exchanges have
been for more merciful kinds of death; and how far this may also fall
within the king's power of granting conditional pardons, (viz. by remitting
a severe kind of death, on condition that the criminal submits to a milder)
is a matter that may bear consideration. It is observable, that when lord
Stafford was executed for the popish plot in the reign of king Charles the
second, the then sheriffs of London, having received the king's writ for
beheading him, petitioned the house of lords, for a command or order
from their lordships, how the said judgment should be executed: for, he
being prosecuted by impeachment, they entertained a notion (which is
said to have been countenanced by lord Russel) that the king could not
pardon any part of the sentence p. The lords resolved q, that the scruples
of the sheriffs were unnecessary, and declared, that the king's writ ought to
be obeyed. Disappointed of raising a flame in that assembly, they
immediately signified r to the house of commons by one of the members,
that they were not satisfied as to the power of the said writ. That house
took two days to consider of it; and then s sullenly resolved, that the house
was content that the sheriff do execute lord Stafford by severing his head
from his body. It is farther related, that when afterwards the same lord
Russel was condemned for high treason upon indictment, the king, while
he remitted the ignominious part of the

m 3 Inst. 52.
n 2 Hal. P. C. 412,
o Fost. 270.
p 2 Hume Hist. of G. B. 328.
s Ibid. 23 Dec. 1680.

sentence, observed, that his lordship would now find he was possessed of
that prerogative, which in the case of lord Stafford he had denied him t.
One can hardly determine (at this distance from those turbulent times) which most to disapprove of, the indecent and sanguinary zeal of the subject, or the cool and cruel sarcasm of the sovereign.

TO conclude: it is clear, that if, upon judgment to be hanged by the neck till he is dead, the criminal be not thoroughly killed, but revives, the sheriff must hang him again. For the former hanging was no execution of the sentence; and, if a false tenderness were to be indulged in such cases, a multitude of collusions might ensue. Nay, even while abjurations were in force, such a criminal, so reviving, was not allowed to take sanctuary and abjure the realm; but his fleeing to sanctuary was held an escape in the officer.

AND, having thus arrived at the last stage of criminal proceedings, or execution, the end and completion of human punishment, which was the sixth and last head to be considered under the division of public wrongs, the fourth and last object of the laws of England; it may now seem high time to put a period to these commentaries, which, the author is very sensible, have already swelled to too great a length. But he cannot dismiss the student, for whose use alone these rudiments were originally compiled, without endeavouring to recall to his memory some principal outlines of the legal constitution of this country; by a short historical review of the most considerable revolutions, that have happened in the laws of England, from the earliest to the present times. And this task he will attempt to discharge, however imperfectly, in the next or concluding chapter.

t 2 Hume. 360.
w See pag. 326.
x Fitzh. Abr. t. coront. 335. Finch. L. 467.

CHAPTER THE THIRTY THIRD.
OF THE RISE, PROGRESS, AND GRADUAL IMPROVEMENTS, OF THE LAWS OF ENGLAND.
BEFORE we enter on the subject of this chapter, in which I propose, by way of supplement to the whole, to attempt an historical review of the most remarkable changes and alterations, that have happened in the laws of England, I must first of all remind the student, that the rise and progress of many principal points and doctrines have been already pointed
out in the course of these commentaries, under their respective divisions: these having therefore been particularly discussed already, it cannot be expected that I should re-examine them with any degree of minuteness; which would be a most tedious undertaking. What I therefore at present propose, is only to mark out some outlines of an English juridical history, by taking a chronological view of the state of our laws, and their successive mutations at different periods of time.

THE several periods, under which I shall consider the state of our legal polity, are the following fix: 1. From the earliest times to the Norman conquest: 2. From the Norman conquest to the reign of king Edward the first: 3. From thence to the reformation: 4. From the reformation to the restoration of king Charles the second: 5. From thence to the revolution in 1688: 6. From the revolution to the present time.

I. AND, first, with regard to the ancient Britons, the aborigines of our island, we have so little handed down to us concerning them with any tolerable certainty, that our enquiries here must needs be very fruitless and defective. However, from Caesar's account of the tenets and discipline of the ancient Druids in Gaul, in whom centered all the learning of these western parts, and who were, as he tells us, sent over to Britain, (that is, to the island of Mona or Anglesey) to be instructed; we may collect a few points, which bear a great affinity and resemblance to some of the modern doctrines of our English law. Particularly, the very notion itself of an oral unwritten law, delivered down from age to age, by custom and tradition merely, seems derived from the practice of the Druids, who never committed any of their instructions to writing: possibly for want of letters; since it is remarkable that in all the antiquities, unquestionably British which the industry of the moderns has discovered, there is not in any of them the least trace of any character or letter to be found. The partible quality also of lands, by the custom of gavelkind, which still obtains in many parts of England, and did universally over Wales till the reign of Henry VIII, is undoubtedly of British original. So likewise is the ancient division of the goods of an intestate between his widow and children, or next of kin; which has since been revived by the statute of distributions. And we may also remember an instance of a slighter nature mentioned in the present volume; where the same custom has continued from Caesar's
time to the present, that of burning a woman guilty of the crime of petit treason by killing her husband.

THE great variety of nations, that successively broke in upon, and destroyed both the British inhabitants and constitution, the Romans, the Picts, and, after them, the various clans of Saxons and Danes, must necessarily have caused great confusion and uncertainty in the laws and antiquities of the kingdom; as they were very soon incorporated and blended together, and therefore, we may suppose, mutually communicated to each other their respective usages a, in regard to the rights of property and the punishment of crimes. So that it is morally impossible to trace out, with any degree of accuracy, when the several mutations of the common law were made, or what was the respective original of those several customs we at present use, by any chemical resolution of them to their first and component principles. We can seldom pronounce, that this custom was derived from the Britons; that was left behind by the Romans; this was a necessary precaution against the Picts; that was introduced by the Saxons, discontinued by the Danes, but afterwards restored by the Normans.

WHEREVER this can be done, it is matter of great curiosity, and some use: but this can very rarely be the case; not only from the reason above-mentioned, but also from many others. First, from the nature of traditional laws in general; which, being accommodated to the exigences of the times, suffer by degrees insensible variations in practice b: so that, though upon comparison we plainly discern the alteration of the law from what it was five hundred years ago, yet it is impossible to define the precise period in which that alteration accrued, any more than we can discern the changes of the bed of a river, which varies its shores by continual decreases and alluvions. Secondly, this becomes impracticable from the antiquity of the kingdom and its government: which alone, though it had been disturbed by no foreign invasions, would make it an impossible thing to search out the original of its laws; unless we had as authentic monuments thereof, as the Jews had by the hand of Moses c.

/b Ibid. 57.
/c Ibid. 59.
Thirdly, this uncertainty of the true origin of particular customs must also in part have arisen from the means, whereby Christianity was propagated among our Saxon ancestors in this island; by learned foreigners brought over from Rome and other countries: who undoubtedly carried with them many of their own national customs; and probably prevailed upon the state to abrogate such usages as were inconsistent with our holy religion, and to introduce many others that were more conformable thereto. And this perhaps may have partly been the cause, that we find not only some rules of the mosiacal, but also of the imperial and pontifical laws, blended and adopted into our own system.

A FARTHER reason may also be given for the great variety, and of course the uncertain original, of our ancient established customs; even after the Saxon government was firmly established in this island: viz. the subdivision of the kingdom into an heptarchy, consisting of seven independent kingdoms, peopled and governed by different clans and colonies. This must necessarily create an infinite diversity of laws: even though all those colonies, of Jutes, Angles, proper Saxons, and the like, originally sprung from the same mother country, the great northern hive; which poured forth its warlike progeny, and swarmed all over Europe, in the sixth and seventh centuries. This multiplicity of laws will necessarily be the case in some degree, where any kingdom is cantoned out into provincial establishments; and not under one common dispensation of laws, though under the same sovereign power. Much more will it happen, where seven unconnected states are to form their own constitution and superstructure of government, though they all begin to build upon the same or similar foundations.

WHEN therefore the West-Saxons had swallowed up all the rest, and king Alfred succeeded to the monarchy of England, whereof his grandfather Egbert was the founder, his mighty genius prompted him to undertake a most great and necessary work, which he is said to have executed in as masterly a manner.

No lest than to new-model the constitution; to rebuild it on a plan that should endure for ages; and, out of its old discordant materials, which were heaped upon each other in a vast and rude irregularity, to form one uniform and well connected whole. This he effected, by reducing the whole kingdom under one regular and gradual subordination of government, wherein each man was an answerable too his immediate superior for his
own conduct and that of his nearest neighbours: for to him we owe that masterpiece of judicial polity, the subdivision of England into tithings, and hundreds, if not into counties; all under the influence and administration of one supreme magistrate, the king; in whom, as in a general reservoir, all the executive authority of the law was lodged, and from whom justice was dispersed to every part of the nation by distinct, yet communicating, ducts and channels: which wise institution has been preserved for near a thousand years unchanged, from Alfred's to the present time. He also, like another Theodosius, collected the various custom that he found dispersed in the kingdom, and reduced and digested them into one uniform system or code of laws, in his dom-bec, or liber judicialis. This he compiled for the use of the court-baron, hundred, and county court, the court-leet, and sheriff’s town; tribunals, which he established, for the trial of all causes civil and criminal, in the very districts wherein the complaint arose: all of them subject however to be inspected, controlled, and kept within the bounds of the universal or common law, by the king's own courts; which were then itinerant, being kept in the king’s palace, and removing with his household in those royal progresses, which he continually made from one end of the kingdom to the other.

THE Danish invasion and conquest, which introduced new foreign customs, was a severe blow to this noble fabric: but a plan, so excellently concerted, could never be long thrown aside. So that, upon the expulsion of these intruders, the English returned to their ancient law: retaining however some few of the customs of their late visitants; which went under the name of Dane-Lage: as the code compiled by Alfred was called the West-Saxon-Lage; and the local constitutions of the ancient kingdom of Mercia, which obtained in the counties nearest to Wales, and probably abounded with many British customs, were called the Mercen-Lage. And these three laws were, about the beginning of the eleventh century, in use in different counties of the realm: the provincial polity of counties, and their subdivisions, having never been altered or discontinued through all the shocks and mutations of government, from the time of its first institution; though the laws and customs therein used, have (as we shall see) often suffered considerable changes.

FOR king Edgar, (who besides his military merit, as founder of the English navy, was also a most excellent civil governor) observing the ill effects of
three distinct bodies of laws, prevailing at once in separate parts of his dominions, projected and begun, what his grandson king Edward the confessor afterwards completed; viz. one uniform digest or body of laws, to be observed throughout the whole kingdom: being probably no more than a revival of king Alfred's code, with some improvements suggested by necessity and experience; particularly the incorporating some of the British or rather Mercian customs, and also such of the Danish as were reasonable and approved, into the West-Saxon-Lage, which was still the groundwork of the whole. And this appears to me the best supported and most plausible conjecture (for certainty is not to be expected) of the rise and original of that admirable system of maxims and unwritten customs, which is now known by the name of the common law, as extending its authority universally over all the realm; and which is doubtless of Saxon parentage.

AMONG the most remarkable of the Saxon laws we may reckon, 1. The constitution of parliaments, or rather, general assemblies of the principal and wisest men in the nation; the wittenagemote, or commune concilium of the ancient Germans; which was not yet reduced to the forms and distinctions of our modern parliament: without whose concurrence however, no new law could be made, or old one altered. 2. The election of their magistrates by the people; originally even that of their kings, till dearbought experience evinced the convenience and necessity of establishing an hereditary succession to the crown. But that of all subordinate magistrates, their military officers or heretoches, their sheriffs, their conservators of the peace, their coroners, their port-reeves, (since changed into mayors and bailiffs) and even their tythingmen and borsholders at the leet, continued, some till the Norman conquest, others for two centuries after, and some remain to this day. 3. The descent of the crown, when once a royal family was established, upon nearly the same hereditary principles upon which it has ever since continued: only that perhaps, in case of minority, the next of kin of full age would ascend the throne, as king, and not as protector; though, after his death, the crown immediately reverted back to the heir. 4. The great paucity of capital punishments for the first offence: even the most notorious offenders being allowed to commute it for a fine or weregild, or, in default of payment perpetual bondage; to which our benefit of clergy has now in some measure succeeded. 5. The prevalence of certain customs, as heriots and military services in proportion to every
man's land, which much resembled the feodal constitution; but yet were exempt from all its rigorous hardships: and which may be well enough accounted for, by supposing them to be brought from the continent by the first Saxon invaders, in the primitive moderation and simplicity of the feodal law; before it got into the hands of the Norman jurists, who extracted the most slavish doctrines, and oppressive consequences, out of what was originally intended as a law of liberty. 6. That their estates were liable to forfeiture for treason, but that the doctrine of escheats and corruption of blood for felony, or any other cause, was utterly unknown amongst them. 7. The descent of their lands was to all the males equally, without any right of primogeniture; a custom, which obtained among the Britons, was agreeable to the Roman law, and continued among the Saxons till the Norman conquest: though really inconvenient, and more especially destructive to ancient families; which are in monarchies necessary to be supported, in order to form and keep up a nobility, or intermediate state between the prince and the common people. 8. The courts of justice consisted principally of the county courts, and in cases of weight or nicety the king's courts held before himself in person, at the time of his parliaments; which were usually holden in different places, according as he kept the three great festivals of christmas, easter, and whitsuntide. An institution which was adopted by king Alonso VII of Castyle about a century after the conquest: who at the same three great feasts was wont to assemble his nobility and prelates in his court; who there heard and decided all controversies, and then, having received his instructions, departed home. These county courts however differed from the modern ones, in that the ecclesiastical and civil jurisdiction were blended together, the bishop and the ealdorman of sheriff sitting in the same county court; and also that the decisions and proceedings therein were much more simple and unembarrassed: an advantage which will always attend the infancy of any laws, but wear off as they gradually advance to antiquity. 9. Trials, among a people who had a very strong tincture of superstition, were permitted to be by ordeal, by the corsned or morsel of execration, or by wager of law with compurgators, if the party chose it; but frequently they were also by jury: for, whether or no their juries consisted precisely of twelve men, or were bound to a strict unanimity; yet the general constitution of this admirable criterion of truth, and most important guardian both of public and private liberty, we owe to our Saxon ancestors.
Thus stood the general frame of our polity at the time of the Norman invasion; when the second period of our legal history commences.

II. THIS remarkable event wrought as great an alteration in our laws, as it did in our ancient line of kings: and, though the alteration of the former was effected rather by the consent of the people, than any right of conquest, yet that consent seems to have been partly extorted by fear, and partly given without any apprehension of the consequences which afterwards ensued.

1. AMONG the first of these alterations we may reckon the separation of the ecclesiastical courts from the civil: effected in order to ingratiate the new king with the popish clergy, who for some time before had been endeavouring all over Europe to exempt themselves from the secular power; and whose demands the conqueror, like a politic prince, thought it prudent to comply with, by reason that their reputed sanctity had a great influence over the minds of the people; and because all the little learning of the times was engrossed into their hands, which made them necessary men, and by all means to be gained over to his interests. And this was the more easily effected, because, the disposal of all the episcopal sees being then in the breast of the king, he had taken care to fill them with Italian and Norman prelates.

2. ANOTHER violent alteration of the English constitution consisted in the depopulation of whole countries, for the purposes of the king's royal diversion; and subjecting both them, and all the ancient forests of the kingdom, to the unreasonable severities of forest laws imported from the continent, whereby the slaughter of a beast was made almost as penal as the death of a man. In the Saxon times, though no man was allowed to kill or chase the king's deer, yet he might start any game, pursue, and kill it, upon his own estate. But the rigor of these new constitutions vested the sole property of all the game in England in the king alone; and no man was entitled to disturb any fowl of the air, or any beast of the field, of such kinds as were specially reserved for the royal amusement of the sovereign, without express licence from the king, by a grant of a chase or free warren: and those franchises were granted as much with a view to preserve the
breed of animals, as to indulge the subject. From a similar principle to which, though 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 wantoning in its highest vigor: both founded upon the same unreasonable notions of permanent property in wild creatures; and both productive of the same tyranny to the commons: but with this difference; that the forest laws established only one mighty hunter throughout the land, the game laws have raised a little Nimrod in every manor. And in one respect the ancient law was much less unreasonable than the modern: for the king’s grantee of a chase or free-warren might kill game in every part of his franchise; but now, though a freeholder of less than 100 /., a year is forbidden to kill a partridge upon his own estate, yet nobody else (not even the lord of the manor, unless he hath a grant of free-warren) can do it without committing a trespass, and subjecting himself to an action.

3. A THIRD alteration in the English laws was by narrowing the remedial influence of the county courts, the great feats of Saxon justice, and extending the original jurisdiction of the king’s justiciars to all kinds of causes, arising in all parts of the kingdom. To this end the cula regis, with all its multifarious authority, was erected; and a capital justiciary appointed, with powers so large and boundless, that he became at length a tyrant to the people, and formidable to the crown itself. The constitution of this court, and the judges themselves who presided there, were fetched from the duchy of Normandy: and the consequence naturally was, the ordaining that all proceedings in the king’s courts should be carried on in the Norman, instead of the English, language. A provision the more necessary, because none of his Norman justiciars understood English; but as evident a badge of slavery, as ever was imposed upon a conquered people. This lasted till king Edward the third obtained a double victory, over the armies of France in their own country, and their language in our courts here at home. But there was one mischief too deeply rooted thereby, and which this caution of king Edward came too late to eradicate. Instead of the plain and easy method of determining suits in the county courts, the chicanes and subtilties of Norman jurisprudence had taken possession of the king’s courts, to which ever cause of consequence was drawn. Indeed that age,
and those immediately succeeding it, were the era of refinement and subtlety. There is an active principle in the human soul, that will ever be exerting its faculties to the utmost stretch, in whatever employment, by the accidents of time and place, the general plan of education, or the customs and manners of the age and county, it may happen to find itself engaged. The northern conquerors of Europe were then emerging from the grossest ignorance in point of literature; and those, who had leisure to cultivate its progress, were such only as were cloistered in monasteries, the rest being all soldiers or peasants. And, unfortunately, the first rudiments of science which they imbibed were those of Aristotle's philosophy, conveyed through the medium of his Arabian commentators; which were brought from the east by the Saracens into Palestine and Spain, and translated into barbarous Latin. So that, though the materials upon which they were naturally employed, in the infancy of a rising state, were those of the noblest kind; the establishment of religion, and the regulations of civil polity; yet, having only such tools to work with, their execution was trifling and flimsy. Both the divinity and the law of those times were therefore frittered into logical distinctions, and drawn out into metaphysical subtleties, with a skill most amazingly artificial; but which serves no other purpose, than to shew the vast powers of the human intellect, however vainly or preposterously employed. Hence law in particular, which (being intended for universal reception) ought to be a plain rule of action, became a science of the greatest intricacy; especially when blended with the new refinements engrafted upon foederal property: which refinements were from time to time gradually introduced by the Norman practitioners, with a view to supersede (as they did in great measure) the more homely, but more intelligible, maxims of distributive justice among the Saxons. And, to say the truth these

scholastic reformers have transmitted their dialect and finesses to posterity, so interwoven in the body of our legal polity, that they cannot now be taken out without a manifest injury to substance. Statute after statute has in later times been made, to pare off these troublesome excrescences, and restore the common law to its pristine simplicity and vigor; and the endeavour has greatly succeeded: but still the fears are deep and visible; and the liberality of our modern courts of justice is frequently obliged to have recourse to inaccountable fictions and circuities, in order to recover that equitable and substantial justice, which for a long time was totally buried under the narrow rules and fanciful niceties of metaphysical and Norman jurisprudence.
4. A FOURTH innovation was the introduction of the trial by combat, for the decision of all civil and criminal questions of fact in the last resort. This was the immemorial practice of all the northern nations; but first reduced to regular and stated forms among the Burgundi, about the close of the fifth century: and from them it passed to other nations, particularly the Franks and the Normans; which last had the honour to establish it here, though clearly an unchristian, as well as most uncertain, method of trial. But it was a sufficient recommendation of it to the conqueror and his warlike countrymen, that it was the usage of their native duchy of Normandy.

5. BUT the last and most important alteration, both in our civil and military polity, was the engrafting on all landed estates, a few only excepted, the fiction of feodal tenure; which drew after it a numerous and oppressive train of servile fruits and appendages, aids, reliefs, primer seisins, wardships, marriages, escheats, and fines for alienation; the genuine consequences of the maxim then adopted, that all the lands in England were derived from, and holden, mediately or immediately, of the crown.

THE nation at this period seems to have groaned under as absolute a slavery, as was in the power of a warlike, an ambitious, and a politic prince to create. The consciences of men were enslaved by four ecclesiastics, devoted to a foreign power, and unconnected with the civil state under which they lived: who now imported from Rome for the first time the whole farrago of superstitious novelties, which had been engendered by the blindness and corruption of the times, between the first mission of Augustin the monk, and the Norman conquest; such as transubstantiation, purgatory, communion in one kind, and the worship of saints and images not forgetting the universal supremacy and dogmatical infallibility of the holy see. The laws too, as well as the prayers, were administered in an unknown tongue. The ancient trial by jury gave way to the impious decision by battle. The forest laws totally restrained all rural pleasures and manly recreations. And in cities and towns the case was no better; all company being obliged to disperse, and fire and candle to be extinguished, by eight at night, at the found of the melancholy curfeu. The ultimate property of all lands, and a considerable share out of the present profits, were vested in the king, or by him granted out to his Norman
favourites; who, by a gradual progression of slavery, were absolute vasals
to the crown, and as absolute tyrants to the commons, unheard of
forfeitures, talliages, aids, and fines, were arbitrarily extracted from the
pillaged landholders, in pursuance of the new system of tenure. And, to
crown all, as a consequence of the tenure by knight-service, the king had
always ready at his command an army of sixty thousand knights or milites:
who were bound, upon pain of confiscating their estates, to attend him in
time of invasion, or to quell any domestic insurrection. Trade, or foreign
merchandize, such as it then was, was carried on by the Jews and
Lombards; and the very name of an English fleet, which king Edgar had
rendered so formidable, was utterly unknown to Europe: the nation
consisting wholly of the clergy, who were also the lawyers; the baron, or
great lords of the land; the knights or soldiery, who were the subordinate
landholders; and the burghers, or inferior tradesmen, who from their
insignificance happily retained, in their focage and burgage tenure, some
points of their ancient freedom. All the rest were villains or bondmen.

FROM so complete and well concerted a scheme of servility, it has been
the work of generations, for our ancestors, to redeem themselves and their
posterity into that state of liberty, which we now enjoy: and which
therefore is not to be looked upon as consisting of mere incroachments on
the crown, and infringements of the prerogative, as some slavish and
narrow-minded writers in the last century endeavoured to maintain; but
as, in general, a gradual restoration of that ancient constitution, whereof
our Saxon forefathers had been unjustly deprived, partly by the policy, and
partly by the force, of the Norman. How that restoration has, in a long
series of years, been step by step effected, I now proceed to enquire.

WILLIAM Rufus proceeded on his father's plan, and in some points
extended it; particularly with regard to the forest laws. but his brother and
successor, Henry the first, found it expedient, when first he came to the
crown, to ingratiate himself with the people; by restoring (as our monkish
historians tell us) the laws of king Edward the confessor. The ground
whereof is this: that by charter he gave up the great grievances of
marriage, ward, and relief, the beneficial pecuniary fruits of his feodal
tenures; but reserved the tenures themselves, for the same military
purposes that his father introduced them. He also abolished the curfeu e,
yet it is rather spoken of as a known time of night (so denominated from
that abrogated usage) than as a still subsisting custom. There is extant a
code of laws in his name, consisting partly of those of the confessor, but with great additions and alterations of his own; and chiefly calculated for the regulation of the county courts. It contains some directions as to crimes and their punishments, (that of theft being made capital in his reign) and a few things relating to estates, parti-


particularly as to the descent of lands: which being by the Saxon laws equally to all the sons, by the feodal or Norman to the eldest only, king Henry here moderated the difference; directing the eldest son to have only the principal estate, primumpatris feudum, the rest of his estates, if he had any others, being equally divided among them all. On the other hand, he gave up to the clergy the free election of bishops and mitred abbots; reserving however these ensigns of patronage, conge d' eflire, custody of the temporalities when vacant, and homage upon their restitution. He lastly united again for a time the civil and ecclesiastical courts, which union was soon dissolved by him Norman clergy: and, upon that final dissolution, the cognizance of testamentary causes seems to have been first given to the ecclesiastical court. The rest remained as in his father's time: from whence we may easily perceive how far short this was of a thorough restitution of king Edward's, or the Saxon, laws.

THE usurper Stephen, as the manner of usurpers is, promised much at his accession, especially with regard to redressing the grievances of the forest laws, but performed no great matter either in that or in any other point. It is from his reign however, that we are to date the introduction of the Roman civil and canon laws into this realm: and at the same time was imported the doctrine of appeals to the court of Rome, as a branch of the canon law.

BY the time of king Henry the second, if not earlier, the charter of Henry the first seems to have been forgotten: for we find the claim of marriage, ward, and relief, then flourishing in full vigor. The right of primogeniture seems also to have tacitly revived, being found more convenient for the public than the parceling of estates into a multitude of minute subdivisions. However in this prince's reign much was done to methodize the laws, and reduce them into a regular order; as appears from that
excellent treatise of Glanvil: which, though some of it be now antiquated and altered, yet, when compared with the code of Henry the first, it carries a manifest superiority. Throughout his reign also was continued the important struggle, which we have had occasion so often to mention, between the laws of England and Rome; the former supported by the strength of the temporal nobility, when endeavoured to be supplanted in favour of the latter by the popish clergy. Which dispute was kept on foot till the reign of Edward the first; when the laws of England, under the new discipline introduced by that skillful commander obtained a complete and permanent victory. In the present reign, of Henry the second, there are four things which peculiarly merit the attention of a legal antiquarian: 1. The constitutions of the parliament at Clarendon, A. D. 1164. whereby the king checked the power of the pope and his clergy, and greatly narrowed the total exemption they claimed from the secular jurisdiction: though his farther progress was unhappily stopped, by the fatal event of the disputes between him and archbishop Becket. 2. The institution of the office of justices in eyre, in itinere; the king having divided the kingdom into six circuits (a little different from the present) and commissioned these new created judges to administer justice, and try writs of assise, in the several counties. These remedies are said to have been then first invented: before which all causes were usually terminated in the county courts, according to the Saxon custom; or before the king's justiciaries in the aula regis, in pursuance of the Norman regulations. The latter of which tribunals, travelling about with the king's person, occasioned intolerable expense and delay to the suitors; and the former, however proper for little debts and minute actions, where even injustice is better than procrastination, were now become liable to too much ignorance of the law, and too much partiality as to facts, to determine matters of considerable moment. 3. The introduction and establishment of the grand assise, or trial by a special king of jury in a writ of right, at the option of the tenant or defendant, instead of the barbarous and Norman trial by battle. 4. To this time must also be referred the introduction of escuage, or pecuniary com-


mutation for personal military service; which in process of time was the parent of the ancient subsidies granted to the crown by parliament, and the land tax of later times.
RICHARD the first, a brave and magnanimous prince, was a sportsman as well as a soldier; and therefore enforced the forest laws with some rigor; which occasioned many discontents among his people: though (according to Matthew Paris) he repealed the penalties of castration, loss of eyes, and cutting off the hands and feet, before inflicted on such as transgressed in hunting; probably finding that their severity prevented prosecutions. He also, when abroad, composed a body of naval laws at the isle of Oleron; which are still extant, and of high authority: for in his time we began again to discover, that (as an island) we were naturally a maritime power. But, with regard to civil proceedings, we find nothing very remarkable in this reign, except a few regulations regarding the jews, and the justices in eyre: the king's thoughts being chiefly taken up by the knight errantry of a croisade against the Saracens in the holy land.

IN king John's time, and that of his son Henry the third, the rigors of the feodal tenures and the forest laws were so warmly kept up, that they occasioned many insurrections of the barons or principal feudatories: which at last had this effect, that first king John, and afterwards his son, consented to the two famous charters of English liberties, magna carta, and carta de foresta. Of these the latter was well calculated to redress many grievances, and encroachments of the crown, in the exertion of forest-law: and the former confirmed many liberties of the church, and redressed many grievances incident to feodal tenures, of no small moment at the time; though now, unless considered attentively and with this retrospect, they seem but of trifling concern. But, besides these feodal provisions, care was also taken therein to protect the subject against other oppressions, then frequently arising from unreasonable amercements, from illegal distresses or other process for debts or services due to the crown, and from the tyrannical abuse of the prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony in the same manner as it still remains; prohibited for the future the grants of exclusive fisheries; and the erection of new bridges so as to oppress the neighbourhood. With respect to private rights: it established the testamentary power of the subject over part of his personal estate, the rest being distributed among his wife and children; it laid down the law of dower, as it hath continued ever since; and prohibited the appeals of women, unless for the death of their husbands. In matters of public police and national concern: it enjoined an uniformity of weights and measures;
gave new encouragements to commerce, by the protection of merchant-
strangers; and forbad the alienation of lands in mortmain. With regard to
the administration of justice: besides prohibiting all denials or delays of it,
it fixed the court of commonpleas at Westminster, that the suitors might
no longer be harassed with following the king's person in all his
progresses; and at the same time brought the trial of issues home to the
very doors of the freeholders, by directing assises too be taken in the
proper counties, and establishing annual circuits: it also corrected some
abuses then incident to the trials by wager of law and of battle; directed
the regular awarding of inquests for life or member; prohibited the king's
inferior ministers from holding pleas of the crown, or trying any criminal
charge, whereby many forfeitures might otherwise have unjustly accrued
to the exchequer; and regulated the time and place of holding the inferior
tribunals of justice, the county court, sheriff's turn, and court-leet. It
confirmed and established the liberties of the city of London, and all other
cities, boroughs, towns, and ports of the kingdom. And, lastly, (which
alone would have merited the title that it bears, of the great charter) it
protected every individual of the nation in the free enjoyment of his life,
his liberty, and his property, unless declared to be forfeited by the
judgment of his peers or the law of the land.

HOWEVER, by means of these struggles, the pope in the reign of king
John gained a still greater ascendant here, than he ever before had
enjoyed; which continued through the long reign of his son Henry the
third: in the beginning of whose time the old Saxon trial by ordeal was also
totally abolished. And we may by this time perceive, in Bracton's treatise, a
still farther improvement in the method and regularity of the common law,
especially in the point of pleadings h. Nor must it be forgotten, that the
first traces which remain, of the separation of the greater barons from the
less, in the constitution of parliaments, are found in the great charter of
king John; though omitted in that of Henry III: and that, towards the end
of the latter of these reigns, we find the first record of any writ for
summoning knights, citizens, and burgesses to parliament. And here we
conclude the second period of our English legal history.

III. THE third commences with the reign of Edward the first; who may
justly be styled our English Justinian. For in his time the law did receive so
sudden a perfection, that sir Matthew Hale does not scruple to affirm I,
that more was done in the first thirteen years of his reign to settle and
establish the distributive justice of the kingdom, than in all the ages since that time put together.

IT would be endless to enumerate all the particulars of these regulations but the principal may be reduced under the following general heads. 1. He established, confirmed, and settled, the great charter and charter of forests. 2. He gave a mortal wound to the encroachments of the pope and his clergy, by limiting and establishing the bounds of ecclesiastical jurisdiction: and by obliging the ordinary, to whom all the goods of intestates at that time belonged, to discharge the debts of the deceased. 3. He defined the limits of the several temporal courts of the highest jurisdiction, those of the king's bench, common pleas, and exchequer; so as they might not interfere with each other's proper business: to do which, they must now have recourse to a fiction, very necessary and beneficial in the present enlarged state of property. 4. He settled the boundaries of the inferior courts in counties, hundreds, and manors: confining them to causes of no great amount, according to their primitive institution; though of considerably greater, than by the alteration of the value of money they are now permitted to determine. 5. He secured the property of the subject, by abolishing all arbitrary taxes, and talliages, levied without consent of the national council. 6. He guarded the common justice of the kingdom from abuses, by giving up the royal prerogative of sending mandates to interfere in private causes. 7. He settled the form, solemnities, and effects, of fines levied in the court of common pleas; though the thing itself was of Saxon original. 8. He first established a repository for the public records of the kingdom; few of which are ancienter than the reign of his father, and those were by him collected. 9. He improved upon the laws of king Alfred, by that great and orderly method of watch and ward, for preserving the public peace and preventing robberies, established by the statute of Winchester. 10. He settled and reformed many abuses incident to tenures, and removed some restraints on the alienation of landed property, by the statute of quia emptores. 11. He instituted a speedier way for the recovery of debts, by granting execution not only upon goods and chattels, but also upon lands, by writ of elegit; which was of signal benefit to a trading people: and, upon the same commercial ideas, he also allowed the charging of lands in a
statute merchant, to pay debts contracted in trade, contrary to all feodal principles. 12. He effectually provided for the recovery of advowsons, as temporal rights; in which, before, the law was extremely deficient. 13. He also effectually closed the great gulph, in which all the landed property of the kingdom was in danger of being swallowed, by his re-iterated statutes of mortmain; most admirably adapted to meet the frauds that had then been devised, though afterwards contrived to be evaded by the

invention of uses. 14. He established a new limitation of property by the creation of estates tail; concerning the good policy of which, modern times have however entertained a very different opinion. 15. He reduced all Wales to the subjection, not only of the crown, but in great measure of the laws, of England; (which was thoroughly completed in the reign of Henry the eighth) and seems to have entertained a design of doing the like by Scotland, so as to have formed an entire and complete union of the island of Great Britain.

I MIGHT continue this catalogue much farther: --- but, upon the whole, we may observe, that the very scheme and model of the administration of common justice between party and party, was entirely settled by this king; and has continued nearly the same, in all succeeding ages, to this day; abating some few alterations, which the humour or necessity of subsequent times hath occasioned. The forms of writs, by which actions are commenced, were perfected in his reign, and established as models for posterity. The pleadings, consequent upon the writs, were then short, nervous, and perspicuous; not intricate, verbose, and formal. The legal treatises, written in his time, as Britton, Fleta, Hengham, and the rest, are for the most part, law at this day; or at least were so, till the alteration of tenures took place. And, to conclude, it is from this period, from the exact observation of magna carta, rather than from its making or renewal, in the days of his grandfather and father, that the liberty of Englishmen began again to rear its head; though the weight of the military tenures hung heavy upon it for many ages after.

I CANNOT give a better proof of the excellence of his constitutions, than that from his time to that of Henry the eighth there happened very few, and those not very considerable, alterations in the legal forms of proceedings. As to matter of substance: the old Gothic powers of electing the principal
subordinate magistrates, the sheriffs, and conservators of the peace, were taken from the people in the reigns of Edward II and Edward III; and justices of the peace were established instead of the latter. In the reign also of Edward the third the parliament is supposed most probably to have assumed its present form; by a separation of the commons from the lords. The statute for defining and ascertaining treasons was one of the first productions of this new-modelled assembly; and the translation of the law proceedings from French into Latin another. Much also was done, under the auspices of this magnanimous prince, for establishing our domestic manufactures; by prohibiting the exportation of English wool, and the importation or wear of foreign cloth or furs; and by encouraging clothworkers from other countries to settle here. Nor was the legislature inattentive to many other branches of commerce, or indeed to commerce in general: for, in particular, it enlarged the credit of the merchant, by introducing the statute staple; whereby he might the more readily pledge his lands for the security of his mercantile debts. And, as personal property now grew, by the extension of trade, to be much more considerable than formerly, care was taken, in case of intestacies, to appoint administrators particularly nominated by the law; to distribute that personal property among the creditors and kindred of the deceased, which before had been usually applied, by the officers of the ordinary, to uses then denominated pious. The statutes also of praemunire, for effectually depressing the civil power of the pope, were the work of this and the subsequent reign. And the establishment of a laborious parochial clergy, by the endowment of vicarages out of the overgrown possessions of the monasteries, added lustre to the close of the fourteenth century: though the seeds of the general reformation, which were thereby first sown in the kingdom, were almost overwhelmed by the spirit of persecution, introduced into the laws of the land by the influence of the regular clergy.

FROM this time to that of Henry the seventh, the civil wars and disputed titles to the crown gave no leisure farther juri-

dical improvement:nam filent leges inter arma. --- And yet it is to these very disputes that we owe the happy loss of all the dominions of the crown on the continent of France; which turned the minds of our subsequent princes entirely to domestic concerns. To these likewise we owe the method of barring entails by the fiction of common recoveries; invented
originally by the clergy, to evade the statutes of mortmain, but introduced under Edward the fourth, for the purpose of unfettering estates, and making them more liable to forfeiture: while, on the other hand, the owners endeavoured to protect them by the universal establishment of uses, another of the clerical inventions.

IN the reign of king Henry the seventh, his ministers (not to say the king himself) were more industrious in hunting out prosecutions upon old and forgotten penal laws, in order to extort money from the subject, than in framing any new beneficial regulations. For the distinguishing character of this reign was that of amassing treasure into the king’s coffers, by every means that could be devised: and almost every alteration in the laws, however salutary or otherwise in their future consequences, had this and this only for their great and immediate object. To this end the court of star-chamber was new-modelled, and armed with powers, the most dangerous and unconstitutional, over the persons and properties of the subject. Informations were allowed to be received, in lieu of indictments, at the assises and sessions of the peace, in order to multiply fines and pecuniary penalties. The statute of fines for landed property was craftily and covertly contrived, to facilitate the destruction of entail, and make the owners of real estates more capable to forfeit as well as to alien. The benefit of clergy (which so often intervened to stop attainders and save the inheritance) was now allowed only once to lay offenders, who only could have inheritances to lose. A writ of capias was permitted in all actions on the case, and the defendant might in consequence be outlawed; because upon such outlawry his goods became the property of the crown. In short, there is hardly a statute in this reign, introductive of a new law or modifying the old, but what either directly or obliquely tended to the emolument of the exchequer.

IV. THIS brings us to the fourth period of our legal history, viz. the reformation of religion, under Henry the eighth, and his children: which opens an entirely new scene in ecclesiastical matters; the usurped power of the pope being now for ever routed and destroyed, all his connexions with this island cut off, the crown restored to its supremacy over spiritual men and causes, and the patronage of bishopricks being once more indisputably vested in the king. And, had the spiritual courts been at this time re-united to the civil, we should have seen the old Saxon constitution with regard to ecclesiastical polity completely restored.
WITH regard also to our civil polity, the statute of wills, and the statute of uses, (both passed in the reign of this prince) made a great alteration as to property: the former, by allowing the devise of real estates by will, which before was in general forbidden; the latter, by endeavouring to destroy the intricate nicety of uses, though the narrowness and pedantry of the courts of common law prevented this statute from having its full beneficial effect. And thence the courts of equity assumed a jurisdiction, dictated by common justice and common sense: which, however arbitrarily exercised or productive of jealousies in its infancy, has at length been matured into a most elegant system of rational jurisprudence; the principles of which (notwithstanding they may differ in forms) are now equally adopted by the courts of both law and equity. From the statute of uses, and another statute of the same antiquity, (which protected estates for years from being destroyed by the reversioner) a remarkable alteration took place in the mode of conveyancing: the ancient assistance by feoffment and livery upon the land being now very seldom practiced, since the more easy and more private invention of transferring property, by secret conveyances to uses, and long terms of years being now continually created in mortgages and family settlements, which may be moulded to a thousand useful purposes by the ingenuity of an able artist.

THE farther attacks in this reign upon the immunity of estates-tail, which reduced them to little more than the conditional fees at the common law, before the passing of the statute de donis; the establishment of recognizances in the nature of a statute-staple, for facilitating the raising of money upon landed security; and the introduction of the bankrupt laws, as well for the punishment of the fraudulent, as the relief of the unfortunate, trader; all these were capital alterations of our legal polity, and highly convenient to that character, which the English began now to re-assume, of a great commercial people, the incorporation of Wales with England, and the more uniform administration of justice, by destroying some counties palatine, and abridging the unreasonable privileges of such as remained, added dignity and strength to the monarchy: and, together with the numerous improvements before observed upon, and the redress of many grievances and oppressions which had been introduced by his father, will ever make the administration of Henry VIII a very distinguished era in the annals of juridical history.

IT must be however remarked, that (particularly in his later years) the royal prerogative was then strained to a very tyrannical and oppressive
height; and, what was the worst circumstance, its encroachments were established by law, under the sanction of those pusillanimous parliaments, one of which to its eternal disgrace passed a statute, whereby it was enacted that the king’s proclamations should have the force of acts of parliament; and others concurred in the creation of that amazing heap of wild and new-fangled treasons which were slightly touched upon in a former chapter e. Happily for the nation, this arbitrary reign was succeeded by the minority of an amiable prince; during the short sunshine of which, great part of these extravagant laws were repealed. And, to do justice to the shorter reign of queen Mary,

e See pag. 86.

many salutary and popular laws, in civil matters, were made under her administration; perhaps the better to reconcile the people to the bloody measures which she was induced to pursue, for the re-establishment of religious slavery: the well concerted schemes for effecting which, were (through the providence of God) defeated by the seasonable accession of queen Elizabeth.

THE religious liberties of the nation being, by that happy event, established (we trust) on an eternal basis; (though obliged in their infancy to be guarded, against papists and other non-conformists, by laws of too sanguinary a nature) the forest laws having fallen into disuse; and the administration of civil right in the courts of justice being carried on in a regular course, according to the wise institutions of king Edward the first, without any material innovations; all the principal grievances introduced by the Norman conquest seem to have been gradually shaken off, and our Saxon constitution restored, with considerable improvements: except only in the continuation of the military tenures, and a few other points, which still armed the crown with a very oppressive and dangerous prerogative. It is also to be remarked, that the spirit of enriching the clergy and endowing religious houses had (through the former abuse of it) gone over to such a contrary extreme, and the princes of the house of Tudor and their favourites had fallen with such avidity upon the spoils of the church, that a decent and honourable maintenance was wanting to many of the bishops and clergy. This produced the restraining statutes, to prevent the alienations of lands and tithes belonging to the church and universities. The number of indigent persons being also greatly increased, by withdrawing the alms of the monasteries, a plan was formed in the reign of
queen Elizabeth, more humane and beneficial than even feeding and clothing of millions; by affording them the means (with proper industry) to feed and to cloth themselves. And, the farther any subsequent plans for maintaining the poor have departed from this institution, the more impracticable and even pernicious their visionary attempts have proved.

HOWEVER, considering the reign of queen Elizabeth in a great and political view, we have no reason to regret many subsequent alterations in the English constitution. For, though in general she was a wide and excellent princeess, and loved her people; though in her time trade flourished, riches increased, the laws were duly administered, the nation was respected abroad, and the people happy at home; yet, the encrease of the power of the dtar-chamber, and the erection of the high commission court in matters ecclesiastical, were the work of her reign. She also kept her parliaments at a very awful didtance: and in many particulars she, at times, would carry the prerogative as high as her most arbitrary predecessors. It is true, she very seldom exerted this prerogative, so as to oppreds individuals; but still she had it to exert: and therefore the felicity of her reign depended more on her want of opportunity and inclination, than want of power, to play the tyrant. This is a high encomium on her merit; but at the same time it is sufficient to shew, that these were not those golden days of genuine liberty, that we formerly were taught to believe: for, surely, the true liberty of the subject consists not so much in the gracious behaviour, as in the limited power, of the sovereign.

THE great revolutions that had happened, in manners and in property, had paved the way, by imperceptible yet sure degrees, for as great a revolution in government: yet, while that revolution was effecting, the crown became more arbitrary than ever, by the progress of those very means which afterwards reduced its power. It is obvious to every observer, that, till the close of the Lancadtrian civil wars, the property and the power of the nation were chiefly divided between the king, the nobility, and the clergy. The commons were generally in a state of great ignorance; their personal wealth, before the extendion of trade, was comparatively small; and the nature of their landed property was such, as kept them in continual dependence upon their feodal lord, being usually some powerful baron, some opulent abbey,

or sometimes the king himself. Though a notion of general liberty had strongly pervadied and animated the whole constitution, yet the particular
liberty, the natural equality, and personal independence of individuals, were little regarded or thought of; nay even to assert them was treated as the height of sedition and rebellion. Our ancestors heard, with detestation and horror, those sentiments rudely delivered, and pushed to most absurd extremes, by the violence of a Cade and a Tyler; which have since been applauded, with a zeal almost rising to idolatry, when softened and recommended by the eloquence, the moderation, and the arguments of a Sidney, a Locke, and a Milton.

BUT when learning, by the invention of printing and the progress of religious reformation, began to be universally disseminated; when trade and navigation were suddenly carried to an amazing extent, by the use of the compass and the consequent discovery of the Indies; the minds of men, thus enlightened by science and enlarged by observation and travel, began to entertain a more just opinion of the dignity and rights of mankind. An inundation of wealth flowed in upon the merchants, and middling rank; while the two great estates of the kingdom, which formerly had balanced the prerogative, the nobility and clergy, were greatly impoverished and weakened. The popish clergy, detected in their frauds and abuses, exposed to the resentment of the populace, and stripped of their lands and revenues, stood trembling for their very existence. The nobles, enervated by the refinements of luxury, (which knowledge, foreign travel, and the progress of the politer arts, are too apt to introduce with themselves) and fired with disdain at being rivaled in magnificence by the opulent citizens, fell into enormous expenses: to gratify which they were permitted, by the policy of the times, to dissipate their overgrown estates, and alienate their ancient patrimonies. This gradually reduced their power and their influence within a very moderate bound: while the king, by the spoil of the monasteries and the great increase of the customs, grew rich, independent, and haughty: and the commons were not yet sensible of the strength they had acquired, nor urged to examine its extent by new burdens or oppressive taxations, during the sudden opulence of the exchequer. Intent upon acquiring new riches, and happy in being freed from the insolence and tyranny of the orders more immediately above them, they never dreamt of opposing the prerogative, to which they had been so little accustomed; much less of taking the lead in opposition, to which by their weight and their property they were now entitled. The latter years of Henry the eighth were therefore the times of the greatest despotism, that have been known in this island since the death
of William the Norman: the prerogative, as it then stood by common law, (and much more when extended by act of parliament) being too large to be endured in a land of liberty.

QUEEN Elizabeth, and the intermediate princes of the Tudor line, had almost the same legal powers, and sometimes exerted them as roughly, as their father king Henry the eighth. But the critical situation of that princess with regard to her legitimacy, her religion, her enmity with Spain, and her jealousy of the queen of Scots, occasioned greater caution in her conduct. She probably, or her able advisers, had penetration enough to discern how the power of the kingdom had gradually shifted its channel, and wisdom enough not to provoke the commons to discover and feel their strength. She therefore drew a veil over the odious part of prerogative; which was never wantonly thrown aside, but only to answer some important purpose: and, though the royal treasury no longer overflowed with the wealth of the clergy, which had been all granted out, and had contributed to enrich the people, she asked for supplies with such moderation, and managed them with so much economy, that the commons were happy in obliging her. Such, in short, were her circumstances, her necessities, her wisdom, and her good disposition, that never did a prince so long and so entirely, for the space of half a century together, reign in the affections of the people.

ON the accession of king James I, no new degree of royal power was added to, or exercised by, him; but such a sceptre was too weighty to be wielded by such a hand. The unreasonable and imprudent exertion of what was then deemed to be prerogative, upon trivial and unworthy occasions, and the claim of a more absolute power inherent in the kingly office than had ever been carried into practice, soon awakened the sleeping lion. The people heard with astonishment doctrines preached from the throne and the pulpit, subversive of liberty and property, and all the natural rights of humanity. They examined into the divinity of this claim, and found it weakly and fallaciously supported: and common reason assured them, that, if it were of human origin, no constitution could establish it without power of revocation, no precedent could sanctify, no length of time could confirm it. The leader felt the pulse of the nation, and found they had ability as well as inclination to resist it: and accordingly resisted and opposed it, whenever the pusillanimous temper of the reigning monarch had courage to put it to the trial; and they gained some little victories in the cases of concealments, monopolies, and the dispensing power. In the
meantime very little was done for the improvement of private justice, except the abolition of sanctuaries, and the extension of the bankrupt laws, the limitation of suits and actions, and the regulating of informations upon penal statutes. For I cannot class the laws against witchcraft and conjuration under the head of improvements; nor did the dispute between lord Ellesmere and sir Edward Coke, concerning the powers of the court of chancery, tend much to the advancement of justice.

INDEED when Charles the first succeeded to the crown of his father, and attempted to revive some enormities, which had been dormant in the reign of king James, the loans and benevolences extorted from the subject, the arbitrary imprisonments for refusal, the exertion of martial law in time of peace, and other domestic grievances, clouded the morning of that misguided prince’s reign; which, though the noon of it began a little to brighten, at last went down in blood, and left the whole kingdom in darkness. It must be acknowledged that, by the petition of right, enacted to abolish these encroachments, the English constitution received great alteration and improvement. But there still remained the latent power of the forest laws, which the crown most unseasonably revived. The legal jurisdiction of the star-chamber and high commission courts was also extremely great; though their usurped authority was still greater. And, if we administration to these the disuse or parliaments, the ill-timed zeal and despotic proceedings of the ecclesiastical governors in matters of mere indifference, together with the arbitrary levies of tonnage and poundage, ship money, and other projects, we may see grounds most amply sufficient for seeking redress in a legal constitutional way. This redress, when sought, was also constitutionally given: for all these oppressions were actually abolished by the king in parliament, before the rebellion broke out, by the several statutes for triennial parliaments, for abolishing the star-chamber and high commission courts, for ascertaining the extent of forests and forest-laws, for renouncing ship-money and other exactions, and for giving up the prerogative of knighting the king’s tenants in capite in consequence of their feodal tenures: though it must be acknowledged that these concessions were not made with so good a grace, as to conciliate the confidence of the people. Unfortunately, either by his own mismanagement, or by the arts of his enemies, the king had lost the reputation of sincerity; which is the greatest unhappiness that can befall a prince. Though he formerly had strained his prerogative, not only beyond what the genius of the present times would bear, but also beyond the example of former ages, he had now consented to reduce it to a lower ebb
than was consistent with monarchical government. A conduct so opposite to his temper and principles, joined with some rash actions and unguarded expressions, made the people suspect that this condescension was merely temporary. Flushed therefore with the success they had gained, fired with resentment for past oppressions, and dreading the consequences if the king should regain his power, the popular leaders (who in all ages have called themselves the people) began to grow insolent and ungovernable: their insolence soon rendered them desperate: and, joining with a set of military hypocrites and enthusiasts, they overturned the church and monarchy, and proceeded with deliberate solemnity to the trial and murder of their sovereign.

I PASS by the crude and abortive schemes for amending the laws in the times of confusion which followed; the most promising and sensible whereof (such as the establishment of new trials, the abolition of feodal tenures, the act of navigation, and some others) were adopted in the

V. FIFTH period, which I am next to mention, viz. after the restoration of king Charles II. Immediately upon which, the principal remaining grievance, the doctrine and consequences of military tenures, were taken away and abolished, except in the instance of corruption of inheritable blood, upon attainder of treason and felony. And though the monarch, in whose person the royal government was restored, and with it our ancient constitution, deserves no commendation from posterity, yet in his reign, (wicked, sanguinary, and turbulent as it was) the concurrence of happy circumstances was such, that from thence we may date not only the re-establishment of our church and monarchy, but also the complete restitution of English liberty, for the first time, since its total abolition at the conquest. For therein not only these slavish tenures, the badge of foreign dominion, with all their oppressive appendages, ere removed from incumbering the estates of the subject; but also an additional security of his person from imprisonment was obtained, by that great bulwark of our constitution, the habeas corpus act. These two statutes, with regard to our property and persons, form a second magna carta, as beneficial and effectual as that of Runing-Mead. That only pruned the luxuriances of the feodal system; but the statute of Charles the second extirpated all its slaveries:

except perhaps in copyhold tenure; and there also they are now in great measure enervated by gradual custom, and the interposition of our courts
of justice. Magna carta only, in general terms, declared, that no man shall be imprisoned contrary to law: the habeas corpus act points him out effectual means, as well to release himself, though committed even by the king in council, as to punish all those who shall thus unconstitutionally misuse him.

To these I may add the abolition of the prerogatives of purveyance and pre-emption; the statute for holding triennial parliaments; the test and corporation acts, which secure both our civil and religious liberties; the abolition of the writ de haeretico comburendo; the statute of frauds and perjuries, a great and necessary security to private property; the statute for distribution of intestates' estates; and that of amendments and jeofails, which cut off those superfluous niceties which so long had disgraced our courts; together with many other wholesome acts, that were passed in this reign, for the benefit of navigation and the improvement of foreign commerce: and the whole, when we likewise consider the freedom from taxes and armies which the subject then enjoyed, will be sufficient to demonstrate this truth, that the constitution of England had arrived to its full vigor, and the true balance between liberty and prerogative was happily established by law, in the reign of king Charles the second.

IT is far from my intention to palliate or defend many very iniquitous proceedings, contrary to all law, in that reign, through the artifice of wicked politicians, both in and out of employment. What seems incontestable is this; that by the law m, as it then stood, (notwithstanding some invidious, nay dangerous, branches of the prerogative have since been lopped off, and the

m The point of time, at which I would choose to fix this theoretical perfection of our public law, is the year 1679; after the habeas corpus act was passed, and that for licensing the press had expired: though the years which immediately followed it were times of great practiced oppression.

rest more clearly defined) the people had as large a portion of real liberty, as is consistent with a state of society; and sufficient power, residing in their own hands, to assert and preserve that liberty, if invaded by the royal prerogative. For which I need but appeal to the memorable catastrophe of the next reign. For when king Charles's deluded brother attempted to enslave the nation, he found it was beyond his power: the people both could, and did, resist him; and, in consequence of such resistance, obliged
him to quit his enterprise and his throne together. Which introduces us to the last period of our legal history; viz.

VI. FROM the revolution in 1688 to the present time. In this period many laws have passed; as the bill of rights, the toleration-act, the act of settlement with its conditions, the act for uniting England with Scotland, and some others: which have asserted our liberties in more clear and emphatical terms; have regulated the succession of the crown by parliament, as the exigences of religious and civil freedom required; have confirmed, and exemplified, the doctrine of resistance, when the executive magistrate endeavours to subvert the constitution; have maintained the superiority of the laws above the king, by pronouncing his dispensing power to be illegal; have indulged tender consciences with every religious liberty, consistent with the safety of the state; have established triennial, since turned into septennial, elections of members to serve in parliament; have excluded certain officers from the house of commons; have restrained the king’s pardon from obstructing parliamentary impeachments; have imparted to all the lords an equal right of trying their fellow peers; have regulated trials for high treason; have afforded our posterity a hope that corruption of blood may one day be abolished and forgotten; have (by the desire of his present majesty) set bounds to the civil list, and placed the administration of that revenue in hands that are accountable to parliament; and have (by the like desire) made the judges completely independent of the king, his ministers, and his successors. Yet, though these provisions have, in appearance and nominally, reduced the strength of the executive power to a much lower ebb than in the preceding period; if on the other hand we throw into the opposite scale (what perhaps the immoderate reduction of the ancient prerogative may have rendered in some degree necessary) the vast acquisition of force, arising from the riot-act, and the annual expediency of a standing army; and the vast acquisition of personal attachment, arising from the magnitude of the national debt, and the manner of levying those yearly millions that are appropriated to pay the interest; we shall find that the crown has, gradually and imperceptibly, gained almost as much in influence, as it has apparently lost in prerogative.

THE chief alterations of moment, (for the time would fail me to descent to minutiae) in the administration of private justice during this period, are the solemn recognition of the law of nations with respect to the rights of ambassadors: the cutting off, by the statute for the amendment of the law,
a vast number of excrescences, that in process of time had sprung out of
the practical part of it: the protection of corporate rights by the
improvements in writs of mandamus, and informations in nature of quo
warranto: the regulations of trials by jury, and the admitting witnesses for
prisoners upon oath: the farther restraints upon alienation of lands in
mortmain: the extension of the benefit of clergy, by abolishing the
pedantic criterion of reading: the counterbalance to this mercy, by the vast
encrease of capital punishment: the new and effectual methods for the
speedy recovery of rents: the improvements which have been made in
ejectments for the trying of titles: the introduction and establishment of
paper credit, by endorsements upon bills and notes, which have shewn the
possibility (so long doubted) of assigning a chose in action: the translation
of all legal proceedings into the English language: the erection of courts of
conscience for recovering small debts, and (which is much the better plan)
the reformation of which the foundations have been laid, by clergy
developing the principles on which policies of insurance are founded, and
by happily applying those principles to particular cases: and, lastly, the
liberality of sentiment, which (though late) has now taken possession of
our courts of common law, and induced then to adopt (where facts can be
clearly ascertained) the same principles of redress as have prevailed in our
courts of equity, from the time that lord Nottingham presided there; and
this, not only where specially impowered by particular statutes, (as in the
case of bonds, mortgages, and set-offs) but by extending the remedial
influence of the equitable writ of trespass on the case, according to its
primitive institution by king Edward the first, to almost every instance of
injustice not remedied by any other process. And these, I think, are all the
material alterations, that have happened with respect to private justice, in
the course of the present century.

THUS therefore, for the amusement and instruction of the student, I have
endeavoured to delineate some rude outlines of a plan for the history of
our laws and liberties; from their first rise, and gradual progress, among
our British and Saxon ancestors, till their total eclipse at the Norman
conquest; from which they have gradually emerged, and risen to the
perfection they now enjoy, at different periods of time. We have seen, in
the course of our enquiries, in this and the former volumes, that the
fundamental maxims, and rules of the law, which regard the rights of
persons, and the rights of things, the private injuries that may be offered
to both, and the crimes which affect the public, have been and are every
day improving, and are now fraught with the accumulated wisdom of ages:
that the forms of administering justice came to perfection under Edward the first; and have not been much varied, nor always for the better, since: that our religious liberties were fully established at the reformation: but that the recovery of our civil and political liberties was a work of longer time; they not being thoroughly and completely regained, till after the restoration of king Charles, nor fully and explicitly acknowledged and defined, till the era of the happy revolution. Of a constitution, so wisely contrived, so strongly raised, and so highly finished, it is hard to speak with that praise, which is justly and severely its due: --- the thorough and attentive contemplation of it will furnish its best panegyric. It hath been the endeavour of these commentaries, however the execution may have succeeded, to examine its solid foundations, to mark out its extensive plan, to explain the use and distribution of its parts, and from the harmonious concurrence of those several parts to demonstrate the elegant proportion of the whole. We have taken occasion to admire at every turn the noble monuments of ancient simplicity, and the more curious refinements of modern art. Nor have its faults been concealed from view; for faults it has, lest we should be tempted to think it of more than human structure: defects, chiefly arising from the decays of time, or the rage of unskillful improvements in later ages. To sustain, to repair, to beautiful this noble pile, is a charge intrusted principally to the nobility, and such gentlemen of the kingdom, as are delegated by their country to parliament. The protection of THE LIBERTY OF BRITAIN is a duty which they owe to themselves, who enjoy it; to their ancestors, who transmitted it down; and to their posterity, who will claim at their hands this, the best birthright, and noblest inheritance of mankind.

THE END.